

AntitrustConnect Blog

Is There a Secret Antitrust Division Policy Regarding Compliance Programs?

Theodore Banks (Scharf Banks Marmor, LLC) · Tuesday, September 13th, 2011

As we all know, human beings are imperfect. Even when they are told how to do something, they sometimes just don't follow instructions. The consequences of not following instructions can run the gamut — from a cake that doesn't rise when you decide to skip the yeast to a stint in jail when you decide to fix prices with a competitor. Most people will try to follow those instructions, but in every group of people there are some who just do their own thing, not knowing or caring about the consequences.

In the corporate world, these instructions take the form of a compliance and ethics program, where employees are told how to follow the law and company policy. In the world of criminal prosecution of corporations, the matter of corporate intent is often important. Notwithstanding the actions of an imperfect (“rogue”) employee, very often the fact that the corporation tried to do the right thing will be very important in determining whether to prosecute the corporation, or whether their attempt to do the right thing should be considered at the time of sentencing.

But right now, the official policy of the Antitrust Division of the Department of Justice is that when they are making prosecutorial decisions about corporate defendants, the existence of a defendant company's compliance program is irrelevant. The only mitigating factor they will consider is the DOJ amnesty/leniency program, which gives a pass on antitrust liability to the first company in the door which is ready to confess to its participation in illegal antitrust activities. Companies that get complete amnesty are not required to do anything — such as implement a compliance program to prevent recurrence.

The Division takes the position, publicly at least, that if the company is a defendant in a criminal antitrust action (or at least a potential defendant), their compliance program obviously failed, and therefore they are not deserving of any credit. This is contrary to the definition of an “effective compliance program” in the Sentencing Guidelines of the United States Sentencing Commission, at § 8B2.1, which states that “(t)he failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing criminal conduct.” It appears that antitrust is the only area of Justice Department criminal enforcement where the Sentencing Guidelines are irrelevant.

Why is this? It may go back to DOJ's annoyance when Judge Singleton, in the *Corrugated* case in the late 70s, instructed the jury that they could credit a company that had a compliance program. It may go back even further, when, according to a story (and it may be an apocryphal story), one DOJ

official complimented General Electric about its antitrust compliance program, while, elsewhere in the DOJ, an indictment of GE was being prepared as part of the *Electrical Equipment* case.

When asked about why the Antitrust Division deviates from the government policy that is applied in the rest of the DOJ, there is not a lot of explanation. Antitrust Division officials stress their desire not to dilute the amnesty program, which is deemed by the Antitrust Division to be very effective. But every so often, a former DOJ staffer will elaborate. He or she might allude to the fact that, in reality, companies that do seem to have had a real compliance program in place, but were the victims of a rogue employee, get consideration from the prosecutor. But they don't want to talk about it. Strange. Why on earth would a prosecutor not want to encourage companies to do the right thing? Why would a prosecutor do anything that would lead a company to believe that attempting to make certain that employees follow the law is not worth the trouble? The evidence is convincing that companies with effective compliance programs violate the law less frequently and have superior business results. The failure to fully support corporate compliance does not seem to have any real basis.

It remains a mystery to me. It makes no sense for the Antitrust Division to have a "secret" policy regarding compliance programs, if such a policy actually exists. But secret policies can be denied or ignored as convenient, and in this case the evidence of the secret policy is scanty enough so that it is not something that gives any comfort.

The bottom line is, of course, that every company should have a robust antitrust compliance program in place in order to prevent those violations, even if the Antitrust Division will not actually give credit for the program should it turn out to be imperfect. Perhaps the Antitrust Division will re-think its position, and join with the rest of the agency in encouraging compliance, and not just confession.

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