



# DEPARTMENT OF JUSTICE

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## **Compliance is a Culture, Not Just a Policy**

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Thank you to the International Chamber of Commerce and the U.S. Council for International Business for inviting me to speak today. I'm happy to be able to share some thoughts on corporate compliance efforts from the Antitrust Division's perspective.

First, let me say that we're glad to see the work that the ICC, the USCIB and others are doing to improve corporate compliance programs. Compliance with laws of all types is the cornerstone of good corporate citizenship. Although a compliance program must be combined with a real commitment by senior management to be truly effective, this work by the ICC and the USCIB helps ensure that the cornerstone of corporate citizenship will be strong for companies that implement programs based on the Compliance Toolkit.

This work by the ICC and USCIB is also a vital complement to the work of the Antitrust Division. We all have the same goal - to prevent antitrust violations. And, we commend this important contribution by the business community. The most effective way to stop crime is to ensure it never starts. Effective corporate compliance programs are an important part of that effort.

As prosecutors, we are seldom positioned to stop a crime before it starts. We must rely on deterrence. This means we seek large criminal fines for corporations and significant jail time for executives who commit antitrust crimes. Certainly, compliance programs that prevent antitrust violations are far more preferable.

This leads me to the most basic point I want to make today, which is also the most important one. A truly well-run compliance program should prevent a company from conspiring to fix prices, rig bids, or allocate markets. Effective compliance programs should prevent that crime from beginning or, at a minimum, detect it and stop it shortly after it starts. Without question the best outcome for a company and its shareholders is to never be a subject of an

international cartel investigation. And an effective compliance program has the potential to be a significant contributor to that end.

The risks of participating in a price-fixing cartel should be obvious: high fines for the company; significant jail time for executives; expensive attorneys' fees; substantial civil damages owed to customers; and exposure to further criminal investigations -- not to mention the associated bad publicity and internal distraction from the actual business of the company. All these outcomes can be avoided if companies implement effective compliance programs.

Compliance is especially important because the risk of detection and punishment has never been higher. Today dozens of countries have effective and aggressive cartel enforcement programs. An increasing number of them have followed the U.S.'s lead and criminalized anticompetitive conspiracies. More and more countries are working together through Interpol to identify individual conspirators as they travel from country to country. And in the last few years, the U.S. has obtained extradition of executives both for conspiring to fix prices and for obstructing our investigations. In short, with each passing year the world gets smaller and there are fewer places to hide from international cartel enforcement.

In an ideal world, every company would have an effective compliance program, and all compliance programs would prevent cartel activity. Unfortunately, this is not an ideal world. But companies can still benefit from their compliance programs, even when those programs fall short of preventing all collusion.

Even where a company's compliance program does not prevent all collusion, it may allow the company to self-report its conduct to the Division under our Corporate Leniency Program. For those of you who are not familiar with it, the Division's Leniency Program allows companies to self-report their

participation in illegal cartels. In exchange for self-reporting the illegal conduct, and for complete cooperation with the resulting investigation, a corporate leniency applicant will not be prosecuted by the Division.

The Division will take a similar approach to the corporate applicant's current employees, if they admit their knowledge and participation in the conspiracy and cooperate completely with the investigation.

Leniency may also permit a company to obtain a reduction in treble damages liability in the civil lawsuits that inevitably arise from our investigations. Companies may also apply for leniency abroad. Dozens of countries today have leniency programs modeled after the Division's, and we frequently see companies apply for leniency in more than one country at a time.

Even a partially effective compliance program can help a company meet many of the requirements of the Division's leniency program. To earn leniency, among other things a company must be the first to report the illegal conspiracy, must promptly stop its participation in that conspiracy, and must fully disclose its crimes.

A company with at least a partially effective compliance program should be able to discover the cartel early, increasing its chances of seeking leniency before its co-conspirators do, and then promptly stop its participation, disclose its antitrust crimes completely, and fully cooperate with the Division's investigation.

In sum, compliance programs make good sense – both good common sense and good business sense. Compliance programs help prevent companies from committing crimes in the first place. Even if they fail to do so, partially successful compliance programs may help companies qualify for leniency.

Either outcome easily warrants your companies' efforts to adopt and strengthen compliance programs.

This leads to an obvious question, and the next topic I want to address – what makes an effective compliance program?

The Division has not provided a “one size fits all” answer to that question. Nor are we likely to do so. Not all effective compliance programs are built alike. Compliance programs should be designed to account for the nature of a company's business and for the markets in which it operates. A multinational auto parts manufacturer with plants and sales all over the world likely requires a different approach to compliance than a road-building contractor that operates in a single state. Both companies have a need for effective compliance, but the necessary approach may be very different.

Nevertheless, I can make a few points of general application. Federal prosecutors are guided by the United States Sentencing Guidelines when it comes to matters related to sentencing and remedies. Chapter 8 of the United States Sentencing Guidelines provides guidance for minimal requirements of an effective compliance and ethics program. The Guidelines set out several common-sense principles that, when applied, increase the likelihood that a compliance program will be effective. The ICC Antitrust Compliance Toolkit extends those principles, providing guidance for a more comprehensive compliance program.

Today, I want to take a couple of minutes to touch on a few points the Sentencing Guidelines and the Toolkit have in common. These are the sort of things the Division looks for when evaluating a company's compliance program.

First, it starts at the top. A company's senior executives and board of directors must fully support and engage with the company's compliance efforts.

If senior management does not actively support and cultivate a culture of compliance, a company will have a paper compliance program, not an effective one. Employees will pick up on the lead of their bosses. If the bosses take compliance seriously, the employees are far more likely to take it seriously. If they don't, the employees won't. It's as simple as that.

When senior management takes a lax approach to questionable competitor contacts or bosses make jokes about reaching agreements with competitors, they increase the likelihood that employees will treat compliance as optional.

Before taking my current job, I was leading the investigation of a company that had regular, comprehensive compliance training for all key company personnel. I knew the outside attorneys who provided the training. They were very good. A senior company executive was the star pupil in compliance quizzes given by outside counsel.

As it turns out, however, the senior executive, and even the head of the company, would walk out of that compliance training and do the very things the training was designed to prevent. They were fixing prices every single day. For years. Subordinates took their lead from the bosses and were involved, too. From the top of the company to nearly the bottom. The company was rife with price fixing. It started at the top.

Even though they are at the top, senior management must help lay the foundation upon which a company builds its culture of compliance. It does not matter how comprehensive a company's compliance program is if the senior management does not make it a foundation of the company's corporate culture.

For senior management, supporting compliance efforts means being fully knowledgeable about those efforts, providing the necessary resources, and assigning the right people to oversee them. This includes making sure the

compliance program is implemented successfully. This means not just receiving regular reports but actively monitoring the program. Executives and board members cannot simply go through the motions and hope that the company's compliance program works. They must make clear to employees that compliance is important and mandatory.

Second, a company should ensure that the entire organization is committed to its compliance efforts and can participate in them. This means educating all executives and managers, and most employees – especially those with sales and pricing responsibilities. When appropriate, it may also mean providing training for subsidiaries, distributors, agents, and contractors. And it means providing all members of the organization the opportunity to report anonymously and seek guidance about potential or actual criminal conduct without fear of retaliation.

Third, a company should ensure that it has a proactive compliance program. This means that in addition to providing training and a forum for feedback, a company should make sure that at risk activities are regularly monitored and audited. And the company should regularly evaluate the compliance program itself to understand what it can improve. The fact that each of you is here today says to me that your respective companies understand this.

Fourth, a company should think carefully about its approach to individuals who personally violated the antitrust laws or otherwise engaged in conduct inconsistent with an effective compliance program. A company must encourage individuals to adhere to the compliance program. And a company should be willing to discipline employees who either commit antitrust crimes or fail to take the reasonable steps necessary to stop the criminal conduct in the first place. It has been departmental policy not to insert itself into the personnel matters of companies by requiring the termination of culpable employees, and

that has not changed. A company's retention, however, of culpable employees in positions where they can repeat their conduct, impede a company's internal investigation and cooperation, or influence employees who may be called upon to testify against them, raises serious questions and concerns about the company's commitment to effective antitrust compliance.

Finally, a company that discovers criminal antitrust conduct should be prepared to take the steps necessary to stop it from happening again. This likely includes making changes to a compliance program that failed to prevent the criminal conduct initially. A company should also recognize that, in such circumstances, it will be required to accept responsibility for that conduct, which is the final topic I would like to touch on this afternoon.

Effective compliance programs prevent antitrust violations. They do not absolve them. So, it is important that guilty companies accept responsibility for their crimes. With that in mind, I'll start with two hard truths and then get to an easier one.

The first hard truth: The existence of a compliance program almost never allows the company to avoid criminal antitrust charges. Why? Because a truly effective compliance program would have prevented the crime in the first place or resulted in its early detection. This has been the Division's position for at least the last twenty years, and it isn't likely to change. Companies don't accidentally conspire to fix prices, rig bids, or allocate markets. Cartels are seldom short-lived and, in my experience, aren't limited to low level or rogue employees.

Instead, the vast majority of conspiracies we see reflect true corporate acts. The conspiracies primarily benefit the companies. As a result, both the companies and individual participants are proper subjects of our investigations. Companies should be fined so they do not profit from the crimes. And



companies should expect that the Division and the courts will take steps so that they do not commit crimes again.

The second hard truth: the Division, like the Department of Justice as a whole, almost never recommends that companies receive credit at sentencing for a preexisting compliance program. The Sentencing Guidelines allow companies to receive lower culpability scores, and thus lower fines, if they have “effective” compliance programs. Eligibility for this credit requires discovery and self-reporting before the offense is discovered or likely to be discovered outside of the company.

As a practical matter, however, it is almost never the case that a company other than the leniency applicant approaches the Division before we conduct searches or issue grand jury subpoenas. Nor do we see companies detecting, stopping, and reporting illegal conduct before significant time has passed.

In these situations, it is hard to see how a company's compliance program has earned it a significant reduction in its corporate fine. Receiving leniency is the ultimate credit for having an effective compliance program. No other company is likely to satisfy the requirements of the Sentencing Guidelines for an effective compliance program.

These may seem like tough positions for the Division to take, but the Division is no different than the Department as a whole. Now it is time for the easier truth, however. Having a compliance program may still benefit a company preparing to plead guilty to an antitrust crime in a couple different ways.

First, companies may avoid additional oversight by the court and the Division. The Sentencing Guidelines require every convicted company to have an effective compliance program. That is not optional. If a company has no

preexisting compliance program or makes no efforts to strengthen a compliance program that has proved ineffective, then that company is a likely candidate for probation.

In those situations, the Division will seek terms of probation that will require the company either to adopt an effective compliance program or address deficiencies in an existing compliance program. This is where a company's decision to retain culpable individuals who do not accept responsibility in key management positions will be considered in deciding whether the company demonstrates a commitment to effective compliance. Conversely, companies that can demonstrate they have adopted or strengthened existing compliance programs may be able to avoid probation.

In addition, we are actively considering ways in which we can credit companies that proactively adopt or strengthen compliance programs after coming under investigation. Although we have not finalized our thinking in this area, any crediting of compliance will require a company to demonstrate that its program or improvements are more than just a facade. As I mentioned earlier, true compliance starts at the top, is not optional, and is part of the company's culture.

In the most egregious cases, the Division will not give a company the autonomy to decide for itself what compliance program works best for it. In those cases, in addition to probation, the Division will seek the appointment of a compliance monitor to oversee the adoption of an effective compliance program. While those situations will most often be limited to companies that refuse to accept responsibility or acknowledge the illegality of their conduct, there may be cases when it will be appropriate for even a pleading company if that company, through word or deed, demonstrates a risk of recidivism.

To date, the Division has sought the appointment of a compliance monitor in only one a criminal matter, but the appointment of monitors is not uncommon in other contexts in the Department of Justice, and, I suspect the Division will more frequently request it in the future. For that reason, it is worth describing the circumstances that led to the Division's decision to seek the appointment of a compliance monitor.

In 2009, a grand jury indicted AU Optronics, its American subsidiary, and several of its senior executives for their participation in a long-running conspiracy to fix the price of liquid crystal displays – the screens used in laptop computers and computer monitors. The company had no preexisting compliance program and, even after it was under investigation, took few steps to put one in place.

Before, during, and after the 8-week trial that led to its conviction in 2012, AUO maintained not only that it had done nothing wrong, but also that the charged price-fixing conduct should not even be treated as illegal. Even after conviction, it did not accept responsibility. It continued to make defiant public statements and took wholly inadequate steps to adopt a compliance program. And, given the tone from the top executives at the company, any such compliance program could never have been effective. As a result, we asked that AUO and its U.S. subsidiary be placed on probation and that the court appoint an independent monitor to oversee the implementation of an appropriate compliance program.

AUO actively resisted this request, but the district court agreed with us. It imposed a three-year term of probation. That probation required AUO to develop and implement an effective compliance and ethics program. And, as importantly, AUO was required to hire, at its own expense, an independent

monitor to oversee the implementation of an antitrust compliance program and provide quarterly reports to the U.S. Probation Office.

The lesson from the AUO case should be clear: active refusal to accept responsibility, including resisting effective compliance, will result in probation and independent monitors. The Division will take a similarly hard line with companies that do not take their compliance programs seriously.

I want to close with just a few more remarks. I've been told that the Division's approach to compliance programs is all stick and no carrot. I don't think that's true, but more importantly, I think it misses the point. The purpose of having an effective compliance program is not so that the Division will cut you a break if your company commits a crime. That view is a concession of failure. Instead, the purpose of having an effective compliance program is to be a good and responsible corporate citizen. The purpose of having an effective compliance program is to avoid ever being the subject of a criminal antitrust investigation. The purpose of having an effective compliance program is the prospect of early detection and leniency. Each of these reasons for having a compliance program is a carrot – a very valuable carrot. And, if the stick becomes necessary, it is the company's conduct and how it responds to the investigation that will determine what the stick looks like.

That is the point I want to leave you with. At all times, and in all ways, compliance, and the consequences of ineffective compliance, are controlled by the company. It starts and ends there. The ICC is giving you some of the tools of compliance, and they are very good tools. But ultimately how you use the tools, what you build with the tools, and how solid that structure is depends on you and your companies.

Thank you.