

**Monitoring Potential Criminal Antitrust Violations and
a Proposal for Efficient and Effective Corporate Probation
Monitorships**

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I. Goals of an Antitrust Monitorship

- To treat fairly and with respect the corporate defendant, the Court, the United States Department of Justice Antitrust Division, and the United States Probation Office;
- To ensure the corporate defendant is adhering to principles of free and open competition in compliance with US antitrust laws;
- To educate the corporate defendant's directors, officers and employees and, in select circumstances, third parties about proper antitrust practices, risks and safeguards;
- To work towards and strongly support a corporate goal of being profitable while conducting business ethically;
- To encourage a corporate defendant to cooperate fully and improve its antitrust compliance program; and
- To conduct the review and monitoring of the company's business in an efficient and effective manner.

II. Experience and Observations

- A. Antitrust and competition compliance, for various reasons, is frequently not the focus of the compliance program and efforts of many companies in the United States and elsewhere;
- B. Companies investigated and prosecuted for antitrust violations have often engaged in cartel and anticompetitive behavior during, if not as a result of, difficult economic conditions and challenges;
- C. Companies investigated and prosecuted for antitrust violations have endured massive legal fines, sizeable civil settlements and judgments, and substantial legal fees and related expenses;
- D. Companies prosecuted for antitrust violations often believe that the Antitrust Division's anticorruption effective leniency program favors the corporate individual wrongdoer granted amnesty and that there is a long term anti-competitive effect on their business and markets;
- E. Price fixing, bid rigging and other forms of collusion are very difficult to detect and monitor due to the secretive nature of those conspiracies and the scope and complexity of international markets;
- F. United States Probation Offices and their resources are generally ill-suited to monitor post-conviction corporate conduct and, in particular, global anti-competitive conduct. Unlike with individual defendants, probation officers are not trained to monitor

corporate activities such as pricing and bidding conduct or to supervise a corporate defendant's antitrust behavior and antitrust compliance program;

- G. In light of the often dire consequences of a second conviction, both convicted corporate offenders and the Antitrust Division have a strong interest in ensuring a quality antitrust compliance program is in place and avoiding the risk of a second conviction;
- H. Companies prosecuted for antitrust violations often face expensive and protracted parallel civil litigation from a vigorous and experienced plaintiffs bar, increasingly backed by litigation funding;
- I. Companies prosecuted for antitrust violations often find their officers and managers subject to prosecution and incarceration while wrongdoers at companies receiving Antitrust Division leniency continue to prosper and advance despite clear misconduct;
- J. Quarterly monitor reports, rather than semi-annual or annual reports, summarizing interviews, document production, compliance issues and progress, keep both the monitor and the corporate defendant on track; and
- K. Grades are a critical compliance tool for a corporate defendant placed on probation. Businesspersons and lawyers around the world understand grades, and so do the Antitrust Division, the U.S. Probation Office and the sentencing court. Thoughtful and fair grades succinctly alert senior management, boards of directors, officers and employees to the strengths and weaknesses of an antitrust compliance program and highlight areas for improvement.

III. Recommendations to Antitrust Monitors

- A. Advise the monitor team that they have a duty to be fair and respectful to the corporate defendant, its officers and employees in their interviews and in their document requests.
- B. Do devote substantial time and study to learning the company's business and goods and services and those of the industry - at no cost to the corporate defendant. Industry publications can get a monitor quickly up to speed on products, sales, market share and industry trends and forecasts.
- C. Do not re-investigate the underlying the antitrust offense, but do devote attention and resources to understand the sufficiency and effectiveness of the compliance program and internal controls, and the specific lapses and failures that may have permitted antitrust violations to occur without being detected.
- D. While certain aspects of a corporate defendant's overall compliance program will necessarily include antitrust compliance (*e.g.*, the Code of Conduct, corporate compliance messaging), a monitor should primarily remain focused on antitrust compliance.

- E. Secure a prompt meeting with a corporate defendant's board of directors (or equivalent corporate oversight body) and share the monitor goals and work plan.
- F. Establish and set forth criteria for periodic letter grades for various elements of a corporate antitrust compliance program, *supra*.
- G. Do give credit when credit is due while offering constructive, clear and tangible suggestions to the corporate defendant on how it may improve an antitrust compliance program and achieve higher grades.
- H. Periodically meet with the board of directors and/or senior management to share progress and challenges and seek their input on the compliance program and ongoing remediation.
- I. As with all corporate investigations, avoid rushing to judgment on suspicious patterns, conduct or statements by bidders. While such indicators may arouse suspicion, they are not proof of collusion. Keep an open mind, review documents carefully and listen to officers and employees.²
- J. Be mindful of the breadth and cost of document requests, electronic searches and interview demands upon the corporate defendant and its directors, officers, employees and counsel.
- K. In the event of a potential antitrust violation, provide the corporate defendant a reasonable time to investigate and respond, with appropriate respect for legal privilege. If a company or its counsel needs three or more weeks to investigate and respond, the monitorship may need to be extended.
- L. When employee antitrust violations are discovered and confirmed, urge the corporate defendant to remediate immediately and to impose employee discipline in a measured way. If a monitor or the company punishes an employee too harshly, officers and employees may lose their faith in and commitment to the goals of the monitorship. Subsequent violations can be dealt with more seriously.

IV. Common Antitrust Compliance Program Issues

A. Common Antitrust Compliance Program Failures

Failures of compliance programs can significantly damage a corporate program's overall compliance effectiveness. As important, it can deprive the company of salutary benefits under the United States Sentencing Guidelines ("USSG"). These deficiencies include when companies:

- Fail to adopt and distribute a clear, written code of conduct or ethics policy, and more particularly, written policies prohibiting proscribed conduct and policies establishing

² See Dep't of Justice, Antitrust Division basic primer, Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For. Available at <https://www.justice.gov/atr/price-fixing-bid-rigging-and-market-allocation-schemes>. (Last visited April 5, 2018.)

protocol for promptly reviewing and, as appropriate, escalating allegations to the general counsel, to senior management, to the audit committee or to the board of directors.

- Fail to appoint qualified and/or truly committed corporate or regional compliance officers.
- Delegate compliance to officers or employees who have no real understanding or training in compliance issues. Similarly, companies mistakenly delegate compliance activities to persons who have an inherent conflict of interest (*e.g.*, having a sales, marketing, or project proponent undertake due diligence of proposed sales agents).
- Fail to make compliance a priority supported visibly by the company's board of directors and senior management, with the result that, due to the press of other business matters, compliance efforts, training, and appropriate due diligence become a secondary priority.
- Fail to implement hotlines or other proper reporting mechanisms that minimize or offer little likelihood of retaliation.
- Fail to adequately undertake and document due diligence efforts in evaluating and approving potential third parties in sensitive positions or performing risky activities.
- Take a “head in the sand” approach with respect to sales and pricing managers. For example, sales personnel often erroneously assume that if they conduct no due diligence of agents, consultants, and partners or if they disregard facts that should prompt them to make further inquiries, they will not face any personal liability.
- Fail to require senior management or newly hired senior managers to undertake periodic and select antitrust compliance training.
- Fail to regularly rotate in-country senior management and financial and accounting personnel in foreign locations.
- Fail to work closely with their outside auditors to evaluate compliance efforts annually and to modify audit work programs, policies, and training.
- Dedicate inadequate internal audit resources to antitrust compliance reviews.
- Fail to implement internal administrative and financial controls that reduce risks of improper employee expensing in connection with trade association meetings or product rollout meetings where customers invite and debrief competing suppliers on new products.
- Fail to adequately monitor the activities of subsidiaries or joint venture partners.

- Ignore their compliance rules and policies due to business deadlines and time constraints, permitting sales personnel to engage in questionable practices without advance compliance clearance or legal advice.
- Fail to translate into applicable foreign languages their codes of conduct, antitrust and anticorruption and ethics policies, forms, and questionnaires.
- Fail to conduct due diligence of sales agents, consultants, distributors, resellers, and other third parties through the life of the contract.
- Fail to monitor the public disclosures of competitors that can reveal a broadening industry-wide investigation.
- Fail to apprise and involve boards of directors or appropriate committees thereof in a timely manner of sensitive allegations in fulfillment of their oversight roles and obligations.
- Fail to design and undertake audit plans that address industry and company standards and risks.
- Fail to set or adhere to deadlines for implementing compliance measures.
- Fail to take appropriate disciplinary actions in the wake of misconduct.
- Fail to periodically update and refresh ethics and compliance programs.
- Fail to make a compliance program sustainable. Many compliance programs arise due to a significant problems and management usually responds forcefully for the near or mid-term. A quality, compliance program must be *sustainable*.

B. The Importance of Preventing Future Antitrust Violations

Finally, even though the USSG's original seventh and final step to an effective compliance program is to take steps to prevent future antitrust violations, it is remarkable how often, after the completion of a thorough investigation and the identification and punishment of wrongdoers, well-intentioned companies will not take adequate steps to prevent the recurrence of misconduct. This lapse is usually not willful, but a result of investigation fatigue and the press of new matters or business priorities. A company should maintain and adhere to a post-investigation action plan with objectives, action steps, responsible persons, and commitment dates. Otherwise, the original problems are likely to recur.

V. Tarun's Proposal for Efficient and Effective Corporate Probation Monitorships

A. General Observations

1. U.S. probation officers generally are not equipped to monitor potential antitrust violations. Their day-to-day efforts are necessarily and overwhelmingly focused on individual defendants. The probation officers simply do not have the

resources or budget to monitor corporations that have complex operations, often far flung on a global basis.

2. Strong compliance programs are critical to corporate adherence to an increasingly large and complex universe of criminal laws. The DOJ should encourage and incentivize corporations to design and implement thoughtful, effective compliance programs. Many companies have inadequate antitrust compliance programs and resources – both before and after antitrust violations are made public.
3. Antitrust monitors can serve in a critical oversight role for corporations that are placed on probation.
4. The first year of corporate probation is especially critical and requires experienced, independent oversight in developing and implementing a robust antitrust compliance program.
5. Three-year antitrust monitorships are unnecessary for many companies, and they can be costly, punitive and, ultimately, counterproductive.
6. The possibility of avoiding a monitorship or shortening its terms as outlined here will create an additional incentive for corporate wrongdoers to self-report violations and mitigate the consequences of an antitrust violation.
7. The benefits of more frequent though shorter, more efficient and effective monitorships, conducted pursuant to the principles and rules outlined in this memorandum, outweigh their attendant and real costs. The Antitrust Division should establish a working group or other appropriate body to monitor the effectiveness and burdens of monitorships, and to prepare a publicly-available report at least every three years.

B. Selection of Monitors and Designation of Company Counsel

1. Monitors who are too busy to promptly interview employees or who will routinely delegate the principal work and responsibilities to others should not be appointed. Similarly, company counsel who are too busy to timely and properly attend to interviews, document requests and other monitor activities should not be designated to represent the company. The goal should be to conduct an efficient, one-year to three-year monitorship. *See* Section V.C.4. Undue and repeated delays by company counsel should not be permitted or, alternatively, should result in an extension of the monitorship.
2. Candidates for monitorships shall apply by submitting prior experience, qualifications and a preliminary budget to ensure that the scope of the monitor's work is focused and reasonable.

3. Absent extraordinary circumstances, companies that voluntarily self-report, cooperate and demonstrably implement an effective antitrust compliance program and receive amnesty do not need appointment of a monitor.
4. Absent sufficient proof to the Antitrust Division or a sentencing Court that a company had in place an effective compliance program at the time of the offense, corporate monitors should be appointed as part of a probation sentence for all corporate offenders except the successful corporate leniency applicant that makes a requisite showing. As indicated in Section V.C.4, the terms of monitorships can vary dependent on the level of cooperation with the Antitrust Division and the state of the corporate antitrust compliance program.

C. Monitor Proposal

1. Elements

- a. A monitor shall principally review and monitor the corporate defendant's antitrust compliance program consistent with the principles noted above;
- b. The corporate defendant shall timely make employees, documents and information requests available to the monitor;
- c. The monitor shall reasonably limit the number of interviews (*e.g.*, no more than fifteen per quarterly period), and not reinvestigate the underlying offense;
- d. The monitor shall attend representative live training sessions conducted by the company's employees or counsel in the first three months;
- e. The corporate defendant shall include an antitrust compliance component in its internal audits;
- f. At least two monitor meetings shall be held with the board of directors, including one by the third month and one by the twelfth month of the first year and at least annually thereafter; and
- g. A corporate defendant, before the end of the prescribed term, shall dedicate and budget appropriate compliance resources for at least 3 years forward.

2. Criteria for Evaluating Compliance Programs

- a. Criteria in evaluating the effectiveness of the antitrust compliance program may vary based on the size, operations and resources of the organization, but may include:

1. The company's culture of compliance, including awareness among employees that any criminal conduct, including the conduct underlying the investigation, will not be tolerated;
2. The resources (financial and otherwise) the company has dedicated to compliance;
3. The quality and experience of the personnel involved in compliance, such that they can understand and identify the transactions and activities that pose a potential risk;
4. The authority and independence of the compliance function and the availability of compliance expertise to the board;
5. The effectiveness of the company's risk assessment and the manner in which the company's compliance program has been tailored based on that risk assessment;
6. The compensation and promotion of the personnel involved in compliance, in view of their role, responsibilities, performance, and other appropriate factors;
7. The regular monitoring and auditing (planned and actual) of the compliance program to assure its effectiveness;
8. The reporting structure of any compliance personnel employed or contracted by the company;
9. Appropriate discipline of employees, including those identified by the company as responsible for the misconduct, either through direct participation or failure in oversight, as well as those with supervisory authority over the area in which the criminal conduct occurred; and
10. Appropriate retention of business records, and prohibiting the improper destruction or deletion of business records, including prohibiting employees from using software that generates but does not appropriately retain business records or communications.

3. Grades

- a. The monitor shall provide a written report and issue letter grades (*i.e.*, A, B, C, D or F, with "+" and "-" gradations) at least twice a year and provide them to senior management and the board of directors, to the U.S. Probation Office and to the sentencing court.

- b. Monitor grades can cover a multitude of antitrust compliance topics, some of which may be unique to the corporation or industry. Possible topics include:
- Code of Conduct
 - Annual Risk Assessment
 - Antitrust Policy (Stand Alone)
 - Comprehensive Antitrust Compliance Manual
 - Live Antitrust Training to Global Sales
 - Senior Management Antitrust Training
 - Director Training
 - Other special antitrust training for new employees, hires from competitors and persons participating in trade association meetings
 - Antitrust Compliance Team Role and Participation
 - "Tone at the Top" Messaging
 - Compliance Program as a Factor in Compensation
 - Periodic Email Screening Process
 - Commitment of Business Partners (Sales Agents, etc.)
 - Internal measures for reporting and responding to questions and potential violations
- c. The monitor shall issue grades at the end of the sixth and eleventh months of each year of a monitorship, or such other times as may be appropriate in light of the length of the monitorship.

4. Terms

- a. Monitors shall be appointed for companies convicted of antitrust violations to assist the US Probation Office.³
 1. A successful Corporate Leniency Program applicant that voluntarily self-reports, cooperates and demonstrably implements an effective antitrust compliance program will not be required to have a monitor.
 2. A second-in corporation will be required to have a monitor for a period of one year.⁴
 3. A third-in corporation will be required to have a monitor for a period of two years.
 4. Fourth-in and above corporations as well as corporations that do not self-report and cooperate with the Antitrust Division will be required to have a monitor for a period of three years.
- b. A company that offers extraordinary cooperation and assistance to the Antitrust Division and promptly and voluntarily elevates its antitrust compliance program to a "state of the art" level may be eligible for a lesser term or no monitorship requirement.⁵
- c. A company that receives higher grades and demonstrates a full and continuing antitrust compliance commitment shall be eligible for early, successful termination of probation and the monitorship.
- d. An antitrust monitorship shall not normally extend beyond three years. However, a company that fails to establish any meaningful antitrust compliance program, after actual notice of an antitrust investigation and up to and including the time of indictment, shall be presumed to need a three-year monitorship.
- e. Absent good cause shown and/or undue delays by the company and its counsel, there shall exist a presumption that the monitorship will terminate at the end of the originally-prescribed period. The burden of demonstrating the need to extend the monitorship beyond the original

³ U.S. Dep't of Justice, Antitrust Division, Corporate Leniency Policy (Aug. 10, 1993) available at <https://www.justice.gov/atr/corporate-lenency-policy>. (Last visited April 4, 2018.)

⁴ Hammond, "Measuring The Value Of Second-In Cooperation In Corporate Plea Negotiations" (Mar. 29, 2006) available at <https://www.justice.gov/atr/speech/measuring-value-second-cooperation-corporate-plea-negotiations>. (Last visited April 4, 2018.)

⁵ For a thoughtful discussion of how companies can help themselves earn mitigation credit in a Department of Justice criminal antitrust investigation, see Baer, *Prosecuting Antitrust Crimes* at pp. 3-4 (Sept. 2014). Available at <https://www.justice.gov/atr/file/517741/download>. (Last visited April 5, 2018.)

term shall be on the Antitrust Division and consultation with the U.S. Probation Office.

5. Delays and Extensions

- a. The goal of an antitrust monitorship shall be to efficiently and timely develop a quality ongoing antitrust compliance program, to monitor the business operations and to enable the company to move toward a strong, antitrust compliance program.
- b. Both the monitor and Company Counsel shall be committed to timely and efficiently working together through the prescribed term.
- c. If either the monitor or company counsel shall unduly delay interviews, or document production, or otherwise fail to cooperate, either party shall have the right to petition the U.S. Probation Office or the sentencing court for a substitution of either the monitor or company counsel.

6. Costs

- a. The goal of the monitorship is to monitor a corporate defendant, to enhance its compliance program and not to financially penalize the company with the costs of a monitorship.
- b. Since the United States government routinely pays for and assumes the costs of federal probation services, a corporate defendant should not be held responsible for the costs of corporate probation with a monitorship component.
- c. After the Antitrust Division and a corporate defendant reach an appropriate fine, the sentencing Court shall set off from the final total fine an estimated amount to for the prescribed monitorship, with a final accounting to be performed at the end of the monitorship.

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