

## Public Roundtable on Antitrust Criminal Compliance

*Thursday, April 9, 2018*

### TRANSCRIPT PART TWO

**ALEX SHEPARD:** We're going to go ahead and get started. I'm Alex Shepard. I'm an attorney in the San Francisco office at the Antitrust Division. And I'm happy to be here today with a great panel. What I'm going to do is, of course, introduce our wonderful panelists.

And then just to give you a preview, we had a very interesting discussion at the end of the last panel about what the Antitrust Division can do to incentivize effective compliance programs. So I think we're going to turn right to that topic with our panelists and get their thoughts as outside counsel.

And then we have a couple of very interesting topics. And we hope to get some audience participation in this as well. And one of those topics is the leniency program, and the role of antitrust compliance in leniency. And then we want to talk about compliance monitors. If we have a little bit of time at the end, we're interested in hearing from our panelists about what they think might be good or bad pieces of an antitrust compliance program.

So let me introduce you to our panelists. Going down the row, Bob Tarun is a partner at Baker and McKenzie in San Francisco, and he's a former executive U.S. attorney in Chicago. He's conducted over 100 corporate internal investigations for companies, for audit committees, and boards of directors in a variety of industries all over the world. He regularly counsels multinational boards of directors and corporations on compliance and governance.

In 2012, he was appointed the first criminal antitrust monitor in U.S. enforcement history for AU Electronics in the LCD case, which is out of our San Francisco office. And he's coauthored the corporate internal investigations book, and is an author of the FCPA handbook.

Ted Banks, sitting next to Bob, is a partner at Scharf Banks Marmor in Chicago. He focuses on general corporate and antitrust matters. He's also the president of Compliance and Competition Consultants, which assists corporations in developing effective and efficient programs in corporate compliance, internal investigations, and records management.

He teaches corporate compliance at Loyola University Law School in Chicago, and he's also currently serving as a compliance monitor for the FTC and also for the Competition Bureau in Canada. And he's written extensively on antitrust compliance.

Adam Hemlock is a partner in Weil, Gotshal's Antitrust Practice Group. And he regularly represents clients in criminal antitrust investigations by the Antitrust Division. And he served as lead coordinating counsel for clients under investigation in multiple jurisdictions outside of the United States, including the U.S.

He routinely represents clients in follow-on cartel class actions and private litigation. He is the vice chair of the Cartel and Criminal Practice Committee of the ABA Antitrust Section, and he also teaches a class on international antitrust cartels at Columbia Law School.

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And Thomas Mueller at the end is chair of Wilmer, Cutler, Pickering, Hale, and Dorr's Antitrust and Competition Practice Group. He's practiced in Washington, and also in Brussels. And his antitrust practice focuses on global cartel enforcement cases plus mergers and other investigations that have transatlantic implications. And he works with clients across a variety of sectors, particularly technology, manufacturing, financial services, and energy.

So we have a great group of panelists, some of whom I have worked with directly before. And so I'm very happy to have our discussion today.

What I wanted to tell you is that I'm going to try at the end of each subtopic to see if there's any questions in the audience. And I really encourage you, if you have any, or you have any thoughts, to step up to that microphone. So let me start where we just left off in the last panel. The Division has never advocated for sentencing credit for an effective compliance program. And we haven't issued any antitrust compliance guidance.

So what is it that the Division can do to incentivize companies to proactively create real and effective antitrust compliance programs? For example, should we be issuing guidance on corporate compliance programs like the Criminal Division or the ICC? So I'm going to start here with Ted and get your thoughts on this.

**TED BANKS:** Well, I think the unqualified answer is yes. The Antitrust Division should do way more than it has done and is currently doing to promote competition. That should be its mission, not playing a game of “gotcha” to find people to indict for violating the law

Yes, of course it should enforce the law, but its broader mission is to promote competition. How do you do that? You get people to compete. And in order for them to do that, they have to know what the rules are. So the Division should see as part of its mission to tell people what those rules are. If it doesn't, then you get what you get.

If the Division gives guidance on what should be in an antitrust compliance program, as the Sentencing Guidelines acknowledge, perfection is not expected. Perfection is not the test of whether you have an “effective” compliance program. It's whether you have used due diligence. And the qualifications for due diligence are defined. If you have, then you're entitled to credit.

I've been in a situation where an enforcer from another federal agency wanted to bring an action against the corporate client, based on the unauthorized actions of just one employee. So, after going through the compliance program, and the training, and the certification from the employee, the question I wanted to ask was: “What more could we have done?”

If you're in that situation with the Antitrust Division, you want to ask that question, but I don't know what the answer will be. Traditionally, it was “It's not our problem. Everyone's liable.” That's not a good position to be in. It doesn't encourage behavior. It doesn't help competition. It just traps the company based on the fact that human beings are fallible, even if it was trying to do the right thing.

**ALEX SHEPARD:** OK. Adam, what are your thoughts on this?

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**ADAM HEMLOCK:** So I think it's not remarkable that the DOJ should be interested in there being effective compliance in corporations. But the question is how to get there. First and foremost, the aggressive enforcement by the Antitrust Division is going to go a long way toward encouraging companies to come up with some type of compliance program and making some reasonable effort.

I think that if the Antitrust Division were to put out some type of guidelines that were unique and specific to the antitrust universe, and not just general guidelines and the sentencing guidelines, they may not necessarily encourage more compliance, but to some extent, the Antitrust Division is competing with a lot of other voices to get the attention, to get the attention of compliance officers and legal officers.

And in our world today, there's a lot of chatter. There's Facebook, and there's LinkedIn, and you're getting messages from all over. And if you really want to convey a message, you've got to pipe up a little bit. Plus, I think, frankly, my impression is that to some extent, in-house counsel and compliance staff do want to do more with respect to antitrust compliance. And having the DOJ say, well, here are some guidelines, here some ways that you could go about doing that, I think would be helpful to them.

I think it would enable them to go to business people, to go to others and say, look, it's not just our law firm that's saying we should do this. This is the government. They're saying these are some best practices. These are some ways to do it. I think that would be impactful.

**ALEX SHEPARD:** OK, Thomas, I'll follow up with you.

**THOMAS MUELLER:** I agree with what Ted and Adam just said. I think we heard from the in-house folks that they're looking for talking points and concrete descriptions of cases, guidance on particular areas of interest, ways of helping them promote policies to prevent and detect.

And one of those is, obviously, putting a financial incentive in place so that if you do have a robust program that you do receive some credit for it. And the Division, as Kathleen pointed out, has promoted the leniency program. And we'll talk a little bit more about that later.

And that program is unique. And the government has been very zealous in making sure that it creates very powerful sticks and very powerful carrots and protecting both of those. And I think it should be looking at whether it reduces the sticks somewhat by giving people credit for robust compliance programs that have failed.

And at present, it currently does give a compliance credit in the form of Amnesty Plus. And what is Amnesty Plus but a compliance credit? And that's typically in the range of 5% to 15% in my experience. It's not particularly large. I'm not suggesting it needs to be as high as the top end of that. But I think some recognition gives a very powerful talking point to in-house people who are fighting over limited resources.

They can point to some benefit here. I just had a conversation within the last week where a compliance person— we were talking about enhancing the compliance program—and the

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compliance person chimed in, said, “Yeah. And if, for some reason, we don't catch it, we'll at least get a credit. And I have to correct them, saying no, no. That's not the case. I'm talking at this thing on Monday and maybe things will change.”

**ADAM HEMLOCK:** He's billing for his time right now.

**ALEX SHEPARD:** So I want to circle back on a couple of follow-up questions. Ted, you said we could be doing more to promote compliance. It sounds like one of the things you think we should be doing is to be giving credit at sentencing. But what else can we do?

**TED BANKS:** Well, obviously, the sentencing credit is at the end of the process. In the appropriate case there could be a decision not to prosecute a corporate entity. But someone mentioned the red flags that the Department could share. Think about all the cases the Department has brought, and how they uncovered the methodology of the cartel or the collusion.

There's a lot of learning there can be applied in specific situations. And rather than having us read every complaint that comes out, there could be more guidance after each case. By providing some indicators of illegality that were apparent in a given case, antitrust compliance people could benefit from the knowledge of the Division. If this knowledge is being shared now, it is being shared imperfectly.

Think about the first case brought dealing with collusion by algorithm. That's something new. There's going to be more of it. You know that. This is an area that needs more guidance and the Division could provide that guidance.

So I think by sharing learnings from these cases, they can really help the cause of what I just now called compliance, but also the cause of competition.

**ALEX SHEPARD:** And, Thomas, I think I'm going to send a philosophical question your way. You had this discussion with your client, and all you were able to tell him was that the Antitrust Division didn't give any credit beyond just the leniency program. But isn't avoiding prosecution a worthy enough goal to institute a compliance program, or at least try?

**THOMAS MUELLER:** It is worth it. But people recognize that compliance programs are not foolproof. And I think having governmental guidance out there, that there's this set of standards, and they need not be very detailed, is a way for a compliance professional to come in and say to a business person, “Look, this is what the norm is. And you see it here in the guidance put out by the agency or by the Sentencing Commission.”

And we should adhere to it. And if we fail to, it's going to have financial consequences. I think that most people, most business people don't anticipate being prosecuted. And that's a hard thing to sell.

**ALEX SHEPARD:** Before we move on, I want to see whether there's anybody in the audience who's got any thoughts or questions on this.

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OK, I wanted to turn to leniency, which is something that Kathleen Grilli spent a little bit of time talking about. The Division's leniency program incentivizes companies to investigate their own conduct, but we don't require companies to institute a compliance program in order to get leniency.

And that is to get their final letter. Should the Division require leniency applicants to create an effective compliance program as a condition of the final grant of leniency, or do you think leniency applicants take steps on their own to improve their antitrust compliance programs? And I'm going to start here with— well, I think we've got two opposing views, so I'm going to start with Ted on this one.

**TED BANKS:** Well, once again, I think the answer is yes. I think that leniency should include some cost. It shouldn't just be a get-out-of-jail-free card. So at the very least, at the minimum, the Division should require a company applying for leniency to say, “OK, you have to now do the following, A, B, and C.”

Otherwise, you could really be a cynic about this and say, “Hey, I'm going to participate in this cartel because it's highly profitable. But I'm going to keep my radar up. And as soon as I sense that the cartel is about to fall apart, I'm going to run to the door and confess. And if I'm good enough, I'll get there before anyone else. And then I can just start doing it again later on.”

So to me, without a requirement that there has to be some behavior change going forward, it really breeds cynicism and skepticism about the Division's objectives. I agree that it's an effective way to break up cartels. I don't quibble with that. I just don't think it's inconsistent with either requiring a compliance program or possibly giving others a credit for compliance.

**THOMAS MUELLER:** So let me jump in with a countervailing view. I don't think it's a good idea. It's not awful, but I don't think it's a wise use of resources. The leniency program is effective as it is because it creates a very big carrot. And the government has yielded a very big stick against people who don't come in the door. And I mentioned in a previous segment that I think it's worthwhile to reduce that stick a little bit.

I don't see the benefit of adding a requirement to the leniency program. First of all, I think, as Joel Poppen said, when it hits home, and you've experienced one of these things—and I think an antitrust investigation is among the worst legal problems that a company can face— you've learned your lesson. I don't think what we do with the leniency applicant, or quite frankly, what we do for a pleading company, including in probation, should be a real focus for the Division.

For the most part, my experience is— and certainly all of my clients, they have learned their lesson, and they're not going to— they're going to do everything they can to have this calamity happen again. There may be a sociopath who tries to play this, to borrow Ann's word. But quite frankly, imposing of leniency, check the box requirement by the Division, or what a probation can do, or even a monitor, I don't think is going to stop the true sociopath.

And so I don't think you get much, and you burden a policy that has its strains right now. Is it something that's survivable? Certainly. It's not that big a deal. But the leniency policy is short.

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It's five pages. I would think to keep it as simple as possible benefits the vibrancy of that policy. And so I just don't see any gain from it. And there's potential.

Another talking point is, well, how long is the government going to be in my business, that I have to address in talking to someone about leniency? That, I would just abort.

**ALEX SHEPARD:** Bob, did you want to jump in here?

**BOB TARUN:** Yeah. I look at the leniency program as something that's been extraordinarily successful in terms of bringing cases in. I'm not sure that it strengthens compliance programs as much as it could. And I think the really quality companies, like I heard from today, are going to satisfy that standard.

And I cannot agree more that the standard should not be, if you fail once, in one place in the world, you have failed in a compliance program. When you're in 100 countries, that's impossible. That's a standard nobody can make. But what I want is a compliance program that's sustainable. And I don't think you figured that out by a company running in, turning in evidence, and saying we're first in, we get to go home.

I think a lot of companies would probably make that standard if you said you have to meet this threshold for a compliance program. But as a result of defending the misunderstood for about 30 years, and prosecuting the guilty for about 10, I've had some experience with corporate defendants. And I think right now, corporate probation is a misnomer.

What I heard was it's a collection agency to make sure someone pays the fine, but it doesn't really instill good conduct going forward or guarantee it? I can tell you that having worked with three probation officers and a first monitorship, and working with them on individuals and corporations, they have no clue what price fixing is, market allocation, or anything else. And while they may be enthusiastic at the outset—oh, this is exciting, this is different than what I do, it's not a year-end drop—after about three weeks, their eyes are glazed over and they have no comprehension of what's doing it.

So I wrote a paper after you pigeonholed me for this, suggesting that if we're going to have corporate probation, we ought to have a monitor light for those companies that truly fit, not the ones that have a one-off, an isolated misconduct, but to have someone that's going to figure out whether they truly have a sustainable compliance program. You can't judge that when the company pleads guilty or gets a pass. It takes a little bit of time.

And companies that are convicted are not happy campers. They're bitter with the leniency program because often, a competitor, which may be stronger, has gotten a huge leap for the next five years or so. So I think you want to have a monitor light for a finite period, not five years. That's what federal probation offers.

But it should be, if you're second in, one year. And by the way, Bill Baer in 2000—I think '14, wrote that second in shouldn't be—he didn't say this literally—but the idea was this timing thing

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shouldn't be the only criteria. If you're second in by five minutes, or a third in, you should look at the quality of the program overall.

What have these people done? What have they done to train people? Were the people at fault here, the real wrongdoers? Were they trained? Did they skip training? So I don't go along with this second and third in. But it may be a fair sort initial barometer if a company comes in second and shows the right thing to DOJ, maybe they get a one-year monitor light. Two years, if there's a third in, maybe two years.

And, again, this is subject to the judge's discretion. But what I proposed—by the way, I do want to give a brief shout out for Ann and the ICC. When I was asked to be the AUL monitor, I looked at a variety of compliance programs. And I selected that one for two reasons.

First, I thought was quality. And I read all 119 pages over and over. And I thought it was very well done. But secondly, when I am a U.S. lawyer supervising a foreign corporation, what signal does it send when I go on and say you've got to do it the U.S. way? I thought that would be the wrong message.

So I welcome the ICC, which represents countries all over the world and said, "I'm not going to put a U.S.-centric compliance program on top of you. Here's one that's embraced by nations around the world. So let's go with it."

And it turned out to be, I think, very well received. And it coincided with the beginning of my monitorship. I think you came out in 2013, and this is manna from heaven. So I really commend that. But what I proposed as a monitorship, just so the corporate folks here understand, is not to penalize the companies just all the way around.

First of all, it's a shortened monitorship. Second, it gives it, those companies that really have quality programs and out, they won't have a monitor. Third, it's a limited period of time. Fourth, I impose grades. It's the best thing I did in the monitorship because everybody around the world—I don't care what country you're from or what your background is—you get grades.

And so I had 15 categories. And you can look at the paper and see the categories I used to say—because at the end of one year, I didn't want to look at these people and say, well, you told us you were doing great in training. Right, but you weren't doing so well in monitoring.

So I want the student, or the probationers, or the corporation to understand what they've done well and what they can improve in. And their grades improved huge. But the board of directors said that was the best thing that happened to us, to understand exactly where you stood. So I push grades.

And by the way, the last thing, which maybe the government's not happy with it— but a new policy, everybody can't be happy—is that I propose that the payment of the monitor be deducted from the fine. In other words once the judges heard all the evidence, et cetera, and the three people or three monitors bid—we're talking about competition. Why shouldn't there be competition?

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With quality, it's one criteria, and cost is the second. And have at least three people compete. And have the judge look at it. And the government will argue the fine on it be \$50 million, and the company will argue \$30 million. The judge might come back at \$40 and say, I'm going to deduct \$1 to \$2 million per year or \$1 million a year for this monitorship, and I want quarterly reports. That's another huge thing. Don't go to these annual reports. It keeps everybody on their toes, quarterly reports.

So I propose a monitorship. I think for corporations that clearly need one, and I think it will lead to sustainable compliance programs, which ought to be the goal.

**ALEX SHEPARD:** So I want to follow up with one question for you, Bob, about leniency as it relates to your program. And then I'd be interested in getting your thoughts, the rest of our panelists. What you're proposing, this kind of compliance light on companies who plead, is arguably an increased penalty on the companies that plead vis-a-vis the leniency applicant. So in your proposal, then would you favor adding a compliance program requirement to the leniency program, to balance out the penalties?

**BOB TARUN:** The requirements, I think the government ought to be reviewing the compliance program in place and giving credit when it's really good. And so we're saying, you need a teacher. You need a monitor for a year or two. That's our view. And I agree with Ted that they ought to roll out papers that tell you what their expectations are.

I do a lot of FCPA work. They've done a very good job in this area of telling you how they're going to evaluate compliance. And so I do think there should be credit given for that, at least in terms of appointing a monitor. It may be that you don't deduct off the sentencing guidelines for the effective compliance programs. It has to be effective at the time of the offense. And I do think the DOJ takes the view that if there was an offense, it couldn't have been effective. And I just don't agree with that.

**ALEX SHEPARD:** Adam?

**ADAM HEMLOCK:** A couple of thoughts and a couple of reactions. One, I do think that to some extent, a company that has gotten leniency has a little bit of that, oh, I really dodged a bullet. And to some extent, it's going to encourage them to have a little bit better compliance. But that's not the same as getting crushed by a huge fine.

Maybe it's akin to a near miss in a car accident, and then that really causes you to buckle up more often. But that's not the same as if you are in an accident, and then you're really going to be buckling up afterward. Now, whether or not having a requirement of a stronger compliance effort as part of it, as a condition of leniency, one factor I think worth considering are the civil cases, because I've always felt that, A, the civil cases are scarier to typical cartelists than the DOJ and the government enforcement.

And if you have a case where the fines are quite substantial, where management and the legal department are living through the nightmare of discovery and really aggressive plaintiff's counsel and so on, that's going to scare them way more straight than anything you could put it in a



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leniency application. And assuming that the leniency application results in pleas or indictments of other conspirators, they are going to be off to the races in the civil cases.

I could see there being some type of requirement of compliance, but you'd have to be careful not to make it too detailed because then we start moving into this notion of, well, does there need to be a monitor? Does it need to be quarterly reviewed and so on? My personal view is that the use of a monitor in these types of cases should be extremely rare and certainly not, I think almost in no circumstance when there's a plea, vis-a-vis if there's actually a trial, and so on.

But I think the DOJ would have to be cautious about not trying to be too ambitious making it too detailed, these requirements, those requirements, and so on. If you have something general that just says as a condition of finalizing the leniency process and closing it out, the company has to demonstrate that they have a reasonable compliance program in place and it's reasonably effective, I don't see much wrong with that.

**ALEX SHEPARD:** Thomas, I think you had some follow-up.

**THOMAS MUELLER:** Sure. So I think like Adam, I would be sparing on monitorships in plea situations. I can see the benefit, Bob, of the program, particularly if there's a company that went to trial and defended its conduct till the end. But I think particularly in the context of imposing some sort of monitorship light on the applicant, I said kicking the tires on that leniency program would be an awful idea.

I do think monitorship in a leniency context would be an awful idea. I think it would be viewed as very unpredictable by leniency applicants, and it would deter it. I'd also say that to pick up on Adam's analogy, leniency applicants, I have yet to meet an leniency applicant that skated free of the accident. There's always the civil litigation, as Adam's pointed out. So people do suffer consequences, and I do think in most cases, take the appropriate lessons from that.

I think the key issue is how do you promote compliance, not to companies like we've heard from today. A lot of our clients are companies without complaint— a lot of our clients are companies without compliance programs. And how does the Division incentivize people like that to institute effective compliance programs?

And I think if we look at the world of FCPA, the Criminal Division has done a huge job in incentivizing that. And to some extent, I think someone in the first panel talked about the Division as losing the competitive race there on where compliance dollars get spent. And I think antitrust suffers from three natural disadvantages too, for instance, the allocation of dollars in the FCPA context.

One, I think there's a broader recognition of business people about the harm of a bribery investigation. There's just more of them. They're more public. Two, I would say that antitrust investigations are among the most catastrophic legal problems the company can have. So it's really not fair representation of the reality. And I think there needs to be more advocacy done in that space so that the people recognize just how serious a problem this is.

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Second, bribery is very easily understandable. Antitrust, we have this whole pallet of antitrust issues. And a lot of compliance programs suffer from trying to address all of it instead of the stuff that really matters from a compliance perspective. So I think it's harder to explain.

And third, there's an easy or easier to maintain audit trail. You can look at payments. You can put mechanisms. People understand that. The detection on antitrust is hard. And so those things put people—I think create disincentives on putting dollars into antitrust compliance. And I think the Division should work to try and counteract those incentives or create countervailing ones. You can't address all of these things.

**BOB TARUN:** I agree with what Thomas has said in terms of why antitrust is different than FCPA. What I find a little bit alarming, as I look back on history, is the number of FCPA recidivists there are of major companies. And that tells me the compliance programs that followed the first conviction weren't very good because in a bribery, I think is instinctively a little more jarring. And you really crossed the line.

But if major corporations are recidivists in the FCPA area, I think it's because the compliance program, the follow-on compliance program wasn't high enough quality. So, again, there are many companies that I don't think will need a monitor. But I think if the government had that warning that that may be coming to your theater, that would incent companies to have better quality compliance programs, those that aren't inclined to do it right now anyway.

And they said, “Wow, we don't want to monitor.” And most companies don't want to monitor. So if they realize if they were convicted, or second in, or third in that there was a good likelihood there would be a monitor, I think they may step up their compliance programs.

**ALEX SHEPARD:** So, Ted, I want to ask you for your thoughts on what Bob proposed.

**TED BANKS:** I hadn't seen Bob's proposal until today. But I read through it quickly. And I sort of like it. And I like it because I've seen from the inside what a monitor can do to help a company. At the lightest level, it's like having a consultant to say, “OK, look at your compliance program. You're a little weak here. You're OK here. Here's how you need to boost it up.”

And I know in my practice, I always acknowledged to the company, “Yes, I know I'm a nuisance. You'd rather not have me here.” No company wants a monitor, if nothing else, that you're messing with their business. But it's obvious they need help. And they wouldn't be there at all unless there was a failure of compliance.

Now, there can be specific reasons why a monitor is appropriate in addition to just the general compliance. And, for example, there might be a technical issue that was connected to the violation where a monitor can get into the weeds a little bit and make sure that technical problem—let's say it was regarding use of confidential information—make sure that's handled appropriately.

I understand that no one at the Justice Department or the Antitrust Division wants to be involved in day-to-day regulation of a company for several years. This is the mantra. We don't want to

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keep touching this company and controlling them. But sometimes it makes sense to have a little bit of a tail to the enforcement to make sure that things get done right.

Sometimes there's an issue of trust where monitors are needed because for all that's going on, there's still a lack of conviction that they will put an effective compliance program in place. And I think that may have been the case with the Apple monitorship, even though that came out of the Court rather than the Division. It was pretty clear to me that there was an issue there.

Sometimes there may be third parties who are afraid of what the company might do afterwards. And so giving them some comfort by having a monitor, at least for a short period of time, can be very useful. All of it's tied to encouraging competition. It's not part of the penalty. It's part of promoting competition, which I think should be the mission of the Division.

**ALEX SHEPARD:** So before we keep going here, we have this interesting proposal from Bob. And I wanted to make sure I checked in with the audience to make sure there isn't anyone who wanted to ask a question or offer their thoughts on that.

OK, I want to follow up with a monitor-related question. One of the things that we see from time to time is that companies, even when they plead guilty, are not the most willing participants in the plea process. Let's say we get to a monitor situation. How do you handle a potentially unwilling company, and potentially uncooperative employees in a monitor situation besides an obvious and probably less productive choice, which is threatening a probation violation? And I'm going to ask Bob that question.

**BOB TARUN:** Sure. And you're absolutely right. Companies that are convicted, that are first in, have a certain bitterness about the whole process, because some competitor got in first and probably has a multi-year jump on that product or line of business. And they're probably, second of all, not pleased with the Antitrust Division, because they didn't think it was a criminal offense. And third, they're probably not pleased with a monitor, although increasingly, they have a say in that person.

I did three things that I think in time made a difference. First of all, when I met the chairman of the company, I said, I'll tell you my first goal is to have you be profitable, ethically. And I really wanted that. I want you to hit the ball out of the park in your business.

They had lost money nine quarters in a row, in part, probably because of the investigation and all the challenges of an antitrust investigation, as Thomas alluded to. But I think that he genuinely understood I meant it. And they did turn the corner. I can't attribute it to my monitorship. But I really said that I wanted that.

The second thing I think was really important was to truly understand their business. And when I met them, I probably spent 50 to 100 hours, non-billable, understanding their business. I asked for industry publications. I want to understand what your products are, what your competition is doing. I'm not going to charge you a dime.

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I just wanted—and maybe it's the MBA brain that I have—but I really enjoyed that. And I think when I was interviewing people, they got that I really knew their products, and I'd read the most recent industry publication, and I understood their challenges and their products, and what the future of certain products was. And then I suppose finally, the third thing is I told them the Jack Welch story.

Now, I don't know how many of you know this story. But in 1995, GE was indicted in Ohio for an industrial diamond conspiracy. Unfortunately, she's old enough to remember that [INAUDIBLE]. At any rate, I think it was '85. At any rate, I was with the firm that defended GE in Columbus.

And the truth of the matter is, I don't think the Antitrust Division at that time had the tools internationally to gather evidence. And that probably helped a Rule 29 by the judge. Now, the story goes around that Jack Welch, who at that time was the domineering CEO in America, did not go down the halls and say we kicked the DOJ's butt. What we said was, never again. We are going to have a first-rate compliance program.

And so I shared that story with business CEOs that are wondering about this. And I said, that is the way you should approach is, not that—and woe is me, and more on me. But let's go forward. Let's really tackle this, and you won't have this problem again. And that's my goal too.

My first goal is to have you do business ethically. My third goal is to have this never happen again to you, because a penalty for a recidivist is just too great. And that's not the way you want to do business. It's just not. You're going to be much more successful, I believe—and that's not to say there aren't cheaters in the world. But their time is coming, and the world is shrinking on them.

So that's what I did to bring them in. But I won't tell you it's easy, because they are bitter. They've spent a lot of money. They probably have civil suits still outstanding they're going to have to pay up. And so I think you have to be understanding.

You don't want to come in there. I'm your policeman. I'm going to be here every day. That's the right approach. I want you to succeed ethically. And I mean it. So that's what I did. And by the end of it, I think it turned out to be very successful.

**ALEX SHEPARD:** And I think that's a good segue to end where the first panel started, which is from your perspective with outside counsel, what makes an effective compliance program? And I want to frame it this way. Let's say we're not in a monitor situation, or in a plea situation, or even in just a grand jury subpoena situation.

So there's no crisis. How do you get your clients to care about spending money on antitrust compliance or maybe just a broader compliance program with an antitrust component to it? And I'm going to start with Adam.

**ADAM HEMLOCK:** There's a lot baked into that question. I'll throw out a few of the more relevant or key points that come to mind. One is a point that's been made a couple of times today,

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which is you have to be careful not to dilute antitrust compliance with the Robinson-Patman Act in Section Seven and all that other stuff.

Sometimes you have to treat compliance as if you're going to trial, which is you really need to sit down and say, what are your most important messages? And there are going to be a lot other words said during the two, three week trial. But you have to come back to certain key themes, and hammer those home in clear, simple words of one syllable or less. But it has to be really simple.

It has to be easy to understand. I've never been a fan of some of these compliance manuals that are just pages and pages that endeavor to teach every aspect of antitrust law, and the history of the Sherman Act, and where Senator Sherman went to high school, and all of that stuff. It's interesting for us, maybe, maybe not all of us. But it's never going to get there to really hammer home to an employee who has a lot of other things to do at work, who has a family, whose attention is being pulled in a million directions. What do they need to do to avoid breaking the law?

Third is, I think there should be an emphasis-- again, I apologize that someone else made this point earlier—on flagging things versus knowing the law. I'd rather have a bunch of employees who don't know the law at all, but they know when something doesn't smell right, and they run to the legal department. And Amy made the point earlier that it's critical that a compliance program has to encourage employees to come and self-report.

Finally, you have to be mindful again that antitrust—and I agree with Tom in this regard— is one of the biggest problems, cartel problems, one of the biggest problems that a corporation can have today. But it's not the only one. And let me just close this by saying there is merit to having a compliance culture generally. And antitrust is going to fit into that or follow on from that.

Frankly, one of the points that was made earlier is that if you have a company put aside legal compliance, but a company that just values integrity, and that values ethics, and so on, and that's implicit in how the company operates in the business sphere, not just the legal sphere, I think antitrust is going to be easier to get people to understand, to appreciate, to follow than if it's by itself, and otherwise, everybody's doing all sorts of dodgy things without any retribution. But antitrust, you're saying, oh, this is really important. You have to follow this vigorously.

**ALEX SHEPARD:** So I'm going to ask for Thomas's thoughts. But I hope it's OK if I twist the question a little bit. What if you don't have a company that is grounded in compliance culture and ethical culture? And I say that because I spent some time overseas last year. And I think as a general matter, that wasn't the culture. And I know, Thomas, you have also worked overseas a fair amount.

**THOMAS MUELLER:** It's hypothetical.

**ALEX SHEPARD:** Totally hypothetical.

**THOMAS MUELLER:** So the question is what do you do with a company like that?

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**ALEX SHEPARD:** Would the steps you take be any different? What would you do?

**THOMAS MUELLER:** No. Well, I think Adam's points are pretty universal. And I think we've heard them said a number of different ways. You've got to make it simple. Take out the extraneous stuff. I think we're talking about the length of the longer form program, and it came to good use.

But this is a world where people respond in emails—I've seen this— TLDR, just wondering what that means. Too long, did not read. And that's the business culture today. And so you need to distill the message. You need to target the message. And I think that's the key thing.

And I think I was struck also by Joe's— I think the last point in their value statement was something about the fact that we encourage people to raise questions. And that's the most important thing. And I think people may want to do the right thing, but they often feel stifled. And you need to create a culture where you can say, “Hey, what about this issue? Let's talk about it.” And that's critically important.

But if you're talking about someone who truly has nothing, it's little baby steps. It's targeting the head guys at sales, I think the guidance that the Division put out. And now I think Hong-Kong has also put it out on HR professionals— is extremely valuable. Target the people who are most at risk, simple messages, do as much in person as you can.

I think where people go wrong is they think, I've got nothing, so I need to do something universal. And they push out a new learning thing to every employee, which sends the message of I haven't thought this through. This isn't really that important.

**ALEX SHEPARD:** And, Ted, I'll ask you for your thoughts too, because I know you do a lot of compliance counseling, not necessarily in a criminal antitrust context.

**TED BANKS:** There's a lot to this. If you want a compliance problem that works, there's a whole lot more required than just having a list of things and checking the box. The in-house counsel panel had a lot of wisdom, which I recognized because I spent 30 years as an in-house counsel before I went to a law firm.

So you learn by experience what works and what doesn't work. Adam touched on this. People are confused in training as to what their goal is. The educational people talk about awareness training versus mastery training. Sometimes antitrust training is somewhere between the two. They like to teach you all the details, but not enough so that you're a lawyer.

But that blunts the fact that we want your radar to be on. When you're in a situation with another competitor, you should know that something needs to be done. Training generally is terrible. And it's not just because it's too detailed, it's also boring. We don't focus on adult education techniques.

The result is that a lot of people go through antitrust training, and it's largely a waste of time. In history, a certain fine antitrust enforcement agency in Washington used to require as part of the

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termination of a case, an agreement that, once a year, the general counsel of the defendant company will stand up in front of the sales force and read the antitrust policy to them. Was that training, or part of the punishment?

So we've come a ways from that one, but that's what many people still think. You have to really have a more subtle education program to be effective. For example, I always like to blend antitrust principles into other education, so that if you're training a salesperson how to talk to a customer, how to stock a shelf, something like that, you build the antitrust guidance into it that message. "Oh, and by the way, if you see the salesperson from your competitor there, you don't talk business with them." So they get that message not as antitrust compliance training, but as just, "Oh, it's how I'm going to be a good salesman."

Another effective training technique is to appeal to self-interest. Not that you're going to go to jail, or not that this will be a nuisance to defend this investigation, but rather that if you're talking to a newly minted MBA, who has been told that he or she is God's gift to—name the industry—and they want to get ahead, and they're aggressive, and they're looking for any angle, what you tell them is, "I'll give you the secret to how you get promoted in this company. You do that by being the master of X."

And X could be how to run promotions, how to handle sales, how to handle finance – all in synch with the antitrust laws. But you make them motivated to understand these antitrust rules because they'll see it as in their self-interest. So there are a lot of other techniques on adult education – like active involvement – but I had to take courses to learn about them, because they don't teach it in law school.

I made all the mistakes in the beginning. I actually prepared an antitrust compliance program that included the year the Sherman Act was passed. It took me a while to go beyond that, to stop doing that, and really focus on what the employee is seeing.

Put yourself in the shoes of the employee. What do they need to do their job? What are they thinking about in the world, in their life, in their family? What do they understand, and what's their attention span? What technology do they use? What's available on their cell phone? That's how they do business in the company. Make sure that's where they get their information.

And then the final thing I want to figure out, I would like to ask the audience, because I am frustrated with it. We have a culture in the United States, and perhaps other places in the world, that teaches us that it's bad to be a "snitch." I play a clip in my law school class from the movie, *Scent of a Woman*, where Al Pacino's giving this bravura performance in a school disciplinary hearing, about why our young hero is such a great guy because he wasn't a snitch.

But the essence of the story is that here's a kid who saw a couple of other kids engaging in some vandalism. The point of the movie was it was good not to tell what was going on. And that's so embedded in our culture. When employees in a corporation don't report wrongdoing, don't use a hotline, or something like that, we should be surprised?

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So I always look for ways to try to encourage people to report, to give clients the tools that they can use to do that. But I don't have a good answer for our cultural challenged. And I think that will continue to frustrate us if we want to learn about antitrust violations or any other kind of violation for now.

**ALEX SHEPARD:** Now, before we close, I just wanted to make sure that whether there's anyone in the audience who has a question. All right, well, I want to thank the panelists. That was really interesting.

**TED BANKS:** Can I say one more thing?

**ALEX SHEPARD:** Yes.

**TED BANKS:** Anne Riley is really selling ICC. And she wanted everyone to know that the stuff is available for free on the website. OK.

**ALEX SHEPARD:** OK, thank you all so much. Thank you.

[APPLAUSE]