COMPLIANCE ISSUES AND OPPORTUNITIES

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The Benefits of an Effective Compliance Program

- Prevent violations of law
- Detect violations of law (more on this later)
- Both civil and criminal cases are expensive to defend and carry very serious consequences
- An ounce of prevention is truly worth a pound of cure
- Helps satisfy officer and director fiduciary duty of good care.

“Ordinary” Civil Antitrust Cases Have Severe Consequences

- Treble damages
- Attorneys’ fees and costs for Plaintiff
- Attorneys’ fees and costs for Defendant
- Distraction for key personnel

Criminal Penalties Are Now More Severe

- Violations are felonies.
- 2004 statute substantially increased penalties:
  - Fine up to $100,000,000 if a corporation.
    - previously $10,000,000
    - 18 U.S.C. § 3571(d) provides alternative fine of twice the gain or loss caused by the crime. This has produced numerous fines in excess of $100 million during the last 10 years—mostly through plea bargains.
  - Fine up to $1,000,000 for individuals.
    - previously $350,000
  - Imprisonment up to 10 years.
    - previously three years

Recent Cases Have Imposed Huge Fines

- Hoffman-LaRoche Vitamins Cartel (1999)
  Hoffman-LaRoche and BASF AG agreed to pay fines of $500 million and $225 million, respectively.
Infineon agreed to pay fine of **$160 million**.

Expensive Civil Actions Often Follow Criminal Charges

- Government judgment has collateral estoppel effect in civil cases.
- **Hoffman-LaRoche Vitamins Cartel** (1999)
  > Hoffman-LaRoche entered federal civil suit settlements valued at over **$1 billion**, and state civil suit settlements valued at over **$100 million**.
- **Sotheby’s Price-Fixing Case** (2000-2002)
  > Sotheby’s and Christies paid **$256 million each** to settle federal civil suit.
  > Former ex-chairman of Sotheby’s contributed **$156 million** to Sotheby’s **$256 million** payment.

How a Compliance Program Can Help in Sentencing

- Reduction of culpability score
  > Up to **three point reduction** for effective compliance program.
  > Up to **five point reduction** for cooperation.
- Where volume of commerce affected is $100 million:
  > Base (20%) = minimum fine of **$20 million**.
  > With culpability score of 10, maximum multiplier of 4 results in minimum fine of **$80 million**.
  > With culpability score of 3 or less, minimum multiplier of .75 results in minimum fine of **$15 million**.
- Thus, seven point reduction of culpability score = **81%** reduction of potential minimum fine.

The Organizational Guidelines

- The government’s “gold standard” for measuring an effective compliance program
- Recent amendments expand the objectives of a compliance program, and place more responsibility on directors and officers.
- Underscore that companies must be actively engaged in compliance, through training and monitoring their programs.
- Although not binding after the Supreme Court’s decisions in *Booker* and *Fanfan*, the Guidelines remain an important factor in sentencing.

Seven Minimum Elements of an Effective Compliance and Ethics Program

- **Establish standards and procedures to prevent and detect criminal conduct**
- **Increased oversight by board and senior management**
- **Screen management**
  > Reasonable efforts to exclude any individual whom the organization knew or should have known has engaged in illegal activities or other conduct that is inconsistent with effective compliance.
Seven Elements of an Effective Compliance Program (cont.)

4. Institute ongoing internal training programs
   > Not only for employees generally, but also specifically for directors and management

5. Ongoing monitoring and risk assessment
   > Must take reasonable steps to confirm that the program is being followed and is effective

Seven Elements of an Effective Compliance Program (cont.)

6. If criminal conduct is detected, take reasonable steps to prevent it from recurring, including modifying the compliance program if appropriate

7. Establish internal enforcement mechanisms
   > Promote, and consistently enforce, compliance with the program
   > Provide incentives for compliance, not just discipline for failure to comply

Don’t Expect Too Much

- If the worst happens, don’t count on your Compliance Program making a difference in sentencing
  > “Paper” compliance are essentially disregarded, and
  > Where “substantial authority personnel” participate, presumption “not effective”

- But it is still worth aiming high

The Antitrust Division’s Corporate Leniency Policy

- Introduced in 1978, but largely ineffectual because grant of immunity was discretionary.
- 1993 revision made grant of immunity non-discretionary.
- By 1999, applications for amnesty rose from one per year to two per month.
- Since 1999, the amnesty program has produced more antitrust prosecutions than most other enforcement methods combined.
The Antitrust Division’s Corporate Leniency Policy

- Benefits are substantial:
  - No criminal violation for the company or its employees.
  - No prison time.
  - No fines.
  - Limit civil damages to actual damages – not treble (new since 2004).

The Antitrust Division’s Corporate Leniency Policy

- Two paths to immunity are available
  - Before investigation
  - After investigation
- Complete amnesty is available only to the first conspirator to come forward—a race to confess
  - A good compliance program can give you a head start
  - But even if first, a “ringleader” is not eligible

The Antitrust Division’s Corporate Leniency Policy

Part A (or automatic leniency):
- Report is made prior to a Government investigation
- Applicant is first to report illegal activity
- Applicant promptly and effectively terminates participation
- Report made with candor and completeness, and Applicant provides full, continuing and complete cooperation
- Confession is a true corporate act
- Applicant makes restitution where possible
- Applicant not the lone “ringleader”

The Antitrust Division’s Corporate Leniency Policy

Part B (or discretionary leniency):
- Applicant comes forward after Government investigation
- Applicant is the first to come forward and qualify for leniency
- Applicant comes forward before Government has evidence sufficient to sustain a conviction
- Granting leniency would not be unfair

The Antitrust Division’s Corporate Leniency Policy

Stolt-Nielsen, S.A. v. United States, 442 F.3d 177 (3d. Cir. 2006) (cert. denied)
Held: Leniency Agreements do not prevent indictment

Lessons:
> A thorough internal investigation is essential
> Ensure representations are accurate
> Scrutinize Leniency Agreement before signing
> Address breach of Leniency Agreement through post-indictment pre-trial motion

Initial Risk Assessment

- Unique to every company
- Take account of the company’s business, prior history, and the regulatory environment
- Shortcuts won’t work
- But the investment will pay off

Designing an Effective Program – Documents

- Compliance Committee Charter
  > May be incorporated into Governance or Audit Committee
- Compliance Policy
  > May be incorporated into code of conduct
- Procedures and guidelines
  > Customize to the risk and functional areas impacted
  > Integrate into existing operational processes
- Training Materials
  > Subject matter dependent; customized to company/audience
  > On-line training
- Acknowledgements and Certifications

Basic Elements of Compliance Policy

- Statement from board and/or senior management regarding importance of policy
- Scope of guidelines (i.e. covered parties) and designation of responsible individuals
- Overview of applicable law—not a treatise
- Guidelines on specific issues
- Instructions for reporting potential violations and description of potential responses

Don’t Miss the Forest for the Trees

- Too many policies and forms try to teach the introductory antitrust course in law school
  > This is hard enough for motivated law students—impossible for busy
executives

- Identify and stress the importance of avoiding core violations that must be avoided
- Identify and encourage seeking of legal advice on dangerous but non-core practices
- Use plain English

**Establish Oversight by Board and Senior Management**

- **Compliance Officer:** Assign member of senior management for overall responsibility for compliance program
- Provide for periodic reporting on compliance to board and senior management
- Very important for sending a message of real importance to the company

**Design and Implement a Training Program**

- **Training**
  > All employees with responsibilities over competitive decisions, particularly pricing, should receive periodic training.
  > Attendance at seminars should be mandatory, records should be kept of who attended, and employee training certifications should be obtained

**Focus Most on the Per Se Rules that Generate the Most Serious Cases**

- Price Fixing (anything price-related should raise concern)
- Bid Rigging
- Allocation of Territories
- Allocation of Customers

**Outside of the Core Areas, Goal Is Awareness—Not Final Decision**

- Example: Market Power is Important in Many Antitrust Contexts
• But Clients Should Not Be Encourage to Act Based on the Conclusion it is Lacking
  > Often a Jury Question
  > Clients Rarely Think They Have Market Power
  > The Risk of Doing Something Stupid is too Great

**Help Issue-Spot**

**Other “Ask for Advice” Categories**

• Exclusive Dealing
• Bundling/Package Offering
• Resale Restrictions
• Restrictive Technology Licenses
• Selective Discounting
• Any Transaction with Competitors

**Establish Ongoing Monitoring and Risk Assessment**

• Review adequacy of internal controls
• Annual review of reported/investigated incidents
• Conduct periodic audits of high risk areas (not an easy sell but very worthwhile for informing the lawyer as well as the client)
• Modify the program where appropriate

**Create Incentives and Discipline**

• **Promote compliance**
  > Provide system for reporting
  > Praise/promote the whistleblower
  > Promptly sanction improper conduct
  > Promote *culture of compliance*—the essential goal

**Respond Appropriately to Apparent Violations**

• Investigate potential violations
• (Be sensitive to warnings to employees concerning attorney-client privilege)
• If violations are found consider (quickly) appropriate remedial action, including self-reporting
Areas of Particular Concern

- Trade Association Meetings
  > Are the right people attending?
  > Are costs, sales, profitability, prices, marketing or distribution being discussed?
  > Are important changes in prices or other competitive factors occurring shortly after the meetings?
  > Have you reminded the attendees about the do’s and don’ts recently?

Adam Smith Said It Well

“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, Book I, Ch. X.

Areas of Particular Concern

- Standard Setting Organization Meetings
  > Do your representatives have business (as opposed to technical) responsibilities?
  > Are standards being used to hurt competitors?
  > Or, to entrench a patent position without disclosure?
  > Do you know the rules of the organization?
  > This is not just for high tech

Areas of Particular Concern

- Joint Ventures
  > Probably the most difficult area of antitrust analysis – many variations
  > Frequently pro-competitive
  > But, often involve agreements among direct competitors
  > If properly structured, analyzed under Rule of Reason
  > Recent 9th Circuit decision applied Per Se standard—expect reversal

Areas of Particular Concern

- Termination of existing distributors
  > This is where challenges to distribution practices come from
  > A little advice can save a lot of litigation costs
  > Check the agreement and the law
> Check the file
> Even if you have the "right," ask if the decision seems "fair"—the jury will

**Areas of Particular Concern**

- “Policy” Requiring Suggested Prices
  - *Colgate* Doctrine Exists but Risky
  - Line is not Clear at Best
  - Danger of Later Incorporation by Reference
  - Can Go from "Manufacturer’s Right to Choose” to “Per Se Illegal” in the Wink of an Eye
  - Rule of Reason Will Eventually Apply

**Closing Thoughts**

- “Off the Shelf” compliance programs probably won’t avoid violations and certainly won’t impress the DOJ.
- Compliance programs need to be customized to the particular company and industry.
- You cannot just implement the program and then forget about it.
- Supplement materials and training with targeted audits.