



Department of Justice

CORPORATE COMPLIANCE PROGRAMS
AND FEDERAL ANTITRUST ENFORCEMENT:
A COOPERATIVE APPROACH TO DETERRING
ANTITRUST CRIME

REMARKS OF

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Corporate Compliance Programs
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Approach to Deterring Antitrust Crime

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Thank you for the opportunity to participate in this symposium on current developments and trends in antitrust enforcement. My topic this afternoon addresses developments in criminal antitrust enforcement at the Department of Justice and, as requested by the program chair, related issues involving the creation and maintenance of corporate compliance programs. The relationship of federal enforcement and corporate compliance programs has become an increasingly interesting and somewhat controversial subject.

Most executives recognize in principle the need for an effective compliance plan. They acknowledge the need for guidelines covering the many occasions that executives and employees of competing companies meet to exchange information about their businesses. They often acknowledge that compliance programs can be extremely useful in reducing the likelihood of antitrust violations. Too often, however, executives do not understand that the true benefit of a compliance program is prevention, and they overestimate the influence a program exerts as a factor in the exercise of prosecutorial discretion.

From the perspective of the Department, the existence of compliance programs has a very limited role in the exercise of prosecutorial discretion. As with any deterrence program, the value of a compliance program is measured by its effectiveness in preventing antitrust violations. Once a violation occurs, the compliance program can do little, if anything, to persuade the Department not to challenge the offense.

During the pre-indictment phase of an investigation, we frequently hear the argument that a corporation should be excused for an employee's conduct when the individual defendant acted without the company's knowledge, authority or approval and in violation of the company's compliance program. A variation on this theme is that the company initiated a program immediately after it discovered its employees' unauthorized conduct, thus claiming assurance that the illegal conduct will not happen again.

It is difficult for the Department to give much weight to such arguments. In the first place, to the extent that federal prosecutors allow failed compliance programs to justify or excuse an antitrust violation, we undermine our own deterrence effort. Secondly, the logic of the argument is not sound.

Legal doctrines of excuse and justification address truly exceptional circumstances that compel a second look at the conduct underlying the alleged crime. Evidence of an ineffective compliance program hardly falls into that category. Finally, acknowledgment of such plans in the decision to prosecute would encourage the creation of pro forma plans, rewarding those whose commitment to deterrence is superficial and penalizing those who genuinely expend resources to ensure that their programs are well understood and heeded.

At the sentencing phase, compliance programs can have a mitigating effect, but the extent to which compliance programs should be a factor at sentencing is not yet settled. The U.S. Sentencing Commission Draft Guidelines for Organizational Defendants, circulated for public comment on October 26, 1990, proposes a reduction to the sentence of an organization that had an effective compliance program in effect before and after the alleged violation. The Commission's commentary on this proposal notes that an effective compliance program is one that has been reasonably designed, implemented, and enforced so that it will generally be effective in preventing and detecting criminal conduct. More recent drafts being considered by the Sentencing Commission would not permit any reduction for

compliance programs where high level management is involved in the offense.

The Commission sets out seven steps that it believes to be essential to any effective compliance program for mitigation:

- 1) the organization must have had policies defining the standards and procedures to be followed by its agents and employees,
- 2) a specific high-level person within the organization must have been designated and assigned ultimate responsibility to ensure compliance with those standards and procedures,
- 3) the organization must have used due care not to delegate significant discretionary authority to persons whom the organization knew, or should have known, had a propensity to engage in illegal activities,
- 4) the organization must have effectively communicated its standards and procedures to agents and employees,
- 5) the organization must have taken reasonable steps to achieve compliance with its standards,
- 6) the standards must have been consistently enforced through appropriate disciplinary mechanisms and
- 7) after an offense has been detected, the organization must have taken all reasonable steps to prevent further similar offenses.

Though they incorporate substantial detail, it is my view that these criteria could let an ineffective "paper" program slip through as a mitigator.

The Department of Justice has circulated to the Commission a draft set of organizational guidelines that also would give defendants credit at sentencing for having a compliance program in place, but under significantly more limited circumstances. The Department's version would apply if the offense, "represented an isolated incident of criminal activity that was committed notwithstanding bona fide policies and programs of the organization reflecting a substantial effort to prevent conduct of the type that constituted the offense."

The Sentencing Commission is still considering the precise format of organizational guidelines, so these proposals are necessarily subject to modification before final promulgation by the Commission and approval by the Congress.

The chief strength of a compliance program lies in its ability to prevent violations before they occur. In this function, Department policy objectives and compliance program goals are in step. In fact, successful plans often cite the Department's strong commitment to antitrust enforcement in order to impart a sense of urgency and importance that the antitrust laws be observed. The key message is that the Antitrust Division is ready, willing and able aggressively to detect, prosecute and punish antitrust crime. That message lies at the heart of the Antitrust Division's deterrence policy, as it should with yours.

The Department's commitment to strong enforcement against criminal antitrust violations is deep and genuine. Four recent developments in antitrust enforcement are worthy of notice. First, the cost of antitrust crimes has risen; second, the Antitrust Division has more resources to commit to criminal enforcement; third, investigation and prosecution techniques have become more sophisticated; and fourth, the professional service sector is fully subject to criminal prosecution. I will cover each point in turn.

Increased statutory penalties.

First, the cost of committing an antitrust crime has risen tenfold for corporations. In a major endorsement of antitrust enforcement, Congress last year increased the maximum fine for antitrust crimes by corporations to \$10 million -- up from \$1 million. This new statutory maximum means that courts can impose the full range of monetary penalties recommended by the U.S. Sentencing Commission's Sentencing Guidelines. Fines will reflect accurately the economic impact of the crime, and corporations will find it impossible to dismiss antitrust penalties on a cost/benefit analysis. Congress has seen to it that the cost of violations will be felt.

Increased Resources.

Second, Congress has reversed the ten-year trend of diminishing antitrust enforcement resources. Calendar 1990 marked the low point for resources. Last year, Congress supported the Antitrust Division with an increase in funding for fiscal 1991. Further, our appropriation for 1991 is stable; unlike the recent past, we will not be dependent on the flow of Hart-Scott-Rodino filings. All indications are that we have the continued support of the Department and the Office of Management and Budget for further stable increases in 1992. On this basis, we are now able to realize the first substantial increase in work force in over a decade, and new personnel resources will significantly enhance our enforcement of the antitrust laws.

Improved Detection and Prosecution.

Third, the Antitrust Division has become even more effective in investigating and prosecuting antitrust bid-rigging and price-fixing. We have initiated a system of regular contacts between the Division's field office chiefs and the State Attorneys General and U.S. Attorneys' offices. These and other governmental agencies are encouraged to be alert to cartel behavior and to call on the Division for assistance or direct action in attacking it. We are continuing to conduct training programs for government procurement officials to

enhance their ability to spot and report to us bid rigging in government contracts. To hone our own skills, we are pulling together a training and technique sharing program on criminal enforcement to take place this Spring.

This kind of improved coordination and cooperation has upgraded our investigative abilities and enhanced the efficient allocation of resources and expertise. It is an approach that paid big dividends in our Florida milk bid-rigging investigations, where information uncovered and provided by Attorney General's office uncovered a widespread, possibly multistate pattern of conspiracies. Working with the information provided by the state, the Antitrust Division successfully prosecuted price-fixing conspiracies among milk suppliers in Florida and developed investigations of similar conspiracies in numerous other states. In the Florida cases alone, the federal government collected \$11.5 million in fines and related civil damages. The State of Florida, focusing on the civil side, collected almost \$30 million in settlement of related damage suits.

In addition to improved coordination with other government agencies, the Antitrust Division has enhanced its own prosecution techniques. It has been the Division's long-standing policy to charge all crimes that were committed

in connection with criminal antitrust schemes -- such as wire fraud, mail fraud, tax evasion, or conspiracy to defraud the government. In two recent criminal cases, we have charged primary violations of wire and mail fraud in situations where failed attempts were made to rig-bids or fix-prices, allowing us to prosecute attempted fraudulent conduct that would hurt consumers through an unreasonable restraint on trade. This is an important expansion of our charging tools, and it has been endorsed in two recent cases.

In United States v. Ames Sintering, the Sixth Circuit affirmed a district court decision holding that attempted bid-rigging is actionable fraud under the federal wire-fraud statutes. In Ames, the defendants -- Ames, its engineering manager and an independent sales representative -- were charged with wire fraud in connection with a scheme to defraud a major customer by rigging bids for a contract to supply pressure plates used in power steering systems. After the contract was advertised, the defendants placed a number of interstate telephone calls in an effort to persuade a competitor to enter into a bid-rigging conspiracy. The defendants were unsuccessful in carrying out their scheme because the competitor they sought to proselytize contacted the government and agreed to cooperate by reporting subsequent conversations with the defendants.

The Ames defendants moved to dismiss the indictment, contending that a mere inquiry or proposal to rig a bid is not actionable fraud under the statute. The trial court rejected that argument and upheld the indictment, stating that actual success is not an element of the prohibited conduct. Rather, the wire fraud statute prohibits "... having devised or intending to devise any scheme or artifice to defraud..." Thus, the government need only prove a scheme to defraud and the use of interstate wires in furtherance of the scheme. The Sixth Circuit affirmed the trial court's ruling.

The district court in United States v. Critical Industries, Inc., a case in the District Court for New Jersey, applied the result in Ames in deciding defendant's motion to dismiss. The government charged two corporate defendants and their chief executive officer with wire fraud, alleging that they devised and intended to devise a scheme to defraud, and that they used the interstate wires in furtherance of their scheme.

In support of the motion to dismiss, the defendants argued that, unlike bid-rigging, price-fixing carries with it no element of deceit or misrepresentation, and therefore an attempt to price-fix can not be construed as a fraudulent scheme. They also argued that if Congress had intended price

fixing to be a federal violation, it would have amended the Sherman Act in 1952 when it passed the wire fraud statute.

In an order denying defendants' motion to dismiss, the court ruled, "Defendants' reasoning is not at all persuasive . . . it is of no moment that the conduct charged does not constitute an offense subject to Section 1 of the Sherman Act. What is significant is [that the conduct charged in the case is] an offense under the wire fraud statute." The Court described the fraudulent scheme as: "an attempt to inflate prices for which goods would be offered to customers generally -- customers who would be deceived into believing that the prices being quoted to them were governed by market forces, not the secret agreement of competitors."

Emphasis on White Collar Crime.

The fourth development in criminal enforcement concerns the Antitrust Division's participation in the President's initiative to attack "crime in the suites." It is extremely important that corporate employees understand that antitrust liability does not stop at the doorstep of a white collar office suite. Any misperceptions on this point must be

erased. Antitrust crimes are as likely to occur in a white collar club as any other, and, given the emerging dominance of the professional services sector in relation to the nation's GNP, white collar environments are increasingly the setting of antitrust investigation.

United States v. Alston, the Department's Tucson dentist price-fixing case, is a prime example of our enforcement program at work in the professional services sector. The case involved clear cut per se illegal conduct warranting criminal prosecution, but the defendants expressed some astonishment that they -- dentists and professional corporations -- were subject to antitrust enforcement.

The indictment charged three dentists and two of their professional corporations with conspiring to fix and raise the copayment fees that members of four independent prepaid dental insurance plans were required to pay to the defendants and other dentists.

The dentists who provided services for the four plans were compensated by a capitation schedule -- in other words, they were paid a predetermined monthly amount for each subscriber who selected them as their provider. Services provided by the dentists that were not specifically covered by the capitation

schedule were compensated by direct payments from the subscriber to the provider at rates independently determined by each plan. These "copayments" were the fees that the dentists wanted raised.

Led by the three individual defendants, more than 30 dentists sent identical letters to each of the plans for which they provided services. The form letters demanded an increase in copayment fees and attached a new copayment schedule that was 25-30% higher than the old one.

This was not a joint venture situation where a panel of providers who were part of a legitimate PPO engaged in fee negotiations with third party payors. Instead, independent dentists banded together for the purpose of forcing a fee hike among the competing plans. Three of the plans did indeed raise copayment rates, and those higher rates are still in effect. The fourth called the federal government.

Upon investigating and confirming the facts, it was clear that the dentists had engaged in a per se violation. There was not even an argument that the dentists' conduct related to any form of efficiency-enhancing economic integration, or that it resulted in the introduction of a new product into the market. Moreover, as more than one unindicted co-conspirator testified,

the primary purpose of the conduct was to set higher co-payment fees. With no economic integration and no new product, what we had was a garden variety price-fix, a per se illegal offense.

Criminal prosecution was the only appropriate course in the Alston case. The Antitrust Division's clear mandate is to deter, seek out and punish cartel conduct, and we have long held the position that aggressive criminal enforcement is a paramount means of achieving deterrence. For that reason we have observed a long-standing policy of prosecuting per se violations criminally. We have the discretion to seek instead a civil remedy for a per se violation, but we exercise that discretion only in very limited circumstances. I know of no case where the existence of a compliance program was a factor in choosing a civil route over a criminal prosecution, and you would be prudent not to rely on a program carrying that type of power. The true power of a compliance program -- and individual legal counsel -- is to dissuade the commission of criminal acts before they are set in motion.

You may know that the district court judge agreed to reverse the jury convictions of the individual defendants in Alston. The Department has filed notice of appeal, but the important lesson of Alston has already been taught: the antitrust laws apply to manufacturing and professional sectors

alike, and defendants are never justified in assuming an exemption. In short, if we see Alston facts again we will prosecute again.

In closing, let me emphasize that compliance programs can play a critical role in the enforcement of the antitrust laws. Without question, the most important element in a successful compliance program is the absolute commitment of company management and counsel to make the program work. That commitment must reflect a commitment to the importance and value of the antitrust laws and a belief in the importance of obeying the law. The Department of Justice places the highest priority on cultivating this type of commitment, and our effectiveness is greatly enhanced by the combined efforts of the states and the bar to secure the same result.