

D.C. Bar Antitrust and Consumer Law Community

CORPORATE COMPLIANCE

*Responsible Business Practices For Thriving
Companies*



ESTABLISHING AND MAINTAINING AN EFFECTIVE COMPLIANCE PROGRAM

Dan Ducore, Former Assistant Director, Compliance, Federal Trade
Commission, Bureau of Competition

Andrew Friedman, Shareholder, Shulman, Rogers, Gandal, Pordy &
Ecker P.A.

Ann O'Brien, U.S. Department of Justice

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Moderator: Robert Hauberg, Baker, Donelson, Bearman, Caldwell &
Berkowitz, PC

OUTLINE

- Why antitrust and anticorruption compliance is important and cost-effective
- What a healthy compliance program accomplishes – do's and don'ts
- Practical takeaways

Emphasizing Compliance Makes Sense

- Attorney General Sessions, 4.24.17: “We have done our part to reward effective compliance programs . . . You have my commitment that we will continue to do so.”
- U.S. Department of Justice Memo, “Evaluation of Corporate Compliance Programs,” February 2017
- Continuing risk from operations
- Risk/reward balance: low cost prevention vs. high cost of investigations, potential fines & penalties

Enforcement

- Forty-eight companies and sixty-five individuals charged in auto parts price fixing/bid rigging cartel investigation; over \$2.9 billion in criminal fines.
- LIBOR price-fixing conspiracy yielded guilty pleas by major banks and over \$2.7 billion in fines. Investigations of individuals are ongoing.
- Six companies and ten individuals charged in capacitor price-fixing conspiracy.
- Many other industries have been subject to large price-fixing investigations: computer memory chips, flat and CRT screens, pharmaceuticals, air and ocean transportation, logistics, and local conspiracies in foreclosure auction bid-rigging, concrete price-fixing.

U.S. Sentencing Guideline Impact On Compliance

- Sentencing of Organizations
 - 8B2.1(b)(5) and 8C2.5(f) – Significant reduction if an offense occurs despite an organization having an “effective compliance and ethics program.”
 - “The organization shall take reasonable steps to ensure that the organization’s compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct.”
 - Monitoring and auditing necessarily requires more than written policies and guidelines

Potential Consequences of a Compliance Challenge

- Financial
- Individuals at risk of severe consequences
- Business restrictions (eg debarment)
- Parallel proceedings
- Defense costs

Primary Elements of a Healthy Compliance Program

- Demonstrated board and management commitment
- Comprehensive written policies
- Best practice: cascaded in-person training
- Means and procedures for individuals to raise concerns
- Requiring business partners and affiliates to comply
- Procedures for investigating and resolving internal compliance issues
- Periodic risk assessments and audits, and corresponding risk-based program adjustments

Board and Management

- ‘Tone at the top’- board and management promotes a culture of compliance
- Chief compliance officer with board access and real authority
- Endorsing all features of an active compliance program

Written Policies

- General business ethics
- Risk-based focus on areas of greatest concern. Examples:
 - FCPA (anticorruption)
 - Antitrust
 - Environmental
- Routine distribution and verification

Hot Issues: FCPA

- DOJ Pilot Program incentivizes internal investigations, self-disclosure
- High geographical risk in specific countries: Brazil, China
- ‘Buried’ bribery
 - foreign job appointments
 - corporate hospitality
 - Intermediaries
 - inflated invoices

Anticorruption Do's and Don'ts

- Do:
 - Emphasize a tough anti-bribery policy, in writing, messaging, and training for employees
 - Apply the same standards to third-party business affiliates
 - Establish stringent limits on gifts, entertainment, hospitality, donations, payments, and hiring/purchasing practices
 - Enforce financial controls concerning potentially corrupt payments
 - Assess the highest risk areas for possible corruption
 - Document any payments made that are reasonably related to protecting employee safety
 - Understand the impact of non-U.S. anticorruption laws (UK Anti-bribery Act)

Anticorruption Do's and Don'ts (II)

- Do not:
 - Continue to conduct business with companies that raise meaningful ethical/anticorruption concerns
 - Assume corrupt payments are 'part of doing business' in some geographical areas
 - Adjust unrelated payments, pricing, or business practices to convey value to foreign government officials
 - Ignore reports to supervisors or a hotline about potential corruption
 - Condone or accept significant gifts, hospitality, or other things of value (if such things are accepted, document and consider donating them to a charitable cause)

Hot Issues: Antitrust

- Simultaneous raids to seize information
 - Create procedures to avoid obstruction, guide IT professionals
- Post-investigation compliance that goes ‘above and beyond’
 - Kayaba (shock absorbers)
 - Barclays (foreign currency)
 - Hitachi (capacitors)
- Leniency program reporting incentives

Hot Issues: Antitrust (II)

- What does DOJ consider to be effective compliance?
 - Culture of compliance from the top down
 - Entire organization participates, understands, can report violations without retaliation
 - Monitoring and auditing compliance
 - Discipline individuals for violations
 - Procedures to prevent repeat violations

Antitrust Do's and Don'ts

- Do:
 - Aggressively compete for existing and new business
 - Compete ethically (no false statements about competitors)
 - Seek the best possible pricing that market conditions allow
 - Set prices and discounts independently
 - Share information in industry or trade groups if pricing information is properly protected or rendered anonymous
 - Leave any meeting where competitors discuss pricing, customer, or geographical agreements that interfere with competition

Antitrust Do's and Don'ts II

- Do not:
 - Agree with competitors on pricing
 - Share pricing information with competitors
 - Discuss pricing strategies with competitors (directly or indirectly – eg trade associations)
 - Coordinate with competitors on bidding
 - Agree with competitors to not bid on business
 - Allocate customers, regions, or lines of business among competitors

Remedy Compliance

ORDERS AND DECREES

- FTC and DOJ require full compliance
- Injunctions – it's about the conduct, not necessarily the underlying antitrust case
- Deadlines (for divestitures) are real
- Remedies for breach are real:
 - Civil penalties (FTC)
 - Civil or criminal contempt (DOJ)
 - Additional injunctive relief (more divestitures)

Remedy Compliance – cont'd

- Do:
 - Institute strong remedy compliance effort
 - Implement close oversight
 - Train executives and relevant staff
 - Meet deadlines for reports, divestitures, licensing, etc.

Remedy Compliance – cont'd

- Do not:
 - Assume small breaches aren't important
 - Assume agency won't find out
 - Assume lack of any antitrust "harm" will excuse a breach
 - Ignore issues or questions without reaching out to agency staff
- Good faith efforts go a long way - mitigate
- Bad faith will be penalized - cases

Growing a Culture of Compliance in Person

- Importance of supervisors conveying ethical values to direct reports
- Employees are more invested when their immediate supervisors care
- Reinforces compliance at middle and lower tiers where issues can arise
- Special difficulties in high risk locations

How Are Whistleblowers Treated?

- Encourage reporting
- Protection from reprisal – policies and anonymity
- Ensuring reports are taken seriously
 - Specific board committee involvement
 - Established procedures
 - Confidentiality/anonymity during investigative process

Affiliates and Partners

- Written relationships include compliance requirements
- Due diligence and risk assessments of all partners, affiliates, subsidiaries
- Real consequences for compliance failures – incorporating the HR annual review process

How Are Challenges Addressed?

- Ensure investigations are truly independent
- Common procedures for managing problems or incidents
 - Outside corporate counsel? Individual counsel?
 - Outside expertise?
 - Witness interview practices
 - Internal reporting of findings
 - Attorney-client privilege issues
- Appropriate corrective/disciplinary action if warranted; self-reporting if warranted

Risk Assessments and Audits

- Must occur on a periodic/regular basis
- Essential to evaluate high risk lines of business or geographic areas and shape program (and focus audits) accordingly
- Audit activity to identify effectiveness, weak spots, potential corrective action

Risk Assessments and Audits (II)

- Requires careful planning
 - Scope
 - Goals
 - Anticipate timing and logistical issues
 - Anticipate global data privacy issues
- Must be documented
- Internal reporting mechanisms
 - Written or oral?
 - Privilege?

Practical Takeaways

- Ethics and compliance programs require regular reviews
- The benefits far outweigh the costs
- The commitment starts at the top but must be embraced by daily operations, not just lawyers

Closing Remarks

