

# COMPLIANCE AND ETHICS SPOTLIGHT

Winter 2015

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## A MESSAGE FROM THE CHAIRS

*Anita Banicevic and Douglas Tween*

Just in time for the new year, the Compliance and Ethics Committee is very happy to publish our second newsletter for 2015-16. On behalf of the Committee, we would like to thank our newsletter editors Vice Chair Jason Dubner and Young Lawyer Representative Jacquelyn Stanley for their hard work pulling together this edition. We would also like to thank our contributing authors Heather Tewksbury, Ryan Tansey, Joe Murphy, Ari Yampolsky, and Robyn Lym.

We have lots of interesting programming coming up. Be sure to join our Town Hall, scheduled for January 28, 2016 at 1 pm Eastern. We also have a merger due diligence audio program scheduled for January 27<sup>th</sup> and a competitive intelligence audio program scheduled for February 10<sup>th</sup>, and are also co-sponsoring an audio program being hosted on by the Corporate Counseling Committee on Jan 20<sup>th</sup> that addresses best practices for compliance programs.

The Compliance and Ethics Spotlight is published by the American Bar Association Section of Antitrust Law, Compliance and Ethics Committee. The views expressed herein are the authors' only and not necessarily those of any agency, firm, or company by which the author is employed, the American Bar Association, the Section of Antitrust Law, or the Compliance and Ethics Committee. This newsletter does not provide any legal advice and is not a substitute for the procurement of such services from a legal professional. If you wish to comment on the contents of the newsletter, please write to the newsletter editor or the American Bar Association, Section of Antitrust Law, 321 North Clark Street, Chicago, Illinois 60654. Copyright © 2015 American Bar Association. All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the publisher. To request permission, contact the ABA's Department of Copyrights and Contracts via [www.americanbar.org/utility/reprint](http://www.americanbar.org/utility/reprint).



Anita Banicevic

We are planning additional programming throughout the year and are always on the look out for new ideas and volunteers, so please feel free to reach out with any ideas or areas you would like to see us cover.

And since Spring is just around the corner, look for our programs at the Spring Meeting on April 5-8, 2016: *Rules of Conflicts: Considerations for Antitrust Practitioners; A Good Name – Breaches of Non-Financial Data, Privacy: Law Firm Ethical and Legal Obligations; What Happens When Collusion and Corruption Meet?*; and “New and Improved” *Effective Antitrust Compliance Programs*.

Finally, we invite you to join our Committee’s Antitrust Connect page and our LinkedIn Group and be a part of the compliance-related discussions.



Douglas Tween

You can find our Antitrust Connect page at:  
<http://connect.abaantitrust.org/committees1/viewcommunities/groupdetails/?CommunityKey=27c2c1c6-4522-492f-abc6-09296a664783>.

And our LinkedIn Group can be found at:  
[https://www.linkedin.com/groups?home=&gid=3716073&trk=anet\\_ug\\_hm](https://www.linkedin.com/groups?home=&gid=3716073&trk=anet_ug_hm).

Enjoy the new year and happy reading!

## MESSAGE FROM THE EDITOR

*Jason S. Dubner*



Jason Dubner

Dear Colleagues,

The Compliance and Ethics Committee is pleased to provide you with this Winter 2015 edition of our Compliance & Ethics Spotlight. This issue includes a number of thought provoking pieces designed to keep you apprised of the current topics being discussed by those responsible for helping clients navigate ethical and compliance-related issues in their antitrust practice.

We begin this issue of the Spotlight with an in-depth analysis of the Antitrust Division’s recent steps towards crediting effective compliance programs. Heather Tewksbury and Ryan Tansey commend the Division on this progress, while recommending that it go even further by establishing a more concrete, transparent structure. Ms. Tewksbury and Mr. Tansey also advocate for changes to the Sentencing Guidelines to codify the role that compliance can play in mitigating criminal antitrust sanctions. Next, Joe Murphy offers his commentary on the issue, noting three key requirements of a good compliance program that the Division should acknowledge in the context of its analysis: (1) strong leadership, (2) systems for evaluation of the program, and (3) appropriate incentives to drive behavior. Finally, this issue of the Spotlight includes summaries of two webinars sponsored by the Compliance and Ethics Committee this past fall: Ari Yampolsky reviews a panel discussion that examined whistleblowing and antitrust enforcement in the U.S., Canada, and Europe, while Robyn Lym discusses the views offered by another panel focused on providing practical guidance for conducting an antitrust audit. The Committee thanks each of our contributors for their energy and insight.

As always, we hope you find this edition of the Compliance and Ethics Spotlight informative, and we look forward to your comments.

Best wishes for a happy and healthy new year.

**PROMOTING ANTITRUST COMPLIANCE –  
THE ANTITRUST DIVISION’S SUBTLE SHIFT REGARDING CORPORATE COMPLIANCE:  
A STEP TOWARD INCENTIVIZING MORE ROBUST ANTITRUST COMPLIANCE EFFORTS**

*Heather Tewksbury and Ryan D. Tansey  
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**INTRODUCTION:**

A surprising aspect of many corporate compliance programs is their limited emphasis on antitrust. Compliance programs are a key feature of modern corporate governance initiatives, and it stands to reason that such initiatives should include safeguards against the severe reputational and financial penalties that may arise from antitrust violations. Nevertheless, corporate antitrust compliance efforts lag behind initiatives addressed to other high-risk legal areas, such as the Foreign Corrupt Practices Act (“FCPA”). Some critics believe that the lack of emphasis on antitrust compliance results from the Antitrust Division’s historical opposition to giving credit for compliance programs under the United States Sentencing Guidelines, which contrasts with efforts to credit effective compliance programs in the FCPA space. In a recent, positive shift, the Antitrust Division has begun crediting compliance in less formulaic ways. This article proposes that the Antitrust Division go further, by establishing a more concrete, transparent structure for crediting antitrust compliance. In addition, this article recommends changes to the Sentencing Guidelines to codify the role that compliance can play in mitigating criminal antitrust sanctions.

**I. CURRENT COMPLIANCE CULTURE:  
Antitrust Compliance—Big Risks But Little  
Recognition Compared to Other Compliance  
Efforts**

Today, companies that collude with their competitors to fix prices, rig bids, or allocate markets face historically severe penalties from criminal antitrust enforcement efforts in both the United States and abroad.<sup>1</sup> In addition to the increasing penalties imposed by government prosecutors, there is also the virtual certainty of tag-along private litigation, which exposes companies to joint and several liability,

treble damages, and counsel fees in connection with class action and opt-out suits by direct and indirect purchasers—not to mention exposure to enforcement by the now-extensive competition regimes across the world.<sup>2</sup>

Given this enforcement backdrop, one would expect companies to focus greater resources on improving internal antitrust compliance protocols. However, critics and anecdotal evidence suggest this has not been the case.<sup>3</sup> Indeed, instead of tracking the steady uptick in detection and prosecution of anticompetitive conduct over the past decade, antitrust compliance has never seemed to get off the ground in the same way as compliance initiatives addressed to other high risk legal areas. FCPA compliance efforts provide an apt example of this contrast. Unlike antitrust compliance, FCPA compliance efforts appear to have significantly expanded as enforcement efforts have increased.<sup>4</sup> Although empirical studies in this area are also limited, the trend is apparent. Practitioners have observed that companies are investing large sums to minimize their FCPA exposure by implementing robust compliance programs, devoting “often scarce resources into the development, benchmarking, monitoring, and auditing of detailed and exhaustive FCPA compliance programs.”<sup>5</sup> These programs have become more sophisticated, with companies overhauling “bulky” programs into “smarter risk-based compliance regimes.”<sup>6</sup> Many companies have even adopted robust “enterprise wide ‘zero tolerance’ policies” regarding FCPA violations.<sup>7</sup>

**II. IMPACT OF INCENTIVES ON  
CORPORATE COMPLIANCE**

The divergent trajectories of antitrust and FCPA corporate compliance efforts may be attributable, at least in part, to the different treatment that antitrust and FCPA compliance programs have historically received from the Department of Justice throughout

the investigation, prosecution, and sentencing of corporate offenders.

### **A. The Antitrust Division’s Historical Position Against Credit For Compliance Under the U.S. Sentencing Guidelines**

The Antitrust Division has expressed the view that compliance programs advance two significant objectives in antitrust enforcement: the prevention and detection of anticompetitive behavior.<sup>8</sup> However, the Antitrust Division has historically rejected the proposition that compliance programs that were initially unsuccessful at detecting anticompetitive conduct can mitigate criminal penalties, and has thus refused to credit such compliance programs under the Sentencing Guidelines.<sup>9</sup> The Antitrust Division has offered three rationales for this often-criticized policy: (1) antitrust cases go to the heart of the corporation’s business, (2) almost all antitrust violations involve high-level company personnel and rarely (if ever) involve “rogue” employees, and (3) the Leniency Program already rewards effective compliance programs.

*Antitrust Violations Go To The Heart Of The Corporation’s Business.* The Antitrust Division has stated that antitrust crimes are unique compared to other corporate crimes because they almost always implicate a corporation’s entire culture.<sup>10</sup> The U.S. Attorneys’ Manual specifically endorses this view, noting that although prosecutors should usually consider voluntary disclosure, cooperation, remediation, or restitution in determining whether to seek an indictment, these considerations “would not necessarily be appropriate in an antitrust investigation” because “[a]ntitrust violations, by definition, go to the heart of the corporation’s business.”<sup>11</sup>

*Antitrust Violations Usually Involve Senior Company Personnel.* The Antitrust Division has also explained that, in its experience, antitrust violations have almost always involved high-level personnel.<sup>12</sup> Because of this, the Antitrust Division believes that any compliance program in a corporation that commits an antitrust violation must not have had the true support of corporate leadership and, therefore, should not receive compliance credit.<sup>13</sup>

*Leniency Already Rewards Effective Compliance.* The Antitrust Division has also historically taken the view that the steep penalties for antitrust violations and the opportunity to take advantage of the Antitrust Division’s Corporate Leniency Program provide sufficient motivation to companies to invest in antitrust compliance programs. In other words, the Antitrust Division has viewed leniency as the benefit for those companies whose compliance efforts detect a violation, but fall short of preventing it.<sup>14</sup>

One significant impact of these historical policies is that the Antitrust Division has categorically declined to account for the existence of or improvements to compliance programs when calculating corporate fines at sentencing.<sup>15</sup> Provisions in the U.S. Sentencing Guidelines have reinforced this approach. And although § 8C2.5(f)(3)(C) of the Guidelines was amended to allow corporate offenders to qualify for the three point culpability score reduction available for maintaining an “effective compliance and ethics program,” even where a high-level company employee was involved in the violation,<sup>16</sup> that change has not, as a practical matter, impacted the Antitrust Division’s crediting of compliance programs under the Guidelines. This is because, in the Antitrust Division’s view, unless a company was first into the Leniency Program it cannot meet the requirement of § 8C2.5(f)(3)(C)(ii) that “the compliance and ethics program detected the offense before discovery outside of the organization or before such discovery was reasonably likely.”<sup>17</sup>

### **B. Treatment of Compliance in Other Divisions of the DOJ**

Since the Corporate Leniency Program is unique to the Antitrust Division, other divisions of the Department of Justice—which do not have that avenue for crediting compliance available to them—readily grant credit under the Sentencing Guidelines to incentivize compliance. For example, in 2012, the DOJ and SEC jointly published “A Resource Guide to the US Foreign Corrupt Practices Act.”<sup>18</sup> The 120-page Resource Guide includes 10 pages devoted exclusively to the role of compliance in FCPA investigations and prosecutions. It makes clear that “a well-constructed, thoughtfully implemented, and

consistently enforced compliance and ethics program helps prevent, detect, remediate, and report misconduct, including FCPA violations.”<sup>19</sup> It also acknowledges that “no compliance program can ever prevent all criminal activity by a corporation’s employees,” and companies will not be held “to a standard of perfection.”<sup>20</sup> The DOJ considers and integrates compliance into the entire FCPA enforcement process and, as discussed above, this has resulted in an apparent increase in company resources being put towards FCPA compliance efforts.<sup>21</sup>

### **C. The Tension Between the Antitrust Division’s Corporate Leniency Policy and Creating Compliance Incentives At the Penalty Phase**

Many practitioners believe that the Antitrust Division’s historical failure to take account of compliance programs of non-leniency applicants may be a contributor to the poor state of antitrust compliance.<sup>22</sup> In the few studies conducted in this area, an “overwhelming majority” of company respondents pointed to lack of government recognition of compliance programs as a motivating factor in their compliance decisions.<sup>23</sup> And while it remains true that the ultimate compliance incentive resides under the Antitrust Division’s Corporate Leniency Program, the disparity between compliance efforts in the antitrust and FCPA space suggest that the Antitrust Division should begin extending some form of compliance credit to non-leniency applicants.

## **III. THE ANTITRUST DIVISION’S CHANGING POSITION ON CREDITING COMPLIANCE**

While the Antitrust Division has long maintained its policy of refusing to credit compliance directly in any phase of the antitrust enforcement process, recent remarks and actions of Division officials make clear that this approach is evolving. Most notably, on May 20, 2015, for the first time in modern history, the Antitrust Division openly credited a non-Leniency company for implementing an effective compliance program after the start of an investigation. Specifically, the plea agreement that Barclays PLC entered into with the DOJ in connection with the foreign currency exchange (“FX”) investigation contains a single sentence acknowledging and crediting Barclays’ post-

investigation improvements to its compliance program.<sup>24</sup>

More recently, at the Annual Global Antitrust Enforcement Symposium at Georgetown University on September 29, 2015, DAAG Snyder announced that the Antitrust Division had discounted a \$62 million fine on KYB Corporation for price-fixing shock absorbers because KYB adopted an effective compliance program.<sup>25</sup> Although Snyder declined to provide details about KYB’s compliance program, he stated that “where we can see that the company has fundamentally taken steps to change its business culture and you can see actual results from the company’s efforts in that regard, we have indicated a willingness to credit that in connection with sentencing and have done so a couple of times over the last few months – and anticipate that we will be doing so again in the not-so-distant future.”<sup>26</sup> The Antitrust Division has provided several similar public statements about its decision to credit Barclays’ compliance efforts.<sup>27</sup>

These sentencing discounts awarded to Barclays and KYB signal a shift in the Antitrust Division’s historical view of corporate compliance, and indicate that the Antitrust Division may be prepared to similarly reward other companies that improve their compliance programs post-violation. However, while crediting compliance under other sentencing provisions, such as 18 U.S.C. §§ 3553(a), may help the Antitrust Division balance its policy concerns with its apparent desire to credit corporate defendants beyond leniency applicants, there is little guidance available on what it takes to secure compliance credit from the Antitrust Division in this context and little to suggest that a concrete articulation of the necessary requirements is forthcoming. While the Antitrust Division may have an “I’ll know it when I see it” mentality about crediting compliance, companies need transparency and structure to appreciate the necessary steps that will lead to compliance credit. Indeed, the Antitrust Division is no stranger to witnessing what success can come from having transparent and concrete guidelines—the Corporate Leniency Program is a shining example of just that. Thus, while the recent shifts in the Antitrust Division’s position regarding compliance are promising, they have, for the most part, been slow to gain the recognition of the larger

legal community, and many companies likely remain unaware that discounts for antitrust compliance could be available at all.

#### **IV. SHORT TERM SOLUTION: TURN AD HOC PRACTICES INTO EXPLICIT POLICIES**

To better incentivize antitrust compliance in the short term, the Antitrust Division should turn its ad hoc practices into transparent policies. The Antitrust Division has already demonstrated that it has an available mechanism for crediting certain compliance programs at sentencing under 18 U.S.C. § 3553(a) and 18 U.S.C. § 3572. Accordingly, the Antitrust Division could take a number of short-term steps to increase transparency and improve compliance incentives.

First, the Antitrust Division should take additional steps to publicly explain its new perspective on compliance. Instead of subtle references buried in plea agreements or ad-hoc exercises of prosecutorial discretion, the Antitrust Division should promulgate guidelines that will more concretely incentivize corporations to implement and maintain robust compliance programs. While the DOJ cannot comment specifically on the Barclays or KYB pleas until the companies have been sentenced, the Antitrust Division should make an official policy statement explaining generally its approach to compliance and sentencing and describing clearly the factors it will consider.

Second, the Antitrust Division should draw upon its vast experience to assemble and disseminate the attributes of corporate compliance programs that it has determined were successful. It need not create a “one size fits all” compliance policy, but should simply set out the types of programs and qualities that have worked, and share that with the antitrust community.

Third, as in the Barclays plea, the Antitrust Division should operationalize these policy changes in the short term by continuing to recommend credit for exceptional existing compliance programs or marked improvements to compliance programs under 18 U.S.C. § 3553(a) and 18 U.S.C. § 3572(a).<sup>28</sup> Crediting of compliance in this respect

should be both “backwards facing” (i.e. applied to existing compliance programs that were well-conceived and implemented, but failed to detect the instant offense) and “forwards facing” (i.e. applied to improvements to compliance made in response to the discovery of the crime). To only consider “forward facing” compliance, as currently supported by the Antitrust Division,<sup>29</sup> would misalign incentives by only rewarding companies that delay investing in antitrust compliance programs until after the Antitrust Division detected a crime. To encourage up-front investments, pre-existing compliance programs (i.e., those in existence prior to action by the Antitrust Division) should also be credited, when deserving.

In the Barclays FX plea agreement, the Antitrust Division provided a pathway grounded in the current law for compliance to be recognized at sentencing. Formalizing and explaining this policy will send a clear message to companies that their compliance efforts may help them mitigate antitrust penalties, thus better incentivizing corporate compliance.

#### **V. LONG TERM SOLUTION: PROPOSED AMENDMENT TO SENTENCING GUIDELINES**

As a long term solution, the Sentencing Commission should amend the Guidelines to explicitly allow up to a two-point penalty reduction for an effective compliance program. Such a revision is necessary to standardize the role that compliance plays in the sentencing process, ensuring consistency across like-situated companies.

As discussed in Part IIA, *supra*, while the normal credit for an effective compliance program is three points under the Guidelines, the Guidelines foreclose any such point reduction for an antitrust compliance program because of the Antitrust Division’s policies and the structure of the Leniency Program. A second- or third-in-the-door company cannot meet the requirement in the Guidelines that its compliance program “detected the offense before discovery outside the organization or before such discovery was reasonably likely.” However, to prevent the continued stagnation of antitrust compliance efforts, the Guidelines should be amended to permit companies to obtain up to a two-point reduction for

their compliance and ethics programs in certain circumstances.

The current all-or-nothing approach to compliance credit does not acknowledge that even imperfect compliance may be worthy of credit. The current scheme sends the message that any compliance effort short of perfection is not worth a company's resources. However, partial credit may still be appropriate in some situations, like the following:

- A company discovers cartel activity through its compliance program, and investigates and reports the violation, without knowing that the Antitrust Division had already accepted a co-conspirator into its Leniency Program.
- The violation is discovered without self-reporting, but between the time of discovery and sentencing the company has implemented a robust compliance program and taken legitimate steps to curb future violations.
- A company has a pre-existing (though imperfect) antitrust compliance program, is a first-time offender, and shows that it intends to improve its compliance policy to better detect future violations.

Permitting up to a two-point reduction, instead of a three-point reduction, would achieve the goal of incentivizing companies to adopt robust compliance programs while acknowledging that any compliance program that failed to prevent or first detect collusive behavior does not deserve full credit at sentencing.

*Proposed Amendment to the Guidelines:*

Any revision to the Sentencing Guidelines should make clear that a company can qualify for a partial compliance credit, notwithstanding that they did not attain leniency. We propose that the following new language be added to § 2R1.1: “(d)(4): When applying § 8C2.5(f)(3)(C), items (ii) and (iii) of that section may still be satisfied despite another party's qualification for leniency for overlapping conduct under the Antitrust Division's Corporate Leniency Policy.”

We further support adding the following limiting language to the comments in § 2R1.1: “under no circumstances may an organization receive a penalty reduction greater than 2 points in the circumstances described in (d)(4).”

Finally, the following language could be added to the comments to evaluate a company's qualification for up to a 2-point reduction under the Guidelines:

*Effectiveness of Compliance Program*

If the company discovered the violation through its compliance program and investigated and reported the violation independently without knowing that the Antitrust Division had already accepted a co-conspirator into its Leniency Program: subtract 2 points.

*Quality of Compliance Program*

If the company had a robust compliance program prior to the violation, which included all of the following: (1) commitment of senior management to antitrust compliance; (2) participation of all employees in compliance efforts; (3) proactive compliance through monitoring and auditing high risk activities; (4) discipline procedures for those who violate antitrust laws; (5) acceptance of responsibility for violations and demonstrated commitment to improve the program: subtract 2 points.

If the company had a subpar compliance program prior to the violation but shows marked improvement and commitment on all of the following between the violation and sentencing: (1) commitment of senior management to antitrust compliance; (2) participation of all employees in compliance efforts; (3) proactive compliance through monitoring and auditing high risk activities; (4) discipline procedures for those who violate antitrust laws; (5) acceptance of responsibility for violations and demonstrated commitment to improve the program: subtract 1 point.

If the company had no compliance program prior to the violation but between discovery and sentencing implemented a compliance program with each of the above factors and shows commitment

and has taken substantial steps to enforce that program: subtract 1 point.

### *Recidivism*

If the company is a first time offender and had a compliance program prior to the violation: subtract 1 point.

\* \* \*

Corporate antitrust compliance has lagged behind compliance initiatives addressed to other high-risk legal areas, such as the FCPA. The Antitrust Division's historical opposition to crediting compliance programs under the Sentencing Guidelines has likely contributed to this disparity. The Antitrust Division has begun to credit compliance in less formulaic ways, but it can and should go further by establishing a concrete, transparent structure for crediting antitrust compliance in the short term, and ultimately amending the Sentencing Guidelines to codify the role that compliance can play in mitigating criminal antitrust sanctions. Such changes will provide companies with the transparency necessary to appreciate the steps that will lead to compliance credit, which will in turn better incentivize them to implement and maintain robust compliance programs.

<sup>1</sup> Average total corporate fines for such criminal violations have steadily increased in the U.S. from an average of \$535 million between 2005 and 2008, to exceeding \$1 billion in all but two years between 2009 and 2014. See *Division Update Spring 2015*, DEPARTMENT OF JUSTICE ANTITRUST DIVISION, <http://www.justice.gov/atr/division-update/2015/criminal-program-update> (last visited June 16, 2015).

<sup>2</sup> Brent Snyder, Dep'y Ass't Att'y Gen., Antitrust Div., U.S. DOJ, Speech Presented at the International Chamber of Commerce and United States Council of International Business Joint Antitrust Compliance Workshop: Compliance is a Culture, Not Just a Policy 2 (Sept. 9, 2014) (transcript available at <http://www.justice.gov/atr/public/speeches/308494.pdf>) [hereinafter Compliance is a Culture].

<sup>3</sup> Although there has not been extensive study in this area, a 2012 survey indicates that, while 92% of companies discussed antitrust compliance in the company code of business conduct, only 60% of companies conducted any kind of antitrust compliance training program. This means that a staggering 40% of companies had no substantial antitrust compliance program. And even for the subset of companies that require some antitrust compliance trainings, the effectiveness of those programs is questionable. For instance, a mere 22% of all respondents required compliance training for employees attending "high risk gatherings of competitors," like trade association

meetings. Furthermore, 64% of companies reported that they did not conduct comprehensive internal antitrust compliance audits, a key safeguard that detects illegal activity. SOCIETY OF CORPORATE COMPLIANCE AND ETHICS, ANTITRUST: A DANGEROUS BUT UNDERAPPRECIATED COMPLIANCE ISSUE 3, 5-6 (March & April 2012), available at:

<http://www.corporatecompliance.org/Resources/View/ArticleId/227/Antitrust-Compliance-How-Does-the-Government-Impact-Your-Program.aspx>.

<sup>4</sup> E.g., Gwendolyn L. Hassan, *The Increasing Risk of Multijurisdictional Bribery Prosecution: Why Having an FCPA Compliance Program Is No Longer Enough*, 42 INT'L L. NEWS 1 (2013) (available at [http://www.americanbar.org/publications/international\\_law\\_news/2013/winter/the\\_increasing\\_risk\\_multijurisdictional\\_bribery\\_prosecution\\_why\\_having\\_fcpa\\_compliance\\_program\\_no\\_longer\\_enough.html](http://www.americanbar.org/publications/international_law_news/2013/winter/the_increasing_risk_multijurisdictional_bribery_prosecution_why_having_fcpa_compliance_program_no_longer_enough.html)); Paul Enzinna, *The Foreign Corrupt Practices Act: Aggressive Enforcement and Lack of Judicial Review Create Uncertain Terrain for Business*, MANHATTAN INSTITUTE (Jan. 17, 2013), [http://www.manhattan-institute.org/html/ib\\_17.htm#.VgHBkU3H\\_mQ](http://www.manhattan-institute.org/html/ib_17.htm#.VgHBkU3H_mQ).

<sup>5</sup> Hassan, *supra* note 5.

<sup>6</sup> Gavin Parrish & Greg Esslinger, *Beyond FCPA: A Look at the emerging compliance landscape*, INSIDE COUNSEL (JULY 15, 2014), <http://www.insidecounsel.com/2014/07/15/beyond-fcpa-a-look-at-the-emerging-compliance-land>.

<sup>7</sup> David Kennedy & Dan Danielson, *Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act* (Sept. 2011), at 11, <http://www.opensocietyfoundations.org/reports/busting-bribery-sustaining-global-momentum-foreign-corrupt-practices-act>.

<sup>8</sup> William Kolasky, Dep'y Ass't Att'y Gen., Antitrust Div., U.S. DOJ, Speech Presented at the Corporate Compliance 2002 Conference: Antitrust Compliance Programs - The Government Perspective (July 12, 2002) (transcript available at <http://www.justice.gov/atr/speech/antitrust-compliance-programs-government-perspective>); Bill Baer, Ass't Att'y Gen., Antitrust Div., U.S. DOJ, Speech Presented at the Global Antitrust Enforcement Symposium: Prosecuting Antitrust Crimes 7 (Sept. 10, 2014) (transcript available at <http://www.justice.gov/atr/speech/prosecuting-antitrust-crimes>).

<sup>9</sup> Snyder, Compliance is a Culture, *supra* note 3, at 7-8.

<sup>10</sup> *Id.* at 5-7.

<sup>11</sup> U.S. ATTORNEYS MANUAL, 9-28.400, available at: <http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations>.

<sup>12</sup> Snyder, Compliance is a Culture, *supra* note 3, at 7-8.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 2-4.

<sup>15</sup> *Id.* at 7-8.

<sup>16</sup> Under previous versions of the Organizational Sentencing Guidelines §8C2.5(f)(3), a compliance program could not be considered effective, and thus not credited at sentencing, if an employee with substantial authority participated in, condoned or was willfully ignorant of the offense. ETHICS RES. CTR., THE FEDERAL SENTENCING GUIDELINES AT TWENTY YEARS 27 (2012), available at

<http://www.ethics.org/files/u5/fsgo-report2012.pdf>. As previously discussed, because the Antitrust Division views almost all antitrust crimes as committed by high level employees, this restriction effectively barred companies from receiving credit for compliance in antitrust cases.

<sup>17</sup> This is one of four conditions that a company must satisfy under §8C2.5(f)(3)(C) to receive compliance credit where a high level employee participates in the violation. See FED. SENTENCING GUIDELINES §8C2.5(f)(3)(C), available at <http://www.uscc.gov/guidelines-manual/2010/2010-chapter-8>.

<sup>18</sup> CRIM DIV. OF THE U.S. DOJ & ENFORCEMENT DIV. OF THE U.S. SEC, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 56 (Nov. 14, 2012), available at <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf> [hereinafter Resource Guide].

<sup>19</sup> *Id.* at 56.

<sup>20</sup> *Id.*

<sup>21</sup> The DOJ has also considered a company's track record of compliance in deciding whether to move forward with prosecutions. See Press Release, Dept. of Justice, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by the FCPA (Apr. 25, 2012), <http://www.justice.gov/opa/pr/former-morgan-stanley-managing-director-pleads-guilty-role-evading-internal-controls-required>.

<sup>22</sup> SOCIETY OF CORPORATE COMPLIANCE AND ETHICS, *supra* note 4, at 5-6.

<sup>23</sup> *Id.*

<sup>24</sup> Plea Agreement at 16, *United States v. Barclays PLC* (available at <http://www.justice.gov/file/440481/download>) [hereinafter Barclays Plea Agreement] (“The parties further agree that the Recommended Sentence is sufficient, but not greater than necessary to comply with the purposes set forth in 18 U.S.C. §§ 3553(a), 3572(a), in considering, among other factors, the substantial improvements to the defendant's

compliance and remediation program to prevent recurrence of the charged offense.”).

<sup>25</sup> Leah Nylen, *Car parts maker KYB becomes second company to gain compliance credit in antitrust case*, MLex (Sept. 29, 2015), <http://www.mlex.com/US/Content.aspx?ID=723322>.

<sup>26</sup> *Id.*

<sup>27</sup> *E.g.*, Brent Snyder, Deputy Ass't Att'y Gen., Antitrust Div., U.S. DOJ, Speech Presented at Sixth Annual Chicago Forum on International Antitrust 7 (June 8, 2015) (transcript available at <http://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-sixth-annual-chicago>) [hereinafter Sixth Annual Chicago Forum]; Brent Snyder, Deputy Ass't Att'y Gen. for Criminal Enforcement, Antitrust Division, address at ABA Americas Cartel Panel, JW Marriott Hotel, Rio De Janeiro, Brazil (June 11, 2015) [hereinafter ABA Americas Cartel Panel] (notes on file with author).

<sup>28</sup> The existence or improvements to compliance programs fit neatly within two sub-sections of § 3553(a). Section 3553(a)(1) broadly provides that judges should consider “the nature and circumstances of the offense and the history and characteristics of the defendant.” And Section 3553(a)(2)(B-C) requires that judges consider if the sentence imposed will “afford adequate deterrence to criminal conduct,” and “protect the public from further crimes of the defendant”—factors furthered by encouraging compliance efforts through fine reductions. Similarly, 18 U.S.C. § 3572(a)(8) requires that for organizational defendants, judges consider “any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense.” Improvements to compliance fit squarely within § 3572(a)(8), as an effort to prevent future anticompetitive conduct.

<sup>29</sup> Snyder, Sixth Annual Chicago Forum, *supra* note 27 (distinguishing between “backward looking” and “forward looking” compliance efforts).



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# COMMENTARY ON THE ANTITRUST DIVISION'S VIEWS OF CORPORATE COMPLIANCE PROGRAMS

*Joe Murphy, CAP*

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The Antitrust Division is now giving us more guidance on its views about compliance programs. This is a big step in the right direction. But even with this, the Division remains somewhat new to the game, so there is value in the compliance and ethics community monitoring this and providing feedback. In any critique, however, we should also be mindful that its EU equivalents, DG Comp, continue to do absolutely nothing meaningful to encourage or recognize compliance programs. So anything the Division does is far ahead of the EU.

In the *Kayaba Industry, Co.* case, the Division made recommendations for the sentencing of a Sherman Act violator, including proposing a decreased penalty in part because the company had instituted a compliance program in response to the violation. This is positive. But there are areas where the Division can definitely improve – and areas where it merits high praise.

First is an important issue of language. The Division commends the company's institution of a new "compliance policy." But policies are just paper. They are not programs. We in the field have been working hard for years to make this point. Merely adopting a policy does nothing. For the Division, please take heed. Companies that are serious do not just adopt "policies," they implement programs. Programs are full management systems designed to get results. Let's be crystal clear about this.

The Division rightly points out the importance of the leadership sending a strong message and the company paying attention to its culture. This is correct and fully consistent with the message of the US Sentencing Guidelines and other compliance program standards around the world.

In guidance that is nicely specific, the Division commends the company's "direction from top management at the company, training, anonymous

reporting, proactive monitoring and auditing" and discipline for those who violated the policy. It noted that training was required for "senior management" – a reminder of how important that is for training to be effective, instead of just training the workers. It also noted that there was testing of awareness before and after the training. This is a remarkable point, and one for us to take to heart. Merely sending messages is not what this is about; we should also be proactive to see if our message is actually reaching anyone.

The reference to "proactive monitoring and auditing" is helpful, but practitioners really need more. There is an unfortunate history in antitrust of antitrust writers and speakers mistakenly confusing audits and risk assessment. When the Division refers to monitoring and auditing together it seems clear that the meaning is taken from the Sentencing Guidelines reference to audits "to detect criminal conduct." This is a very demanding standard. In the future it would be very helpful if the Division could flesh this out further illustrating the types of auditing steps it would expect to find. Just as it provides useful detail relating to training, it should do the same regarding the more difficult area of auditing.

The Division notes a requirement of approval for contacts with competitors. Although the Division did not use the word "control", that is what this is. The US Sentencing Guidelines requirement for "standards and procedures" is usually misread to refer only to policies, but in fact it also calls for "internal controls." (see the Guidelines Commentary.) For those wondering what this means, the Division is here giving us a specific example.

The Division also observes that there is an "anonymous hotline." This is also a good thing, but whenever there is reference to this feature of anonymity it is necessary to remind people that the European privacy bureaucrats, who seem determined to prevent company efforts to fight crime, have taken aim at such compliance efforts. In the Iberian

Peninsula they have even purported to make such employee protection efforts illegal by prohibiting anonymity. In Iberia it is much easier for the boss to find out who raised the issue and to retaliate – nice protection for bosses, not nice for employees.

These are some excellent points provided by the Division. What is missing? Here are three essentials that need a place in these cases:

1. First, a good program requires strong leadership. Who was the compliance officer, what empowerment did the person have and what was the reporting relationship to the board?
2. Second, good programs need systems for evaluation of the program. This is not “monitoring and auditing;” rather, it is a fundamental management point: you need to evaluate and measure any management system to see how it is working and where it needs to be improved.

3. Third – incentives, people! Antitrust is about economics. How can any antitrust compliance program leave out the key economic drivers? Why do companies use incentive systems? Because they work. They drive behavior. If we actually want to change culture and drive behavior, the compliance program needs to use incentives. And lest anyone forget, this is one of the minimum steps required under the Sentencing Guidelines.

The Division has made amazing progress. We in private practice should be using these initiatives to educate managers about antitrust compliance programs. But we should also be providing useful feedback to our colleagues in the Division, so that working together we can take meaningful steps to prevent cartels.



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**SUMMARY:**  
**ABA WEBINAR WHISTLEBLOWING IN ANTITRUST:  
PROSPECTS AND PITFALLS, AUGUST 27, 2015**

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**I. Introduction**

The promotion of whistleblowing has become an important element of regulatory oversight in several contexts, most recently in securities-law enforcement. But apart from the amnesty/leniency framework, antitrust authorities have been less enthusiastic about incorporating whistleblowers into their enforcement efforts. On August 27, 2015, the ABA sponsored a panel discussion titled *Whistleblowing in Antitrust: Prospects and Pitfalls*, in which four panelists considered the role that whistleblowing should play in antitrust enforcement. The panel also discussed how best to incorporate internal whistleblowing measures in corporate-compliance programs. [Mark Katz](#), a partner at Davies Ward Phillips & Vineberg LLP, moderated the panel. Panelists included [Peter Dent](#), the national head of Deloitte's Forensic Services practice; [Brian Fields](#), the Chief Ethics and Compliance Officer at Structure Tone, a multinational construction-services provider; [Petra Linsmeier](#), a partner at Gleiss Lutz; and [Gordon Schnell](#), a partner at Constantine Cannon LLP.

The discussion covered four general topic areas. The panel set the table with a comparative overview of whistleblowing in the U.S., Canada, and Europe. Panelists next discussed the current state of whistleblowing and antitrust enforcement in the U.S. and Europe. The panel then focused on lessons for in-house counsel in considering how whistleblowers fit into a corporate organization. The webinar concluded with a debate on the relative merits of providing financial rewards to whistleblowers.

**II. Overview of Whistleblower Protections in the U.S., Canada, and Europe**

While no international standard of whistleblower protections exists, the webinar reflected a relative

consensus on the components of a broad framework. These points of agreement include a clear scope and definition of whistleblower protections, such as safe disclosure procedures and protection from reprisals; adequate relief and remedies; a comprehensive legislative framework; and effective enforcement and corrective action. Mr. Dent added that a gold-standard regime for protecting whistleblowers would include other key elements, such as removing the burden from the whistleblower to prove that retaliation occurred, and placing it instead on the employer to show it did not retaliate against a whistleblower; establishing a single authority to receive whistleblower complaints; providing monetary rewards to whistleblowers; and making transparent the results of actions undertaken to protect whistleblowers.

With respect to whistleblowing in the United States, Mr. Schnell identified four developments that have resulted in what he maintains has created "the golden age of the whistleblower":

- First, more whistleblowers are coming forward to address unlawful conduct. In the False Claims Act (FCA) arena, less than three decades ago only about thirty whistleblower cases were filed; in 2014, by contrast, there were roughly 700 whistleblower cases filed. As well, the United States Securities and Exchange Commission (SEC)—whose whistleblower program was created by the Dodd-Frank Act just five years ago—reported receiving 3,600 tips from would-be whistleblowers in 2014.

- Second, Congress and state legislatures have expanded whistleblower rights and protections. The FCA, a Civil War-era law, was amended in 1986, 2009, and again in 2010, each time removing judicially erected barriers to enforcement to make it easier for whistleblowers to bring cases. And Dodd-

Frank, as noted, created the SEC’s whistleblower program in 2010. What’s more, executive agencies are recognizing the force-multiplier effect of whistleblowers on their own enforcement agendas. The SEC says its whistleblower-award program—which SEC Chair Mary Jo White [recently called](#) a “game changer”—is among the agency’s most effective tools to combat securities-law violations. Even DOJ—which has long relied on whistleblowers but typically has been muted in its recognition of their role—is now more animated in acknowledging whistleblowers’ contributions.

- The third development that has cemented the role of whistleblowers in regulatory enforcement is greater judicial recognition of their importance. In the last few months alone, the Supreme Court and several appellate courts have decided cases that have expanded the rights of whistleblowers. *See, e.g., Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter; United States ex rel. Hartpence v. Kinetic Concepts, Inc.; United States ex rel. Escobar v. Universal Health Services; United States v. Triple Canopy, Inc.* The judiciary is following the legislative and executive tide to make it easier for whistleblowers to bring cases and right corporate wrongs.

- Finally, positive media attention has helped whistleblowers gain public acceptance. Not long ago, news coverage cast whistleblowers as snitches, sneaks, and tattletales; today, press accounts tend to take a more balanced view.

In sum, according to Mr. Schnell, the three branches of government, in concert with the press, have created a climate that embraces, protects, and rewards whistleblowers.

The picture, however, is very different in Canada or Europe. By Mr. Dent’s reckoning, Canada has woefully inadequate protections for whistleblowers in both the private and public sectors. For example, Criminal Code § 425.1 makes it a criminal offense to retaliate against whistleblowers, yet Mr. Dent could not recall the last time anyone was prosecuted for violating it. In a similar vein, the Office of the Public Sector Integrity Commissioner—created to administer the whistleblower protections in the Public Servants Disclosure Protection Act of 2007—received zero complaints for the first three years of

its existence. Since then, the Office received 140 complaints, of which it referred only six to an investigatory tribunal, which found that none merited disciplinary action.

With respect to Europe, Dr. Linsmeier observed that the absence of harmonized rules for all E.U. member states results in a “fractured landscape” for whistleblower protections. The United Kingdom, Luxembourg, Romania, and Slovenia are the most advanced. Germany and sixteen other E.U. member states have some legal protections but they are largely insufficient to properly promote and protect whistleblowers. And seven E.U. states offer no protections at all. Bribery and corruption scandals dogging global corporations have ushered in a new wave of corporate-compliance programs for reporting violations, particularly in countries with less protective legal regimes. But unpredictable outcomes deter insiders from stepping forward. As well, the public image of whistleblowing is far from positive, creating an inhospitable environment for would-be whistleblowers to step into the klieg lights.

### III. The Current State of Whistleblowing and Antitrust Enforcement in the U.S. and Europe

Mr. Schnell described what he sees as a bright future for whistleblowing in the enforcement of antitrust laws in the United States. This largely comes from the growing recognition that using the False Claims Act may be the most cost-effective way for companies to go after competitors engaging in anticompetitive conduct. As evidence, Mr. Schnell pointed to several recent FCA cases that companies have filed against competitors. In one case, an ambulance company brought an FCA case against a competitor that provided services to a hospital at below-market rates in order to capture referrals of the hospital’s more lucrative patients. In another, a highway-guardrail company sued a competitor that made cost-saving changes to its guardrail design without proper approvals, resulting in a defective product that could spear through vehicles. The ambulance case settled for \$11.5 million in May 2015. In the guardrail case, a federal judge handed down a \$663 million judgment against the manufacturer, though that judgment is currently on appeal.

According to Mr. Schnell, a company's calculus in deciding whether to bring a whistleblower action against a competitor is clear. Three options are available. One is to sue the competitor directly for violating antitrust laws, which is expensive and difficult. Another is to report the conduct to regulatory authorities, which is cost-effective but will not necessarily yield results. And the third is to file a whistleblower case that gets at the conduct, forces the government to investigate the claims, and makes it possible to share in the government's recovery. In more and more cases, companies are seeing the whistleblower option as superior for remedying anticompetitive conduct.

There is legislative activity in the U.S. that may further fuel this emergence of whistleblowers in the antitrust-enforcement scheme. While antitrust regulation is one of the last areas in which whistleblowers have not been brought into the enforcement regime statutorily, the Criminal Antitrust Anti-Retaliation Act of 2015, currently pending in Congress, may change that. The bill, which the Senate passed unanimously in July, would prohibit an employer from retaliating against an employee who reports on or provides information about an actual or suspected criminal antitrust violation. The bill was written in response to a July 2011 report from the Government Accountability Office that recommended amendments to the corporate-leniency program to bring whistleblowers into the antitrust enforcement mix. *See* <http://www.gao.gov/assets/330/321794.pdf>.

While hopeful that the bill would become law, Mr. Schnell pointed out several limitations that may hamper its effectiveness. The most critical problem is that the legislation does not offer financial rewards to whistleblowers. In this, it parts ways with the FCA and Dodd-Frank's whistleblowers programs, both of which incentivize reporting of corporate wrongdoing by rewarding whistleblowers with up to 30 percent of any government recovery. More, the legislation only protects individuals who report criminal violations of Section 1 of the Sherman Act. It thus leaves out a whole range of anticompetitive conduct that may not rise to the level of criminal activity. Further, a six-month statute of limitations gives whistleblowers a short time to benefit from the law's protections. Finally, the bill has no private

right of action that allows a whistleblower—like the FCA does—to pursue legal action against the alleged wrongdoer if the government decides not to pursue the matter. Even if its effectiveness is limited, however, Mr. Schnell concluded the proposed legislation is a good start and may pave the way for stronger and more comprehensive antitrust whistleblower legislation in the future.

The environment for antitrust whistleblowers in Europe is decidedly different. While internal complaints within a company about antitrust violations are fairly common, antitrust whistleblowing to government authorities is less typical. The German Federal Cartel Office does not offer financial rewards to whistleblowers, but it did recently establish an anonymous whistleblower hotline. And while U.K. antitrust regulators may pay whistleblowers up to £100,000, in practice it is very difficult to secure even these relatively paltry monetary rewards.

#### **IV. Lessons for In-House Counsel**

After reviewing the legal landscape for whistleblowers in the various jurisdictions, the panel then turned to what corporate in-house counsel needs to know about whistleblowers. In his role as in-house counsel at Structure Tone, a multinational construction-services provider, Brian Fields laid out a utilitarian view of whistleblowing. Starting with the premise that a whistleblower's interests and a company's are often aligned, Mr. Fields argued that companies should develop strong internal programs that encourage and protect whistleblowers as a matter of corporate self-preservation.

As far as short-term benefits go, such programs allow in-house counsel to learn of potentially problematic practices before the government does, and put a plan in place to fix them before a regulator comes calling. On the flip side, shutting down reporting avenues does nothing to stop allegedly problematic conduct. The long-term benefits are apparent as well. Robust whistleblower programs breed an atmosphere of compliance in a firm. Since the reach of a corporation's compliance department is almost always limited, relying solely on compliance personnel to turn over every stone doesn't work. Neither does a culture of fear:

compliance tied to a likelihood of getting caught is a good way to get caught. Instead, employees should envision compliance as growing out of a sense of duty, honor, and love of company.

Internal whistleblower programs also provide external benefits. For one, regulators like to see them. Prosecutors may consider the scope of such a program a mitigating factor in exercising their discretion. Indeed, the role of compliance programs is baked into the Federal Sentencing Guidelines, which explicitly take into consideration the depth of such a program in meting out punishment for criminal wrongdoing. They may also provide a business advantage: insofar as companies want to do business with other compliant companies, corporate-whistleblower programs can help differentiate a company from its competitors.

The hardest part of establishing a successful program, Mr. Fields conceded, is getting global buy-in from stakeholders throughout an organization. The key is not just to convince top executives to appreciate and embrace it. In-house counsel also needs to reach the lower-level personnel would-be whistleblowers interact with everyday; namely, their co-workers and immediate supervisors. Absent a mechanism that gets ground-level constituencies to see its value, nearly any whistleblower program is bound to languish.

In-house counsel must help the organization understand who whistleblowers are and what motivates them. The challenge is that misconceptions abound in this arena. Whistleblowers are not disgruntled employees looking for revenge. To the contrary, they are typically engaged, high-performing employees who often hold supervisory responsibilities. Whistleblowers report internally to their immediate supervisors or up the chain of command, and generally do not want to report to the government. Somewhat paradoxically, whistleblowers are moved to act out of loyalty to the company. For most, remedying misconduct is a primary motivator, and the possibility of a whistleblower award is a secondary consideration.

But whistleblowers run into the arms of regulators when companies rebuff their complaints or fail to take them seriously. Whistleblowers may also be

motivated to go outside the company when they fear retaliation. Because whistleblowers need to feel that their concerns will be addressed properly, a transparent communication process is critical.

While other panelists agreed with how Mr. Fields described how companies *should* approach whistleblowers, they did not share his optimism that companies *actually do so* in practice. Mr. Dent, for instance, took the view that seeing whistleblowers as white knights is completely contrary to human nature. He pointed to an academic study, [\*Nobody Likes A Rat\*](#), which concluded that the peer group that most benefited from a whistleblower's conduct also most forcefully ostracized the whistleblower. Any corporate program design needs to be built around this harsh reality. Whistleblowers must be protected from reprisal precisely because they are often vilified within an organization and their peer group.

Mr. Schnell, too, pointed out that many corporations have cultures of fear that condone retaliation and, in doing so, drive whistleblowers away from internal reporting. Nearly all of his whistleblower clients, for instance, went to regulators only after reporting internally first and then suffering retaliation.

## V. Should Whistleblowers Be Paid?

The webinar concluded with a debate on the relative merits of providing financial rewards to whistleblowers; fireworks are typically saved for the end of the show, and this discussion was no exception. Mr. Fields expressed deep discomfort with paying whistleblowers, comparing the practice to prosecutors paying witnesses to testify in criminal cases. The prospect of a bounty creates credibility concerns for whistleblowers and mars legitimate claims with proof problems. Moreover, Mr. Fields spotted a philosophical inconsistency between bounty payments and the Federal Sentencing Guidelines, which contemplate reduced punishments for corporations that have muscular compliance programs, and thus give corporations strong incentives to police themselves. Incentivizing whistleblowers to report outside of those internal channels undermines the Guidelines' push to make companies create the programs in the first place.

Other panelists saw things differently. For Mr. Dent, given that there is a scant history of companies treating whistleblowers well, remuneration is an essential safety net for the terrible outcomes that befall whistleblowers, irrespective of anti-retaliation protections. And Mr. Schnell highlighted the empirical failure of whistleblower regimes that don't offer financial remuneration: in the antitrust sphere, for example, leniency and amnesty programs have had limited success in reducing cartel activity.

Even more critical is the success of whistleblower regimes that pay tipsters for their information and cooperation. The False Claims Act was on the books since the Lincoln Administration but didn't start to recover significant dollars for the government until after 1986, when Congress made it easier for whistleblowers to bring suits and get monetary rewards. Twenty-four years later, Congress passed Dodd-Frank to bulk up the Sarbanes-Oxley Act of 2002, which included anti-retaliation protections for

corporate whistleblowers but did not provide for monetary rewards. Today, the SEC is the first to say that the rewards program motivates whistleblowers to help the SEC uncover violations it couldn't uncover before. At bottom, financial rewards are critical to any program that must coax whistleblowers to put their careers and livelihoods at risk.

## VI. Conclusion

ABA's August 27, 2015 program explored the wisdom of promoting whistleblowing as an element of antitrust enforcement. Panelists expressed broad agreement about the centrality of protecting antitrust whistleblowers from retaliation. But their most spirited disagreements focused on the issue that most vexes policymakers in this area: should the government compensate individuals who help it do its work?



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# CONDUCTING ANTITRUST AUDITS AS PART OF AN EFFECTIVE COMPLIANCE PROGRAM

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Given the stated expectations of enforcers in the United States and around the world, and with large financial penalties and lengthy prison sentences for antitrust violations, every company should be regularly conducting antitrust audits as part of its compliance program. The Compliance and Ethics Committee on September 29 presented a CLE webinar entitled “Conducting Antitrust Audits as Part of an Effective Compliance Program” which aimed to provide practical guidance on how to conduct an antitrust audit.<sup>1</sup>

Doug Tween, Co-Chair of the Compliance & Ethics Committee and then a partner at Baker & McKenzie LLP,<sup>2</sup> moderated a panel that consisted of Elizabeth Prewitt, partner at Hughes Hubbard & Reed LLP; Andrew Friedman, a shareholder at Butzel Long, P.C.; and Dean Hoffman, Associate General Counsel and Compliance Manager for Deutsche Bahn Americas.

The panelists emphasized the increased costs of antitrust investigations and violations, as well as the importance of regular antitrust audits in reducing violations and mitigating penalties. Mr. Hoffman explained that an effective compliance program is particularly important in reducing exposure because the risk of detection and punishment has never been higher or so severe. In addition to the United States, over 30 jurisdictions around the globe have criminal penalties for antitrust violations, and the number is growing. Civil litigation arising from antitrust violations is also risky, with growing class actions and many statutes permitting treble damages. An antitrust investigation or violation is financially burdensome with high costs such as attorney’s fees and expert fees. In addition, enforcement authorities may restrict the company’s business practices and impose non-monetary sanctions. Furthermore, investigations and violations often have long-term negative impacts on the company’s productivity and reputation.

## **A. Why Conduct Antitrust Audits?**

Ms. Prewitt and Mr. Tween explained that audits are necessary because U.S. and European enforcers have stated that they expect companies to conduct audits as a key component of an effective compliance program.

Deputy Assistant Attorney General Brent Snyder of the U.S. Department of Justice Antitrust Division, in a speech entitled “Compliance is Culture, Not Just Policy,” emphasized that every company should ensure it has a proactive compliance program, which includes, in addition to training and a forum for feedback, efforts to monitor and audit.<sup>3</sup> The U.S. Sentencing Guidelines provide significant sentence reductions if the organization has an effective compliance and ethics program, which must be more than a paper program and include monitoring and auditing.<sup>4</sup>

The European Commission has also recommended monitoring and auditing as effective tools to prevent and detect anticompetitive behavior.<sup>5</sup> The panelists emphasized the importance of a comprehensive compliance program that can lead to early detection and leniency. Additionally, enforcement authorities expect proactive measures, such as comprehensive audits, as a key component of an effective compliance program.

## **B. Considerations Before Conducting an Audit**

Mr. Friedman noted that audits should be conducted regularly on a proactive basis. There is no “one size fits all” approach when it comes to audits, and each audit should be uniquely designed considering the particular needs of the company in the market. However, all audits should aim to meet enumerated goals for the company: (1) ascertaining its current level of compliance with policies and the law; (2) meeting the expectations of regulators; (3)

detecting existing violations; (4) remediating problems; and (5) taking preventative action.

Ms. Prewitt promoted awareness of certain red flags in the market which indicate conditions favorable for collusion and should also trigger an audit, such as industry overcapacity, stable market shares, few competitors, undifferentiated products, frequent contact with competitors, and unusual bidding practices or similar pricing. It is also prudent to conduct an audit when the company is embedded within a high-risk industry or when there are specific allegations of a violation.

Mr. Hoffman recommended that attorneys conduct the audit because attorneys are better suited to recognize the subtle antitrust legal issues which could arise. Other experts retained should act at the direction and under the supervision of attorneys, to maintain attorney-client privilege.

### **C. How to Conduct an Audit**

The first step to an antitrust audit is to examine the relevant product and markets. The market shares of the largest competitors in the market and whether the market is favorable to collusion should be considered. The second step is to determine the scope and objectives of the audit. The scope of the audit will depend on the type of company, the size of the company, and the company's risk profile. The third step involves obtaining internal support from within the company, which includes addressing management to explain the scope and purpose of the audit, including the benefits as well as potential consequences. Finally, the last step of the audit involves determining what methods to use in the audit, such as whether to employ interviews, document review, or questionnaires.

The panel noted a few other considerations when conducting an audit. The audit should aim to protect confidentiality, data protection and privacy, and attorney-client privilege. The process should also be sensitive to legal conflicts of interest, as well as conflicts of interest which could arise within the company. The results of the audit should be communicated to management simply and effectively with sufficient detail to support the assessment.

### **D. Laws to Cover and Procedures to Review**

A company's compliance program should be regularly reviewed and updated. A comprehensive compliance program should include training each employee as to internal policies, standards of conduct, and reporting requirements and procedures. Employees should provide an annual certification indicating they understand and have followed antitrust laws and policies.

A company's antitrust policy should cover high-risk activities, such as price fixing, bid rigging, resale price maintenance, output restrictions, boycotts, market, product and customer allocation.

The panelists also noted that companies should be aware of conduct which could lead to collusion, including formal agreements with competitors such as joint ventures, supply agreements, or information exchanges. There has also been an uptick in prosecutions arising from trade association meetings.

Finally, the panelists emphasized the importance of noting the similarities and differences in antitrust law in various jurisdictions around the globe. There is a global consensus that cartels and other agreements to restrict competition are illegal. However, various jurisdictions differ on whether other practices are anticompetitive, such as monopolization, joint ventures, and vertical restraints. An effective audit should ensure that the company is addressing these appropriately.

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<sup>1</sup> A recording of the program is available at <http://shop.americanbar.org/eBus/Default.aspx?TabID=251&productid=211004902&ct=a1a85f73f2d3ee6ca7e42f1b1b26cdd7e17f32057a5c80f20e238c0ee17ca1f5fb1ad9ad5760402793091fe8649eb7c3198f88ff7538f0c973f69749524e4a82>.

<sup>2</sup> Mr. Tween has since joined Linklaters LLP as a partner in its New York office.

<sup>3</sup> Brent Snyder, Deputy Assistant Attorney General, U.S. Department of Justice Antitrust Division, *Compliance is a Culture, Not Just a Policy*, Sept. 9, 2014, available at: <http://www.justice.gov/atr/file/517796/download> (reminding companies that where the risk of detention and punishment has never been higher, effective compliance efforts are particularly important in efforts to prevent violations and obtain leniency).

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<sup>4</sup> U.S. Sentencing Guidelines Manual, §8B2.1, §8C2.5(f), available at: [http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/CHAPTER\\_8.pdf](http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/CHAPTER_8.pdf).

<sup>5</sup> European Commission Brochure, *Compliance Matters: What Companies Can do Better to Respect EU Competition Rules*, Nov. 30, 2011.



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