"IT DIDN'T WORK": ANTITRUST COMPLIANCE AND THE ROLE OF THE SENIOR EXECUTIVE

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I. INTRODUCTION

When I entered private practice in 1986 after ten years at the Antitrust Division of the U.S. Department of Justice, I became involved in a debate with a senior Division official and good friend on whether the enforcement community or defense counsel were more effective in implementing and fostering compliance with the antitrust laws. I came out strongly for the great work of defense counsel in training corporate executives to act in conformity with the antitrust laws. My friend responded, simply, that every time a company was investigated or prosecuted by the Division, it meant defense counsel's efforts "didn't work." In the thirty-three years since that encounter, I heard time after time from Division staff that the company's compliance program "didn't work."

After hearing repeatedly that the Antitrust Division would not consider giving credit for compliance programs because "it didn't work," the antitrust bar was heartened by the July 11, 2019 announcement by Assistant Attorney General Makan Delrahim that the Division would now consider a company's compliance program both at the charging stage and at the penalty stage of a criminal prosecution. To be sure, this new program will be available only to a company that meets the very strict requirements laid out in the Division's guidance statement, "Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations" (the "Division Guidance").[2]

This article will address the great benefits of the new Division Guidance and its major limitation – the role of senior executives in executing and promoting compliance programs if senior executives are aware of or involved in antitrust violations. At the same time, the article will remind the business community that the U.S. Corporate Leniency Policy is still the best outcome for a company that has uncovered serious antitrust violations and for its senior executives.[3] The shiny new compliance initiative should help the company get to leniency, but if leniency is not available, it offers another powerful incentive for company cooperation.

2 U.S. Department of Justice, Antitrust Division, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations, July 2019.

3 See Leniency Program Page, U.S. Dep't Justice, Antitrust Div., available at http://www.justice.gov/atr/leniency-program

II. THE DIVISION GUIDANCE SETS OUT A COMPREHENSIVE EVALUATION OF THE ELEMENTS OF AN EFFECTIVE COMPLIANCE PROGRAM

Even if nothing else develops from the Division Guidance, the Antitrust Division did a great service for the Antitrust Bar by setting up a comprehensive evaluation of the elements of an effective compliance program. It is much more than a checklist – it is a full-scale analysis of what it takes to build an effective compliance program and demonstrate the value of the company's compliance program. The nine elements of an effective compliance program that the Division presents – design and comprehensiveness, culture of compliance, responsibility, risk assessment, training and communication, periodic review, monitoring and auditing, reporting, incentives and discipline, and remediation and role in the discovery of the violation – are, indeed, one of the best and most comprehensive compliance analyses I have encountered.

I strongly encourage corporate counsel and their antitrust advisors to study the entire 14-page analysis of the elements, including the extremely helpful questions that are posed by the Division. The categories of questions focus the compliance program and build it block by block. Even if a company already has what it would consider an effective compliance program, I encourage the company to compare its current program to the nine elements and the questions flowing from them – and I further encourage the company to conduct that comparison and review every year. While the company does not need to have a program identical to the Division's elements, this is a situation where imitation is, most certainly, the sincerest form of flattery.

Since this new Division Guidance is only three months old, it still needs to be tested in practice. It is not completely clear how the Antitrust Division will evaluate the nine elements. Footnote 1 of the Division Guidance is a full-scale disclaimer, asserting that it has "no force or effect of law."[4] It goes on to say that nothing limits the discretion of the Department to "take . . . or not take action."[5] While this is a standard disclaimer, it does suggest that it will take some time for any pattern of activity to be identified. This places a burden on the Antitrust Division to keep this initiative in the Antitrust Bar's sights and market it broadly and enthusiastically. In the early days of the 1993 U.S. Corporate Leniency Policy, senior officials of the Division promoted the Policy externally to the bar and internally to Division staff, urging the staff to became true partners with the applicants by providing the resources and guidance to make it as easy as possible for the parties to be successful. The parties that seek to be included in the compliance initiative at the charging stage also need to aggressively pursue the Antitrust Division with proof of the effectiveness of its compliance program, and the evidence and cooperation it provides at the earliest stages of the investigation.

Companies will be well advised to devote the time and resources necessary to establish a comprehensive compliance program, obviously calibrated to the size and sophistication of the company. No company should say that it already has a compliance program and does not need anything further. This is especially relevant to companies headquartered outside of the U.S. that do not consider themselves subject to U.S. antitrust law. Earlier, there were many major companies in Europe and Asia that considered compliance programs to be an annoyance and an unnecessary expense. Many of these companies are now memorialized in the Antitrust Division's "$10 Million Club"— companies that have been fined between $10 million and $925 million in U.S. criminal antitrust cases. That list is maintained on the Antitrust Division's website.[6]

The task ahead is simple and direct: Establish an antitrust compliance program using the Division Guidance as a template. If the company already has an antitrust or corporate ethics program, revise that program consistent with the Division Guidance. Once created, administer the program aggressively by training, audits, conspiracy screens and the other tools that the Division Guidance identifies or recommends. As a company conducts the program, maintain a complete record of the actions taken so the company has direct evidence of the steps it has taken and can document the effectiveness of the compliance program. If the company does that, the odds are very good that it will not face criminal indictment because its compliance program did work. And, if it does face criminal charges, it will have detailed evidence of the steps it has taken to comply with the law. From that point, the Antitrust Division must make good on its initiatives at the charging stage or the penalty stage. Time will tell us how effective the initiative is.

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4 *Supra* note 2 at 1.

5 *Id.*

6 See https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more.

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III. THE MOST DIFFICULT ISSUE IN CONSIDERING THE IMPACT OF A COMPLIANCE PROGRAM AT BOTH THE CHARGING STAGE AND THE PENALTY STAGE IS EVALUATING THE CONDUCT OF SENIOR EXECUTIVES IN THE INVESTIGATION

The single most difficult issue in the Division Guidance is the role and conduct of senior executives. The Division Guidance has at least thirty primary references to the role and conduct of senior executives in determining responsibility for corporate criminal conduct, including one of the three preliminary questions about the efficacy of the company's compliance program: "To what extent was a company's senior management involved in the violation?"[7] The burden that the Division Guidance places on senior executives is indeed a heavy one. The top executives are responsible for organizing and orchestrating each step of the compliance program, overseeing the conduct of all employees in the marketplace and resisting the temptation of conspiring with competitors at all levels. In determining the breadth of the Division's preliminary question, it is necessary to explore three areas where the role of the executives may disqualify the company from obtaining any credit for its compliance program.

A. The Role of Senior Executives in Establishing and Supervising the Compliance Program

First, the Division Guidance deals with the role of corporate management in establishing and fostering the compliance program and the company's culture of compliance. The Division Guidance is very clear that if management "does not actively support and cultivate a culture of compliance, a company will have a paper compliance program, not an effective one."[8] This is essentially an "I know it when I see it" situation. How can the Division investigate and evaluate the participation and attitude of a senior executive in compliance training? If he reads from a prepared statement in a monotone, does that signal disinterest? Who would be called as witnesses by the Division to establish the degree of interest and enthusiasm of senior management? I have seen the monotone, but I have also seen very energetic activity by a CEO that would certainly meet the requirements of the new Division Guidance. This is a very difficult area to establish a true culture of compliance. I am sincerely concerned about the ability of the Division to give credit for a culture of compliance, except in very, very few situations.

B. The Role of Senior Executives in Monitoring and Tolerating the Conduct of Employees

Second, the Division Guidance raises concerns that senior management is aware of antitrust violations by other executives and turns a blind eye to the conduct. This also takes us to the culture of compliance. The key word in the Division Guidance is "tolerate."[9] The fact that senior executives will do such things as approve travel for sales executives to meet with competitors or read memos by sales personnel that strongly suggest that they received data directly from competitors or notice changes in pricing that are inconsistent with company practice should be reported to the compliance team or be reviewed by the audit or screening team. If, instead, the senior executive is confronted with these documents for the first time during the Division's investigation and responds with shock and surprise that these actions slipped through the compliance program, the company's opportunity to receive compliance credit is greatly diminished. The quality of the compliance program overall will not matter. It didn't work.

C. The Role of Senior Executives in Participating Personally in Illegal Conduct

Third, as noted above, the Division Guidance addresses, as a threshold issue, the extent to which a company's senior management was involved in the violation of the antitrust laws. While the Division Guidance does not say it directly, if the executive responsible for establishing and supervising the compliance program and supervising key sales employees is the person meeting with competitors and agreeing to fix prices, rig bids and allocate markets, it would be virtually impossible for a company to receive compliance credit at either the charging or penalty stage.

Over the course of the past twenty-five years as international cartels have been investigated and prosecuted in many industries, the vast majority of those cartels have been personally operated by the very senior management of the company. The acts of those CEOs and international heads of sales have been imputed to the company, despite corporate policies to the contrary (i.e. compliance programs). Given the size and significance of these international agreements, they could only be approved and established by the international leadership of the companies. It would be a rare situation where such a company would – or should – qualify for compliance credit regardless of how good the compliance program appeared to be. This would certainly be the circumstance where the Division would be correct in announcing that "it didn't work."

7 *Supra* note 2 at 3.

8 *Id.*

9 *Supra* note 2 at 5.

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IV. THE ANTITRUST DIVISION'S CORPORATE LENIENCY POLICY REMAINS THE ULTIMATE PRIZE IN ANTITRUST CRIMINAL ENFORCEMENT

While the Compliance Guidance is an admirable initiative to focus attention on compliance and bring new life to the sagging criminal enforcement program, the Antitrust Bar and Corporate Counsel should remember the Division's Corporate Leniency Policy is still the ultimate prize in criminal antitrust enforcement. Although there have been some bumps in the road to leniency in recent years, it remains the single most effective tool in the detection and prosecution of cartels ever devised by enforcers.[10] Those of us who grew up as defense counsel over the past 25 years can attest to the great value of leniency for clients and for the Antitrust Division as well. If leniency is executed well, it is a partnership between the company and the Division, each helping the other for their mutual benefit.

A comparison between leniency and the new compliance initiative demonstrates leniency's enormous advantages. First, only one company can receive leniency; it is still unclear how the compliance initiative will be carried out. Second, once a company meets the conditions and receives conditional leniency, the process is transparent – the company will not be prosecuted. With the compliance initiative, the company may need to wait until the end of the process before it knows what benefit it will receive, if any. Third, with leniency, the company (and usually its executives) will not be charged, prosecuted or fined; the best result under the compliance initiative is a deferred prosecution agreement (DPA) where the company will be fined and where the criminal charges are set out in writing. The largest criminal fines that the Division ever obtained were in DPA proceedings. Fourth, the leniency applicant could receive single damage treatment in civil damage actions under ACPERA, whereas a company under the compliance initiative would be subject to treble damages in any proceeding.

The final – and perhaps most important – comparison is the treatment of senior executives. Historically, the leniency policy provided that cooperating current employees of the leniency applicant would not be prosecuted, including the most senior – and culpable – executives. While the most recent amendments to the Division's Frequently Asked Questions ("FAQs") in 2017 have tightened up the policy, it has not excluded any current and cooperating executive from inclusion in the Policy. On the other hand, the new compliance initiative does not discuss the non-prosecution or sentencing of any individuals and focuses only on company prosecutions. That is an issue to keep in mind as this initiative moves ahead.

If a company can apply and obtain leniency, it should consider that opportunity seriously. The compliance initiative – although a very important move – is second best.

V. A FINAL COMPLIANCE IDEA: MAKE AN EFFECTIVE COMPLIANCE PROGRAM A CONDITION OF LENIENCY

In today's enforcement environment, an effective compliance program is essential to obtaining compliance credit at the charging and the penalty stages of an antitrust criminal proceeding. How can it be then, that a company potentially can obtain corporate leniency – still the best result for a company – and not even have a compliance program? Until recently, no leniency regime in the world required a compliance program as a condition for obtaining leniency. In June 2018, the Hong Kong Competition Commission was the first to establish a compliance program requirement as a condition of receiving corporate leniency.

This amendment to the leniency policy would have the following advantages.[11] First, it would be another step in the movement to place compliance in its rightful place at the center of Antitrust Division enforcement policy. Second, a vibrant antitrust compliance policy makes corporate executives more aware of what cartel behavior looked like, and, third, it gives the Antitrust Division greater confidence that the corporate executives understood what cartel behavior entailed and, as a result, there would be few, if any, situations where the 2017 FAQs would be invoked to exclude corporate executives. This is beneficial to the company, the executives and the Antitrust Division.

Encouraging companies to establish comprehensive compliance programs that provide the opportunity for them to either obtain leniency or charging and sentencing credit is a major step forward for criminal antitrust enforcement. Hopefully, after thirty-three years, the positive aspects of the policy will drown out the chant of "It didn't work."

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10 For a more detailed analysis of current issues and controversies with the Leniency Policy see Donald C. Klawiter, "The U.S. Corporate Leniency Policy: It Is Time for a Renaissance," *CPI Antitrust Chronicle*, January 2019, available at https://www.competitionpolicyinternational.com/the-u-s-corporate-leniency-policy-it-is-time-for-a-renaissance/.

11 *Id.* The proposal to require a compliance program as a condition for obtaining leniency has been discussed with greater frequency over the last year.

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