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## The Trouble With Antitrust Compliance and 10 Ways to Fix It

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### From the Experts

Looking at the continuing stream of cartel enforcement, one must reluctantly conclude that the state of antitrust compliance today is terrible. What is going on here?

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At the recent spring meeting of the American Bar Association's Antitrust Section, there were at least three sessions devoted to antitrust compliance. Even in the sessions not dedicated to compliance, common themes included aggressive enforcement, global cooperation, and increased penalties—all concerns that come as no surprise to any antitrust practitioner. And they are all things that should make companies wary of violating these now-universal laws. But companies still do violate them.

Looking at the continuing stream of cartel enforcement, one must reluctantly conclude that the state of antitrust compliance today is terrible. After decades of talking about compliance programs, companies still decide to fix prices. We should have figured out how to stop criminal conduct that has robbed billions of dollars from consumers over the years. And yet it seems that every antitrust lawyer (myself included, of course) pontificates about antitrust compliance as if they know what they are talking about. What is going on here?

### Compliance History—Not So Ancient

First, a little background. Antitrust compliance programs probably got their first exposure in the *Electrical Equipment* cases from the late 1950s and early 60s. General Electric had a very explicit antitrust compliance policy, but, as the judge noted, it was something that was observed in the breach, with apparent hearty support from management. This may have been the first example of what we now call a "paper program": something that looks good on paper but doesn't mean anything in reality.

As penalties were increased for antitrust violations, more companies began paying attention to antitrust compliance. Written policies were augmented by training programs, taking advantage of the audio-visual tools of the day (carousel slides, perhaps with synchronized narration from a cassette tape, or overhead projector slides). As the personal computer became commonplace, computerized presentation became possible and computer-based training, delivered via a network or CD-ROM, put compliance training in front of every employee.

But were the presentations working?

### The Government's Approach

The jury instructions in the *Corrugated Container* criminal case allowed the jury to consider a corporate compliance program as part of the determination of guilt. It did seem reasonable to think that an employee who violated specific instructions not to fix prices would be engaging in *ultra vires* actions for which corporate liability should not be automatic. The government was outraged with this idea, of course, and insisted that an

antitrust violation by a corporate employee was a case of strict liability, and the existence of an antitrust compliance policy was irrelevant. If the company had a policy and an employee engaged in a violation, then it was a “failed” policy (a name that would be attached years later) and was deserving of no credit.

At the same time as the government was insisting that compliance programs were deserving of no credit when it came to prosecution or sentencing, there were the usual speeches by antitrust enforcers encouraging companies to have compliance programs. Consent decrees sometimes included provisions requiring an antitrust compliance “program,” which often required only that the general counsel stand up in front of the sales force once a year and read the antitrust policy aloud. Members of the sales force who had to listen to this speech probably assumed that this was part of some punishment, not part of an educational program.

### The Sentencing Guidelines Arrive

In 1991, the United States Sentencing Commission released “Guidelines for the Sentencing of Organizations,” contained in chapter 8 of its *Guidelines Manual*. The guidelines operated from the premise that an organization that demonstrated due diligence to prevent and detect violations of law was serving the public interest and deserving of credit when it came to enforcement and sentencing. But, most importantly for a company trying to do the right thing, the guidelines provided an outline of what a company could do to demonstrate due diligence, representing the collective wisdom of the expert advisory group that had assisted in the creation of the guidelines, as well as commentators.

Over the years, when one observed the causes of corporate violations of law, a number of consistent themes appeared. Yes, there was often the case of the ignorant employee, and that could be addressed by education (a.k.a., training) programs. But the root cause of a violation was more often found in a failure of senior management and the board to support compliance, and these factors, along with other considerations, were included in the guidelines.

### Antitrust: The “Heart” of the Company?

Somewhere along the line, however, the Antitrust Division of the U.S. Department of Justice decided that the guidelines should not apply to antitrust, since antitrust violations went to the “heart” of a company’s activities. Why antitrust went to the heart of a company more than bribery, government contract fraud, healthcare fraud, pollution, or any other federal crime went unexplained. Yet alone among all of the criminal laws enforced by the Justice Department, an antitrust compliance program made no difference.

While the Antitrust Division was rejecting the value of compliance programs, the enforcement focus centered on the amnesty program: the first member of a cartel to confess to wrongdoing would receive amnesty from prosecution, regardless of guilt. Other members of the cartel were out of luck, even if they had a compliance program that followed the sentencing guidelines and the cartel participant was a classic example of the “rogue employee” who ignored corporate instructions. Cartel enforcement continued (and continues) aggressively, and news reports trumpeting huge fines and jail sentences no doubt bring a smile to prosecutors’ faces.

Over at the Federal Trade Commission, compliance requirements were often found in consent orders, and enforcement decisions were usually made in a more nuanced fashion. A company’s intent to violate the law was clearly a factor in enforcement, and unauthorized actions by individuals could be enforced as such.

### What is a Company to Do?

A cynic might well assume that it might be in the best interest of a company not to worry about compliance, but instead to devote its attention to making sure that it was always the first one to confess to the government if a cartel was about to be discovered. It could then keep most of its excess cartel profits, since it would not be responsible for large fines, and its plea would limit its civil exposure to single damages.

But let’s suppose instead that a company really does want to follow the law, since it knows that in the long run companies that have a sincere commitment to business ethics have greater profits, reflected in superior stock appreciation. Customers (whether they be consumers or businesses) remain loyal to companies they trust, and employees who are proud of their employers work harder, are more creative, and serve as additional salespeople for their employer. The answer is to adopt a modern antitrust compliance program that takes advantage of what we have learned over the years about technology, management, motivation, and education.

Unfortunately, we do not get any modern antitrust compliance guidance from the Antitrust Division. It does not

appear that this is an area of focus for them. If we look at the recent (April 11, 2012) compliance program contained in the proposed final judgment as to defendants Hachette, HarperCollins and Simon & Schuster in the [e-book price-fixing case](#), we see that they have agreed to certain compliance provisions. First, they have agreed to designate the general counsel or someone reporting to the general counsel as antitrust compliance officer who will distribute a copy of the final judgment to officers and directors and employees involved in selling e-books. Those folks would also get four hours of training annually on the meaning and requirements of the final judgment and the antitrust laws, delivered by an experienced antitrust attorney. Provisions also require certifications, audits, a whistleblowing system, and inspections by the Department of Justice or a representative.

What do we make of these requirements? Well, they are part sensible, part punitive. The requirement of four hours of annual training seems arbitrary to me—and if you had to sit through a four-hour antitrust talk by a lawyer (or sit at your computer for four hours) you would feel punished. Will that be likely to engage your interest in antitrust and encourage you to comply with the law? Not very likely. What about the other provisions of the sentencing guidelines that provide indicia of an effective compliance program? What about the use of technological tools to monitor pricing? What about recognition of the importance of incentives to ensure compliance? Having the compliance officer report personally to the board? The other management-oriented elements found in the guidelines? Nowhere to be found.

No, Really, What Should a Company Do?

Obviously, if you are faced with a final judgment or a consent decree that contains compliance requirements, you do what is ordered, no matter how ineffective it might be in actually convincing people to obey the antitrust laws. But for a company that just wants to do the right thing, there are much better ways to make it more likely that a conspiracy won't be taking place under your nose. Here are 10 key things you should do:

1. Make certain that the antitrust program tracks each requirement of the sentencing guidelines.
2. Tailor the antitrust compliance program to each employee's job, not to the law. If a person is in sales, talk about the restrictions on price-fixing, bid rigging, and market allocation—and not mergers. If a person is involved in marketing, talk about unfair and deceptive practices and price discrimination, not interlocking directorates. Training should use relevant examples that the employee can relate to. (I've never seen a widget and don't know why an antitrust course is worried about them. . .)
3. Communicate to employees in the way they communicate—live, via computer-based training, via their smartphones, via podcast. Use the media that is easiest for them, not for you.
4. Keep any sort of communications or training short and punchy. People tune out after a certain amount of time, and get angry and resentful if they are forced to sit through training that is boring and/or irrelevant to their jobs and their lives. Mix antitrust messages into other training as well. Don't feel compelled to use an attorney for training—there is nothing that requires a law degree to say, "Don't fix prices."
5. Recognize that each level of management has a role in an antitrust compliance program, and help them perform their roles by giving them the materials to do their job. Senior management sends a message to the organization. Department management makes sure that everyone understands the need to follow the laws, take training, and ask questions. Local management makes sure that every member of the staff knows that compliance with the antitrust laws will take precedence over any annual or quarterly goal. The board makes sure that senior management delivers, and that sufficient resources are devoted to the program.
6. Perform a risk assessment to identify the highest-risk areas. Start with trade association involvement. Have the participants been trained? Have the policies and procedures of the trade associations been reviewed? Do you even know who goes to which meetings?
7. Establish annual compliance goals for everyone who has annual goals, and be sure they count in performance evaluations.
8. Use computerized screening to watch price quotes and look for anomalies that might indicate collusion. Antitrust audits are also appropriate, along with business controls that can reduce risk by, for example, requiring justifications for price changes, or separating the power to change prices from the people who may talk to competitors.
9. Make sure that employees understand the rewards of following the law—and the consequences of violating the law. Employees who violate the law or company policy should be disciplined, and the discipline should be public.
10. Whatever you do in your program, evaluate it periodically. Don't assume that something will work with your people just because you found it in a book or a consent decree.

I could go on with more. But the main point is that companies that want to implement an effective antitrust compliance program need to do it themselves. Although it would seem to be appropriate for the Justice

Department to help companies comply with the antitrust laws (as they do in so many other areas where they really want to prevent violations and not just catch them), they have chosen not to do so. So you are on your own, and while implementing a compliance program in good faith won't necessarily convince the Antitrust Division not to prosecute should your program be imperfect, at least you will have minimized the chances that your rogue employee will be able to get the company in trouble.

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