

For companies that fail to see the importance of antitrust compliance as an organizational imperative, data recently released by the US Department of Justice (DOJ) provide a sobering reminder for why such compliance efforts are necessary. The DOJ announced that it collected nearly US\$1.9 billion in criminal fines and penalties in the most recent fiscal year from prosecutions by its Antitrust Division. This marks the third straight year in which criminal fines collected by DOJ topped the US\$1 billion mark.

The record fines included the fourth-largest fine ever obtained by the Antitrust Division, notable because the fine was increased due to the company's failure to disclose the alleged conspiracy when it pleaded guilty to earlier violations. In total, five companies paid criminal fines exceeding US\$100 million in the most recent fiscal year and 21 individual defendants received jail terms, with an average sentence of 26 months.

Antitrust Compliance is Not Just a US Concern

Continuing a trend of increased global antitrust enforcement, countries such as Brazil (US\$1.7 billion) and South Korea (US\$1 billion) reported record fine totals for the most recent year, and the European Union imposed more than US\$2 billion in fines during that time. Fines in other jurisdictions, such as China, India and Japan increased significantly as well in 2014. Taken together, these statistics demonstrate that companies (and their executives) who fail to comply with the antitrust laws potentially face severe criminal consequences on a global scale. In the US and certain other jurisdictions, criminal antitrust enforcement proceedings invariably lead to follow-on private class-action or other civil proceedings that can take years to resolve, tie up significant company resources to defend, and result in settlement payments that often dwarf the amount of the criminal fine.

What Does an Effective Compliance Program Look Like?

When asked whether they have an antitrust compliance program, most companies can identify a document in their files that lays out in general terms what the antitrust laws are, what types of conduct can violate those laws, and a checklist of behavioral "DOs" and "DON'Ts" that employees should adhere to lest they subject their employer (and themselves) to potential antitrust liability. While having such a document is an essential first step toward achieving antitrust compliance, the reality is – and our experience suggests – that many of the antitrust violators receiving criminal fines in 2014 likely had such a policy in their files.

An effective compliance program is more than a policy outlined on a piece of paper.

To be truly effective, an antitrust compliance program should have at least three core components, and those components should be tailored to the company and the industry in which it operates. These components are:

- **Policies and Guidelines**

The starting point for any effective program is having a set of written documents that evidence the company's commitment to antitrust compliance and provide detailed guidance to management and employees as to what types of conduct can violate the antitrust laws. While certain issues will be common to all antitrust policies, the most effective ones are those that address a company's specific antitrust risk profile. For example, a company with global operations in multiple foreign jurisdictions will likely need policies that address issues not relevant to a company with only US operations. Similarly, a company that engages in joint venture activity with its competitors would want a policy that highlights antitrust concerns unique to such activities. The same could be said for companies in industries where trade association and standard-setting activities predominate – where employees may have competitor interactions that, while often times lawful, raise inherent antitrust concerns. In short, when it comes to effective antitrust policies and guidelines, one size does not fit all.

- **Employee Awareness**

Critical to any effective antitrust compliance program is employee awareness of the company's policies, how those policies apply to their daily business activities, and the employee's responsibilities under those policies. This can be accomplished through employee training, which again should be tailored to different levels of employees. The issues that should be communicated to and be top of mind for sales personnel, for example, are likely to be different in certain respects from what is communicated to senior executives. An important element of employee training is to know not only what the company's policies are, but also the procedures for reporting or seeking guidance regarding suspected violations of those policies.

- **Monitoring**

The third core component of an effective compliance program is monitoring employee adherence to the company's policies. This could involve conducting compliance audits of the company and/or certain business units, as well as tracking reported breaches of the company's policies. Also important is taking appropriate disciplinary measures when necessary for employees that engage in criminal conduct or fail to take reasonable steps to prevent or detect criminal conduct.

Taking the First (or Next) Step Toward Compliance

The move toward effective compliance begins with an understanding of your company's antitrust risk profile. Start by asking the following questions:

- What company activities give rise to potential antitrust exposure, and in which geographies? For companies that have engaged in recent acquisitions or transitioned into new product or geographic markets, assess whether those activities have introduced new antitrust risks.
- Have there been recent changes in industry dynamics or market conditions that increase the company's potential antitrust exposure? Price-fixing conspiracies are often hatched when industries face tightening margins or new, unforeseen costs that uniformly impact all competitors.
- How have recent governmental enforcement actions (anywhere in the world) impacted the company's risk profile?

Understanding your company's antitrust risk profile – something that experienced antitrust counsel can assist with – will allow you to assess whether your existing antitrust policies and guidelines are appropriate, how those policies can best be communicated to employees to maximize awareness and achieve your compliance objectives, and which monitoring mechanisms are likely to ensure effective adherence to company policies and the identification of non-compliant conduct.

To be sure, establishing an effective antitrust compliance program involves an initial, and ongoing, investment of company resources, in terms of both time and money. Yet as the criminal fine statistics from 2014 demonstrate, there are literally billions of reasons why such an investment is one companies should not hesitate to make.

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