Once Upon a Time. . .

There was an antitrust compliance program

Policy 20.5
(adopted in 1954)

“No employee shall enter into any understanding, agreement, plan, or scheme, expressed or implied, formal or informal, with any competitor, in regard to prices, terms, or conditions of sale, production, distribution, territories, or customers, nor exchange or discuss with a competitor prices, terms, or conditions of sale, or any other competitive information, nor engage in any other conduct which, in the opinion of company’s counsel, violates any of the antitrust laws.”
And it looked so nice, that even the government complimented the company for its impressive program.

But meanwhile, bad people were doing things in secret.
And they were caught by other government people

And some even went to jail
Why didn’t that nice program stop the bad people?

“[The conspirators] would not have been involved if they had obeyed [the antitrust] policy: they were out of step with the organization when they departed from the code of conduct laid down by the company.”

“[The antitrust policy] was observed in its breach rather than in its enforcement. . . . I am not naïve enough to believe that [the defendant] didn’t know about it and it didn’t meet with their hearty approbation.”

Sound familiar?
Making Your Antitrust Compliance Program Work . . .

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. . . And not just look good on paper
A little legal background

• Antitrust (criminal conspiracy)
  – Felony (jail time)
  – Massive fines
  – Treble damages
  – Injunctions
  – Debarment

Legal Standard

• Strict liability?
  – If it happened, you are guilty, or
  – If it happened, corporation not guilty if done by “rogue employee”
Story of the Electrical Equipment Case

- Conspiracy to fix prices of equipment sold to power companies. Business assigned according to phases of the moon.
- TVA became suspicious of identical bids.
- Senior execs found (or plead) guilty = jail.
- Compliance policy at GE ineffective

Compliance Policy Goal

- Convince enforcer that company had right intent, or
- Make sure the program works since no credit for a failed program
Corrugated Case

"... the mere existence of an antitrust compliance policy does not automatically mean that a corporation did not have the necessary intent. If, however, you find that a corporation acted diligently in the promulgation, dissemination, and enforcement of an antitrust compliance program in an active good faith effort to ensure that the employees would abide by the law, you may take this fact into account in determining whether or not the corporation had the required intent."*

*Material in this section adapted from J. Cross, Antitrust Liability and Compliance, in Banks (ed.) Corporate Legal Compliance Handbook (2d ed. 2010).

Government View

• [T]he existence of a corporate compliance program is, as a matter of law, irrelevant. That was why we disagreed so strongly with the instruction given by Judge Singleton during the recently concluded trial of the Corrugated Container case in Houston... We believe that this was an erroneous instruction and contrary to settled law....

• Carrying the Corrugated instruction to its logical conclusion would make it virtually impossible to convict a corporation of criminal antitrust violation, a result that is self-evidently nonsensical. The effect of the instruction is to give the corporation an identity independent of the sum of its parts. Thus, regardless of the intent of its agents and employees, the corporation could absolve itself of all liability by virtue of the existence of a compliance program. This imbues the corporation with anthropomorphic qualities that clearly are contrary to settled legal principles.*

• *John H. Shenefield & Richard J. Favretto, Compliance Programs as Viewed from the Antitrust Division, 48 Antitrust L.J. 73, 79 (1979).
Hilton

• Purchasing agent threatened to boycott suppliers who did not contribute to a fund whose purpose was to bring conventions to Portland. Hilton president testified that it would be contrary to Hilton’s policy to condition purchases upon the payment of contributions to a local association. The manager of the Portland hotel testified that it was the hotel’s policy to purchase supplies strictly on the basis of price, quality, and service. He also testified that on two occasions he told the hotel’s purchasing agent not to participate in the boycott. The purchasing agent admitted that he had been so instructed, but violated those instructions because of “anger and personal pique toward the individual representing the supplier.”

• Instructions to the jury: “A corporation is responsible for acts and statements of its agents, done or made within the scope of their employment, even though their conduct may be contrary to their actual instructions or contrary to the corporation’s stated policies.”

• The court also found that the Sherman Act focuses on commercial offenses that are often the result of pressures, either directly or in the form of a corporate culture, to maximize profits. Generalized directions to obey the Sherman Act are the least likely to be taken seriously in the face of such corporate pressures. Consequently, the court concluded that general policy statements of the hotel’s president not to violate the law, or even of the hotel’s manager not to participate in the boycott, were no defense and the corporation would be liable for the acts of its agents even though contrary to the corporation’s instruction.*


Koppers

• “One of the factors, among others, that you may consider in determining the intent imputed to Koppers Company through its [managerial] agents or employees is whether or not that corporation had an antitrust compliance policy. In this regard, you are instructed that the mere existence of an antitrust compliance policy does not automatically mean that a corporation did not have the necessary imputed intent. If, however, you find that Koppers Company acted diligently in the promulgation, dissemination, and enforcement of an antitrust compliance program in an active good faith effort to ensure that the employees would abide by the law, you may take this fact into account in determining whether or not to impute an agent or employee’s intent to the Koppers Company.”*

Basic Construction

- The bid-rigging acts involved relatively low-level employees and were done without the knowledge of high-level corporate officers. Furthermore, the corporation had a long-standing, well-known, and strictly enforced policy against bid rigging. The trial court permitted a jury instruction based on classic vicarious liability and apparent authority lines.

- “A corporation may be responsible for the action of its agents done or made within the scope of their authority, even though the conduct of the agents may be contrary to the corporation's actual instructions, or contrary to the corporation's stated position. However, the existence of such instructions and policies, if any be shown, may be considered by you in determining whether the agents, in fact, were acting to benefit the corporation.”


Antitrust Compliance Becomes Accepted

But, what do companies do as part of their antitrust compliance programs?
Coverage in Code of Conduct

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(adopted in 1954)

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They may give lectures
Often they will write a detailed policy

Sometimes they try to explain the economics to employees
The employees even certify that they understand the antitrust laws!

But does anybody really test effectiveness?
But “compliance” is not just having a policy

Compliance is not just education.
You need to affirmatively do things

So what might we need to do?

• Look at general items (applicable to all compliance areas) in the FSG
  – Due diligence to prevent/detect
  – Culture of compliance
  – Standards and procedure
  – Board knows the program
  – High level personnel responsible for compliance
  – Adequate resources to get job done
  – Training related to jobs
  – Monitoring & auditing
  – Periodic evaluation
  – Reporting system
  – Incentives & punishments
  – Response to violations
  – Risk assessment
• Which of them are you not doing for antitrust?
You need to have an

**EMPLOYEECENTRIC**

program

for antitrust . . .

. . . and for every other element of your compliance program
There are Many elements to a successful antitrust program

Tone at top – or not

Is that enough?

• Bad tone often = violations, but does that cause violations?
Employee problems

• Financial
• Drug, alcohol
• Greedy
• Sociopathic

Employees may not get the message & be oblivious to the wrongness of what they are doing
So let's think about an employee focus first

Put Yourself in the Employee’s Shoes
Relevance

Diverse backgrounds
Diverse Cultures

Diverse Ages
Diverse Problems

Diverse jobs . . . Factory?
Call Center?

Sales?
Relate to what the employees do every day

• Make it relevant to their lives

Comprehension
And do it in a way they can understand the message

Certain types of agreements may violate § 1 of the Sherman Act if they are found to be per se illegal or are determined to be unreasonable restraints of trade under the rule of reason.

Strive for Zen Clarity

• Don’t fix prices
• Don’t talk to anyone outside the company about how you compete
• Call if you have questions
Think Hollywood: Tell a Story

But this doesn’t mean dumbing down. Tell stories, explain the context

• Great Depression + politics =
• Robinson-Patman Act
What are people worried about?

Senior executives: stock price
Lawyers: litigation
Most of the staff: next paycheck

Don’t just regurgitate the law.
Step 1: Know your demographic

• Work with HR to understand corporate structure, ages, backgrounds in each business unit
Step 2: Know Your Business

- Get org. charts and understand what each business unit does
- Get job descriptions: what each function does

Step 3: Assign Risks to Jobs

- Think about what each business unit does, what each job does
- How does their activity implicate antitrust risk?
Step 4: Identify Best Way to Communicate

- How do they communicate on the job.
- How do they communicate at home?
- Where do they get their information?

Step 5: Illustrate with Examples & Images from Each Business Unit
Risk “Assignment”

- List of choices of antitrust risk
  - Conspiracy: all of the variations
  - Monopolization
  - RPM
  - Price discrimination
  - Mergers
  - Commercial bribery
  - Deceptive/unfair conduct
  - More?

Sales

Don’t talk to competitors
How do these differ?

• Multiple org charts for sales; central office, remote offices, home offices, customer calls, internet, trade shows

Marketing

• Honest advertising
• Fair promotional programs
Procurement

• Don’t lie
• Don’t try to hurt a competitor by driving up prices, or tying up supply

Strategy

• Raise prices
• Eliminate competition, or
• Increase competition
• Increase efficiency
Manufacturing

Customer service
Constant vigilance

• New cases = reason to communicate with target audience, not necessarily everyone

Focus on Your *Diverse* Target Audience

Make it relevant to their world
Thank you.

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