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4 Tips For Effective Antitrust Compliance Regimes

By **Matthew Perlman**

Law360 (March 12, 2020, 4:38 PM EDT) -- The Justice Department ushered in a new day for antitrust compliance programs last summer when it began allowing companies to receive reduced sentences or avoid prosecution for potential violations when they have an effective compliance regime in place.

Prior to the July 2019 shift, the only way for companies to avoid prosecution in criminal antitrust investigations was to be the first party involved in a possible violation to cooperate with the U.S. Department of Justice under the agency's leniency program. While cooperation and prompt reporting are still required, companies can now potentially avoid criminal charges even if they're not the first in line — as long as they have a robust compliance program in place.

John Terzaken, a former criminal enforcement director of the DOJ Antitrust Division and co-chair of Simpson Thacher & Bartlett LLP's global antitrust and trade regulation practice, told Law360 the policy shift is a recognition that companies should be rewarded for trying hard to prevent and detect illegal dealing.

"Really, what the department is after is not to bring cases, but to eradicate the conduct," Terzaken said. "If you want to encourage people to get rid of this conduct and really police organizations, then you ought to be encouraging compliance at every turn that you can."

But in order for a company to qualify for the perk, the agency said it will evaluate the programs to ensure they are in fact effective and has laid out elements it looks at when making that determination.

Here, Law360 provides tips for attorneys helping clients implement the programs or update existing policies.

Customize the Program

A primary characteristic of effective antitrust compliance programs is that they are specifically tailored to the companies and industries they are implemented in. Lisa Phelan, a partner at Morrison & Foerster LLP and former chief of the DOJ Antitrust Division's National Criminal Enforcement Section, told Law360 that this starts with an upfront analysis.

It's important, she said, to first identify key individuals that can help explain the business and how the industry operates to pinpoint potential points of risk. Risky situations might include things like company representatives interacting with competitors at trade shows or in other forums, or an industry where employees often move between competitors.

“Get a feel for where risk factors or risky situations might exist, then you try to put in place things to minimize that risk,” Phelan said. “Every industry’s interactions are structured a little definitely. One size does not necessarily fit all.”

Terzaken said effective compliance programs can’t just be copied from other companies, they need to be designed to address risks specific to the organization implementing it. Once the risks are identified, decisions can be made about where to focus training, monitoring and supervision.

In a typical manufacturing organization, for example, he said the likely first targets for a compliance regimen would be members of the sales and procurement teams.

“Those are the people who are making decisions about where we're going to sell and where we're going to buy,” Terzaken said. “They have to face-off in the market with customers, and frankly competitors, in the natural course of business.”

Tiffany Rider, an antitrust partner with Axinn Veltrop & Harkrider LLP, told Law360 that a properly tailored program strikes a balance to avoid being too broad, which wastes resources, and being too narrow, which could mean risks are being overlooked. This requires understanding the nuances of a business to ensure the compliance measures are applicable and appropriate.

If the balance is properly struck, Rider said, it’s easier to get executives and employees to buy in.

“Tailoring helps with the overall culture because they’re not seeing something from ‘legal’ that’s disconnected from them,” she said. “You want a compliance program to be relatable and meaningful to the business executives.”

Build a Compliance Culture

The DOJ’s guidance on compliance programs calls for a “culture of compliance” that encourages ethical conduct and emanates from the company’s top executives.

This can start with company communications to its workers explaining the importance of compliance and asking for their support. But it also means making sure incentives for the workers are aligned with the goals of compliance, Phelan said, like making sure employees aren’t evaluated based solely on the profits they generate and face consequences if they cross ethical lines.

“If you become aware that someone’s operating a little bit riskier, is that person punished? Is somebody going to come down on them?” Phelan said. “Do they have to go to remedial training because of it?”

She also said it’s essential to have an accessible, well-publicized but anonymous way for workers to report problems without feeling they could lose their jobs.

Terzaken said the DOJ will be looking for companies to demonstrate that their programs are not an “artificial construct that's made up for the sake of compliance, but actually has the investment of the senior management down through staff-level employees.”

This means making sure that senior management is overseeing the regime and they are instilling the importance of compliance with staff-level personnel.

Rider said broad support from within a company also makes a compliance program more effective.

"At the end of the day, if everyone has bought in, and they understand how it can help their business, that's when you've reached a state where there is a culture of compliance, where you've affected the company's culture," she said. "You've nudged people in the right direction."

Adapt Over Time

Another key characteristic of effective compliance programs is a mechanism allowing for adjustments over time. The DOJ's guidance calls for periodic reviews, monitoring and auditing of the programs, and Terzaken said this helps to make sure they keep up with changes in the industry and in the company itself.

"Nothing in the world of business is static," he said. "Simply because you invest in coming up with a program, and you have a culture of compliance, doesn't mean that business doesn't change. A company has to continue to reevaluate on a consistent basis."

This means ensuring new personnel are properly trained and that any business units acquired are included in the program. It also means making sure that training and messaging surrounding compliance remains uniform across the company and keeps pace with any broader shifts in the industry.

"There's a continual cycle of reassessment because things change," Rider said. "People change, businesses might change, the industry might change. The program can't be something that's stagnant."

Document the Efforts

As companies make these continual adjustments, it's important to document what's being done.

This includes capturing the risk assessments and trainings that were performed and any policy adjustments made as a result of the periodic reviews. Rider said documenting efforts to implement and improve compliance programs helps companies with the process and makes the programs stronger. It's difficult to reassess and tailor, she said, if you don't know exactly what you've been doing.

While documenting is important for record-keeping purposes, Terzaken said, it can also help a company show the DOJ that the compliance program is effective if the firm ever ends up being investigated for antitrust issues.

"In fairness to the DOJ, everybody comes in and talks about how wonderful their compliance program is," he said. "It's one thing to tell them, it's another thing to show them.

"Like all good things, you don't get credit for that which you can't demonstrate."

--Editing by Connor Relyea and Katherine Rautenberg.