

M&A Risk Is One of Many Reasons Why an Antitrust Audit Is Critical for Your Company's Compliance Health

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Companies involved in strategic M&A have a particular need to know how well an antitrust compliance program is working. Many companies—including sophisticated, multinational corporations—cannot answer this question, other than to note that they have not (yet) been sued or investigated by competition authorities for suspected antitrust violations. While most companies have an antitrust compliance policy in place that describes the antitrust laws and the types of conduct that can violate those laws, far fewer undertake employee training on antitrust compliance issues. Fewer still have deployed strategies to monitor employee adherence to company policies and detect improper conduct, such as through an antitrust audit.

The lack of attention to employee monitoring is somewhat perplexing considering the record level of criminal fines collected by the U.S. Department of Justice (DOJ) in 2015 from prosecutions by its Antitrust Division, a number that reached approximately \$3 billion after three straight years of more than \$1 billion in fines. Those prosecutions typically involved large companies, presumably with antitrust compliance policies in place and the sophistication and resources to adequately train employees on antitrust issues. What their compliance programs lacked, apparently, was an effective mechanism for identifying and addressing areas of latent antitrust risk within their companies, either in the form of actual antitrust violations or business practices that created antitrust exposure. This, in our experience, is where most antitrust compliance programs fail, and where tools such as an antitrust audit can be effective. Indeed, DOJ has explicitly encouraged companies to deploy audits and noted their relevance to the adequacy of an antitrust compliance program.

For those companies considering strategic mergers or acquisitions, the risk of an unsuccessful antitrust compliance program highlights the value of an audit. M&A increases antitrust risk because many transactions receive scrutiny from competition authorities. In some instances, in our experience, the discovery of conduct questionable under the antitrust laws has led to difficulties in the antitrust review of a merger and could, under some circumstances, prevent the completion of the merger review process. In other instances, it may lead to complications after the completion of the regulatory review.

We can see an apparent illustration of this risk in the aftermath of the failed Comcast-Time Warner merger. In November, according to public reports, the DOJ initiated an investigation of Comcast Corp.'s business practices in the cable advertising sales market after reviewing documents and receiving competitor complaints about those practices in connection with Comcast's failed acquisition of Time Warner Cable. This action by DOJ—initiating an investigation

of potentially anticompetitive business practices based on information obtained in connection with an unrelated or, at most, tangentially related investigation—is not unprecedented and serves as a reminder that parties to M&A transactions should ensure their antitrust compliance houses are in order before the government starts opening the cupboards. One effective way to accomplish this is through an antitrust audit.

Antitrust audits can also be useful post-acquisition as a means to uncover noncompliant behavior and identify antitrust risk areas within recently acquired companies. Although antitrust risk analysis is becoming an increasingly important part of M&A due diligence, there are limits on a party's ability to identify hidden liabilities and evaluate the robustness of employee compliance pre-closing. An audit can serve not only to detect areas of potential antitrust exposure within the acquired company, but also as a tool to educate employees about, and integrate them more fully into, the compliance culture of your company.

Antitrust Audit Basics

The substance and scope of the antitrust audit will vary depending on the company's antitrust risk profile, the nature of the product markets and geographies within which it operates and the existence of any ongoing or prior government investigations of the industry or adjacent industries. With input from antitrust counsel, an audit can be structured in ways that minimize disruption to the business and maximize company resources, while also ensuring with a high degree of probability that actual or incipient antitrust problems will be detected if they exist. Among the issues to be considered when conducting an audit are the following:

- **Audit Focal Points**

An initial step is determining the objectives of the audit and its focal points. This involves identifying aspects of the company's operations where antitrust risks are likely to be more significant, such as joint ventures and other competitor collaborations, government contracting activities, trade association activities, distribution arrangements and pricing practices. An audit can be companywide or limited to certain business units, depending on the audit's objectives. In the M&A context, for example, a company that operates in multiple industries or geographies might limit the audit to cover only those of its business units involved in a particular transaction and whose files might be produced to the government. Similarly, an audit might be limited to recently acquired businesses or those doing business in jurisdictions where antitrust enforcement is more aggressive.

- **Audit Process**

The audit process typically includes the review of company files and interviews with company employees. Here, counsel can assist with identifying the personnel whose files should be reviewed, the types of files to be reviewed and the time period covered by the review. Interviews provide an opportunity to gain insight into company practices and areas of potential risk not identified through the document review process, as well as to clarify employee documents containing ambiguous or problematic language. For companies with operations in the EU and certain other jurisdictions, data privacy concerns may also need to be considered prior to the collection and review of documents by outside counsel or a third-party vendor.

- **Audit Results**

Once the audit is complete, any identified unlawful conduct, or conduct contrary to company policy, should be immediately terminated, and any conduct that presents a potentially unacceptable level of antitrust risk for the company should be discussed with the company and corrective action taken where appropriate. Results of the audit can be presented either orally or in a written report, although the propriety of reducing findings to writing should be discussed with counsel. Throughout the audit process, it is important that the confidentiality of materials reviewed and/or prepared in connection with the audit be maintained and all privileges preserved.

The Antitrust Audit as Your Company's New Year's Compliance Resolution

With the beginning of a new year, companies would be well-served by an antitrust audit. Antitrust audits are a core component of an effective antitrust compliance program and a cost-effective way to assess a company's compliance health. Given the literally billions in fines collected each year from companies that violate U.S. antitrust and foreign competition laws, companies would be remiss in instituting an antitrust policy and then failing to evaluate employee compliance with that policy. This is particularly true for companies considering strategic M&A activity in 2016 and those that acquired businesses in 2015. In this age of aggressive antitrust enforcement in jurisdictions around the world, a failure to understand your company's antitrust compliance health is a mistake that few can afford to make.

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