

## INTRODUCTION: AN IN-HOUSE COUNSEL'S VIEW

Theodore L. Banks

A common refrain throughout this book is that the primary goal of any antitrust compliance program is to prevent violations from occurring. Merely having a written antitrust policy is not enough. One should think about how and why violations occur and proceed from there. The most basic cause of illegal conspiracies, for example, may be simple ignorance combined with the human nature of people to talk with those with whom they have something in common. In other words, a businessperson is likely to find it easy to talk to someone in the same business. If this desire to bond with someone in the same business, experiencing the same challenges, is combined with ignorance of the antitrust laws, then there is the very real possibility that someone may engage in an illegal conspiracy, totally unaware that they are breaking the law and exposing their employer to significant legal risk.<sup>1</sup>

Most antitrust compliance programs are primarily focused on preventing price-fixing conspiracies, and with good reason. Yet there are many other areas of antitrust risk that also need to be part of the program. It is also necessary to bear in mind that antitrust compliance is only one part of a comprehensive compliance and ethics program. Antitrust does not exist in a vacuum, and employees must understand that they are expected to do the right thing in every area. Management must set the tone of integrity for all company activities.

Putting aside the question of whether an antitrust compliance program could ever succeed absent a culture of compliance in the organization, historically, too many antitrust compliance programs have been completely ineffective, since they were created by lawyers who thought the best way to approach the subject was to recreate law school. Consider salespeople, sitting in a room listening to a lecture from a company lawyer who talks about the Sherman Act, the Clayton Act, etc.

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1. "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public or in some contrivance to raise prices." ADAM SMITH, *THE WEALTH OF NATIONS* (1776).

Their reaction will be to tune out. Yet this approach was long considered the appropriate way to approach the subject.

Today, the most effective antitrust compliance programs are based on these broad principles:

- All the essential elements of the compliance and ethics program—policies and procedures, training, evaluation, audits, monitoring—are tailored to the company, its industry, and the activities in which it engages internally and externally with competitors and others.
- The company takes genuine steps to make sure that its compliance policies and procedures (antitrust and others) are effectively and consistently communicated and enforced.
- The company sets a proper tone at the top by reinforcing its commitment to a culture of compliance at all levels of management.
- Antitrust risk assessment and training focus on the areas where antitrust violations are most likely to occur, such as trade association participation and other interactions with competitors.
- Employees are taught how the antitrust laws apply to their particular jobs in easily understandable language, with familiar examples drawn from the workplace.
- Employees are not trained in areas that will never apply to them (e.g., a salesperson does not need to know about mergers), since time spent on irrelevant material detracts from the impact of the material that does apply.
- Employees learn that antitrust policy violations are serious, and those who may be inclined to “take their chances” understand that criminal and civil penalties,<sup>2</sup> loss of a job, ruinous legal fees, and a destroyed reputation are all consequences of violating the antitrust laws.

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2. In 1974, Sherman Act antitrust violations were made a felony. Antitrust Procedures and Penalties Act, Pub. L. No 93-258, § 3, 88 Stat. 1706. The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 increased to ten years the maximum prison term for criminal antitrust violations. Fines were increased to \$1 million for individuals and \$10 million for corporations, or twice the gain or loss resulting from the violation. 15 U.S.C. § 1; Fines Enhancement Act, 18 U.S.C. § 3571.

- Every employee knows where to go to ask a question or report a concern.
- In response to periodic evaluation, the program improves and evolves to reflect changes in the law, the company's industry, and its position in the market.
- Auditing is used to verify not only delivery of training, but also actual compliance with the policy. An employee who might have some motivation to violate the antitrust laws should abandon the idea, if for no other reason than the fear of getting caught.<sup>3</sup>

As a framework for understanding the more detailed treatment of these broad principles in the chapters that follow, below are the observations of one practitioner who, while serving as in-house counsel at a global manufacturer of a wide range of brand name consumer and industrial products, designed and carried out the company's antitrust compliance program.

#### **A. The Compliance Tripod: Policy, Training, and Controls**

To create an effective antitrust compliance program, where should one start? A good place is to establish a policy that distills the key points of the antitrust laws in simple language, such as the example below.

##### Antitrust Policy of XYZ Corporation

XYZ Corporation believes in aggressive but fair competition in all of its business operations. We will continue to succeed through superior product quality and service, and by delivering the best value to our customers.

Accordingly, XYZ and all of its employees, agree to the following:

- We will never engage in illegal agreements with our competitors, such as price fixing, market allocation, or customer boycotts.
- We will never abuse our market position, or engage in unfair or deceptive practices.
- We will not try to eliminate competitors or talk as if we are.
- We will treat our customers fairly and equitably.
- We will abide by the antitrust (competition) laws wherever we do business.

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3. See Andreas Stephan, *See no evil: Cartels and the limits of antitrust compliance programs*, 31 THE COMPANY LAWYER 231 (2010).

Any employee with a question as to whether any part of a sales or marketing program might incur a legal risk is directed to contact the legal department for guidance before starting the program. Additional information is available on the compliance intranet site [hyperlink], and through the training courses you will be expected to complete.

There is never any penalty for asking a question. However, employees that do not follow this policy are subject to discipline, up to and including termination, in addition to any penalties imposed by law.

Once the policy is in place, the goal of antitrust compliance training is awareness of antitrust risks, not mastery of the nuances of antitrust law. From the standpoint of actually educating employees, the more modest its goals, the more successful training will be. At bottom, employees should know the basic rules of antitrust (“Don’t fix prices”) and understand the importance of seeking guidance whenever there is a hint of an antitrust issue.

Lawyers believe themselves to be skilled at the use of language, but to ensure that policies and training are even more effective, professional writers, editors, and course designers may be employed to bring to life examples from each employee’s business life. To illustrate, antitrust training focused on job responsibilities in a company that manufactures and distributes products could use the following examples:

<b>Function</b>	<b>Activity</b>
Sales	Encountering a competitor while making a sales call Trade association participation Pricing decisions when faced with a tough local competitor
Marketing	Developing promotional programs Developing advertising Selling multiple products Restrictive distribution agreements
Logistics	Utilizing exclusive distribution Procurement practices, including commercial bribery
Strategy	Acquisition planning
Human Resources	Salary surveys No-poach agreements Covenants not to compete Compliance goals as part of annual planning

The approach to training senior management should reflect why it is in the interest of the business—as well as their own personal interest—to

follow the antitrust laws. Possible criminal penalties are always a reason to avoid legal violations. But even with civil antitrust cases, the disruption to business, consumption of management time, and huge legal costs, can be extremely damaging to a corporation's operating results. Damage to reputation that accompanies an antitrust violation will make it more difficult to deal with customers, suppliers, and government agencies. Publicly held companies often experience a decline in stock prices.

Antitrust compliance should be backed up by a system of business controls. It may be possible to remove authority to change prices from the salesperson on the street who is most likely to encounter competitors. The law staff may be employed to review antitrust-sensitive activities, such as price increases, defensive price decreases in targeted markets, deviations from established prices to meet competition, promotional allowance programs, and proposed acquisitions and divestitures. Guidance should be prepared for participation in trade associations, as these are the source of many price fixing conspiracies.

The law staff can work in conjunction with internal audit staff to include antitrust matters as part of routine audits of departments or locations. The audit staff can review both the compliance aspect (e.g., whether appropriate staff have received training, whether antitrust compliance goals are included in annual plans) and the conduct aspect (e.g., whether files reveal correspondence from competitors, whether pricing behavior is unusual).

## **B. The Ultimate Message: Better to be Safe than Sorry**

Antitrust lawyers tend to talk about the program employed by the Antitrust Division of the U.S. Department of Justice that grants amnesty for the first member of a cartel to confess to the violation.<sup>4</sup> The first in the door gets amnesty from criminal prosecution, and also is subject to single, rather than treble damages.<sup>5</sup> While it may be true that the amnesty program has encouraged confessions of cartel participation earlier than

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4. The U.S. Department of Justice's leniency program (also referred to as the amnesty program) is described on the DOJ website at <http://www.justice.gov/atr/public/criminal/leniency.html> and discussed in more detail in Chapter XII.
  5. Antitrust Criminal Penalty Enhancement and Reform Act (Antitrust Reform Act) of 2004, P.L. 108-237, as amended by P.L. 111-290, codified at 15 U.S.C. § 1 Note.

might otherwise have occurred, the program is simply the antitrust equivalent of a plea bargaining tool that does not take into account the existence of a compliance program. Independent of the leniency program, however, the Antitrust Division of the Department of Justice will consider the presence of an effective compliance program in its charging decisions and sentencing recommendations.<sup>6</sup> So even if the compliance program is not perfect, it may mitigate the harshness of a penalty.

### **C. Remember the Employee**

This handbook presents a comprehensive picture of what should be part of an effective antitrust compliance program. But as you put the pieces together, you should always keep in mind your primary target audience: the employee. To increase your chances that your message will reach the employee effectively, remember to put yourself in his or her shoes. What does the employee do? What does the employee worry about? How does the employee communicate? What are the employee's job pressures?

Your job is to ask and answer all of these questions, and use that information, along with the details provided in this handbook, to create an antitrust compliance program that works.

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6. U.S. DEP'T OF JUSTICE ANTITRUST DIV., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS IN CRIMINAL ANTITRUST INVESTIGATIONS (July 2019), *available at* <https://www.justice.gov/atr/page/file/1182001/download>. *See also* Makan Delrahim, Ass't Att'y Gen., U.S. Dep't of Justice Antitrust Div., Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs, Remarks at the New York University School of Law Program on Corporate Compliance and Enforcement (July 11, 2019), *available at* <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-1-0>.