

## OF INTEREST

# Antitrust Compliance: An Ounce of Prevention...

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The benefits of a culture of compliance cannot be overstated. Antitrust compliance programs allow companies to reduce the risks of an obvious violation and to invite officers and employees to consult counsel on a timely basis regarding more complex antitrust issues. In the unusual case in which the compliance process discloses an issue of concern, a company may have the opportunity to use corporate leniency programs and to mitigate penalties.

A commitment to compliance is an ongoing effort that requires a training program, proactive efforts, and a willingness to discipline personnel who violate or ignore the company's compliance rules. No program can be successful without the full support of a company's senior management and board of directors. A culture of compliance must begin at the top and permeate every level of the company to be effective.

Brent Snyder, as Deputy Assistant Attorney General of the Department of Justice's Antitrust Division (and who, until recently served, as the Acting Assistant Attorney General), addressed the importance of a compliance program. Mr. Snyder drew upon his expertise in criminal antitrust law to describe the severe liability that can result from violating the antitrust laws. In a speech entitled, "Compliance is a Culture, Not Just a Policy," Mr. Snyder stated that "large criminal

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finances for corporations and significant jail time for executives” can follow serious antitrust violations.<sup>1</sup> In addition, Mr. Snyder noted that “an increasing number of countries have . . . criminalized anticompetitive conspiracies,” and, “with each passing year, the world gets smaller and there are fewer places to hide from international cartel enforcement.”<sup>2</sup>

“[T]he best outcome for a company and its shareholders is never to be a subject of an international cartel investigation. And an effective compliance program has the potential to be a significant contributor to that end.”<sup>3</sup> If the program prevents violations from occurring, the company would be spared criminal liability for both itself and the personnel involved. The program could also avoid years of civil litigation with potentially ruinous damages. Developing a compliance program is thus an investment that always sharpens legal awareness and may avoid catastrophic liability.

Mr. Snyder acknowledged that even a “partially effective compliance program” may be productive insofar as it detects antitrust concerns and allows the company to participate in the Antitrust Division’s “Corporate Leniency Program.”<sup>4</sup> Under that program, “[i]n exchange for self-reporting the illegal conduct, and for complete cooperation with the resulting investigation, a corporate leniency applicant will not be prosecuted by the Division.”<sup>5</sup> Participation in the leniency program could also limit under a federal statute the damages awarded in U.S. private suits if certain additional criteria are met.<sup>6</sup> To participate in the Antitrust Division’s leniency program, the company “must be the first to report the illegal conspiracy, must promptly stop its participation in that conspiracy, and must fully disclose its crimes.”<sup>7</sup> Leniency programs are offered by other jurisdictions, but the terms of participation in those programs vary.<sup>8</sup>

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<sup>1</sup> Brent Snyder, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, “Compliance is a Culture, Not Just a Policy,” Remarks as Prepared for the International Chamber of Commerce/United States Council of International Business Joint Antitrust Compliance Workshop at 1 (Sept. 9, 2014) [hereinafter *Compliance Culture*].

<sup>2</sup> *Id.* at 2.

<sup>3</sup> *Id.* at 1-2.

<sup>4</sup> *Id.* at 2-3; see also DEPARTMENT OF JUSTICE ANTITRUST DIV., CORPORATE LENIENCY POLICY (1993) [hereinafter *CORPORATE LENIENCY POLICY*].

<sup>5</sup> *Compliance Culture* at 3; see also *CORPORATE LENIENCY POLICY* at 1 (“The Division has a policy of according leniency to corporations reporting their illegal antitrust activity at an early stage, if they meet certain conditions.”)

<sup>6</sup> Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237 §§ 211-214, 118 Stat. 661 (2004); extended to 2020 by Antitrust Criminal Penalty Enhancement and Reform Act-Amendment, Pub. L. No. 111-190 § 1, 124 Stat. 1275 (2010).

<sup>7</sup> *Compliance Culture* at 3; see also *CORPORATE LENIENCY POLICY* at 1-2 (listing requirements).

<sup>8</sup> See eg. Commission Notice of Immunity from Fines and the Reduction of Fines in Cartel Cases, 2006 O.J. (C 298) 17-19 (eligibility requirements for European Commission’s Leniency Program); COMPETITION BUREAU, LENIENCY PROGRAM: 3.1 CONDITIONS FOR ELIGIBILITY (Sept. 29, 2010), [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03288.html#s3\\_1](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03288.html#s3_1) (requirements for participation in Canada’s Competition Bureau’s Leniency Program).

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In certain jurisdictions, the existence of a well-run compliance program itself could reduce the penalties assessed against the corporation. For example, Canada's Competition Bureau has stated that the existence of a "credible and effective" program could lead the Bureau to recommend lesser penalties in both criminal and civil matters.<sup>9</sup> In the United Kingdom, depending on the circumstances, "evidence of adequate steps having been taken to achieve a clear and unambiguous commitment to competition law compliance" could "merit a discount from the penalty of up to ten percent."<sup>10</sup> In the United States, the Department of Justice assesses how a company formulates its compliance program following an investigation. For example, in a separate address, Mr. Snyder stated that, although the DOJ will not recommend a reduction in fines for companies that "put into place or nominally improve an antitrust compliance program[,] . . . efforts that go further, that reflect in some way genuine efforts to change a company's culture, will receive consideration in calculating a company's fine."<sup>11</sup>

To prevent and detect wrongdoing and to have any reasonable prospect of receiving credit from a regulator, a compliance program must be genuine and systematic. According to Canada's Competition Bureau, "[a] compliance program will be considered credible and effective when the company can demonstrate that it was reasonably designed, implemented and enforced in the circumstances."<sup>12</sup> Hui Chen, a compliance expert retained by the Department of Justice, explained that the signs of an effective compliance program cannot be found "in the glossy diagrams of a company's 'core values' or their training slides; rather, they are in what happens in real life . . . the smallest details that manifest themselves in the company's daily operations."<sup>13</sup> She also assesses whether "most front-line workers understand their jobs: Does the clerk in the accounts-payable room understand his job to be processing payments as quickly as he can, or does he understand that he is supposed to keep an eye on certain things and escalate issues he identifies."<sup>14</sup>

A company must "empower" its compliance personnel, as Ms. Chen explains: "I also look at empowerment and consequences. Are the compliance and control personnel empowered to identify, escalate, and address problems? Are there consequences of non-compliance: [Are] [p]rocesses continually improved based on lessons learned; [are] people

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<sup>9</sup> COMPETITION BUREAU CANADA: CORPORATE COMPLIANCE PROGRAMS 5-7 (2015) [hereinafter CANADA COMPLIANCE].

<sup>10</sup> UNITED KINGDOM OFFICE OF FAIR TRADING, OFT'S GUIDANCE AS TO THE APPROPRIATE AMOUNT OF A PENALTY 12 n. 26 (2012) ("OFT Guidance"). This document has been adopted by the Competition and Merger Authority Board. See COMPETITION AND MARKETS AUTH., DECISION OF THE COMPETITION AND MARKETS AUTHORITY: RESTRICTIVE ARRANGEMENTS PREVENTING ESTATE AND LETTINGS AGENTS FROM ADVERTISING THEIR FEES IN A LOCAL NEWSPAPER, 2015, Case CE/9827/13 ¶ 6.41 n. 683 (UK) (indicating CMA's adoption of OFT Guidance); see also *id.* at ¶ 6.42 (identifying adequate steps for demonstrating clear and unambiguous commitment to compliance).

<sup>11</sup> Brent Snyder, Deputy Assistant Attorney General, Antitrust Division, Remarks at the Sixth Annual Chicago Forum on International Antitrust (June 8, 2015).

<sup>12</sup> CANADA COMPLIANCE at 5.

<sup>13</sup> Laura Jacobus, "DOJ's Andrew Weissmann and Hui Chen Talk Corporate Compliance in Exclusive Interview," Ethics and Compliance Initiative, <https://www.ethics.org/blogs/laura-jacobus/2016/02/01/doj-interview> (Feb. 1, 2106 9:58 am) [hereinafter Chen Interview].

<sup>14</sup> *Id.*

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disciplined for non-compliance; or [are] deals rejected and approvals not granted?”<sup>15</sup> In his 2014 remarks, Mr. Snyder stated that companies must educate “all executives and managers, and most employees – especially those with sales and pricing responsibilities.”<sup>16</sup> Programs must also be “proactive,” and companies need to be willing to discipline employees who violate or ignore compliance guidelines.<sup>17</sup> Finally, where violations do occur, a company “should be prepared to take the steps necessary to stop it from happening again.”<sup>18</sup>

Ultimately, a compliance program can succeed only if it has the full support of senior management. As Ms. Chen noted, a “compliance program [cannot] be truly effective if it is set in an organization whose culture and value are fundamentally incompatible with or hostile to it.”<sup>19</sup> As Mr. Snyder remarked, “[Compliance] starts at the top. A company’s senior executives and board of directors must fully support and engage with the company’s compliance efforts.”<sup>20</sup> Otherwise, the corporation will have “a paper compliance program, not an effective one.”<sup>21</sup> If senior management fails to take compliance seriously, he warned, “the employees won’t. It’s as simple as that.”<sup>22</sup>

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If you have any questions regarding this alert, please contact William H. Rooney (212 728-8259, [wrooney@willkie.com](mailto:wrooney@willkie.com)) or the Willkie attorney with whom you regularly work.

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<sup>15</sup> *Id.*

<sup>16</sup> Compliance Culture at 6.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Chen Interview.

<sup>20</sup> Compliance Culture at 4-5.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 5.