



By Justin T. Toth

ANTITRUST COMPLIANCE: ARE YOU SURE YOUR COMPANY IS SAFE?

Once every ten days, a major U.S. or international corporation meets with the U.S. Department of Justice (DOJ) to confess to engaging in anticompetitive activity. As a result, the confessing company and its management may avoid stiff fines and jail time in exchange for providing information about their competitors' illegal behavior to assist the DOJ's forthcoming prosecution. In a world of increasing scrutiny of corporate activity (and enhanced responsibility for management), most companies are reviewing their behavior in the marketplace to ensure they do not run afoul of federal and state antitrust laws. Antitrust laws impact both large and small companies and involve virtually every aspect of manufacturing, marketing, distribution and pricing. Wondering where your company fits in? As a simple test, you should know the answers to some basic antitrust compliance questions.

YOUR CORPORATE ANTITRUST I.Q. TEST

1. Does your company price its products using volume discounts, marketing incentives, seasonal adjustments, or other variable factors? If so, do you know whether your pricing constitutes "price discrimination" in violation of the federal Robinson-Patman Act, or Utah's Unfair Practices Act?
2. Does your company bid on projects or business? Do you know what behavior constitutes "bid rigging" under federal and state law?
3. Does your company use distributors to market its products? Do you know whether your distribution agreements create potentially illegal restrictions on your distributors' ability to market and price your products?
4. Are you or your company a member of any trade or industry association? If so, do you know how information is shared between your company and the association?
5. Have your employees been trained in identifying anticompetitive behavior from competitors, suppliers and customers so that they do not participate (even unknowingly) in such activity?

Both Sarbanes-Oxley and the federal Sentencing Guidelines for Business Organizations impose affirmative obligations on corporate executives to implement compliance and ethics programs to address these types of issues. To put it bluntly, any corporate officer, or senior manager, ought to know the answers to each of these questions. If you do not, both you and your company run the risk of serious criminal and civil penalties for violation of federal and state antitrust law.

SCOPE OF ANTITRUST AND UNFAIR COMPETITION LAW

Federal and state antitrust laws likely touch on a variety of aspects of your company's business. By way of a very general background, antitrust law is designed to protect competition in the marketplace and prevent

the improper consolidation of market power. Some aspects of antitrust law are intuitive. For example, almost everyone knows that it is illegal for competitors to agree to fix prices, allocate markets and customers, refuse to deal with other parties, or share bidding information. Other aspects are much more subtle. When are exclusive distributorships illegal? When is it appropriate to talk to your competitors and what subjects are off-limits? What are the guidelines for participating in an industry "benchmarking" program? Can a company offer its competing customers different pricing and marketing support? What types of comparisons may a company make with its competitor's products? All of these questions may raise serious concerns under federal and state law.

PRACTICAL, EFFECTIVE SOLUTIONS

The best way for your company to avoid both civil and criminal antitrust problems is to maintain an effective compliance program. Moreover, in today's business environment, this is not simply a laudatory goal – it is a "nuts-and-bolts" requirement for businesses. For example, recent federal cases have found that corporate officers and directors have a fiduciary duty to see that the company maintains an effective compliance program. Further, the DOJ's Principles of Federal Prosecution for Business Organizations allows prosecutors to examine whether a corporation has an appropriate compliance program in determining whether to file criminal charges.

Toward that end, an effective antitrust compliance program should incorporate at least the following elements:

1. Drafting internal guidelines and procedures to detect criminal conduct;
2. Establishing overall responsibility by officers and directors to oversee compliance;
3. Training and educating all employees on appropriate legal issues;
4. Monitoring, auditing and reporting violations within the company;
5. Establishing standards for enforcement and discipline;
6. Enforcing the standards with consistent and appropriate penalties.

Obviously, these general guidelines only form the skeletal structure of a proper compliance program. With the help of competent antitrust counsel, though, this "ounce of prevention" could prevent an extremely painful "pound of cure" somewhere down the road for the company.

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