



TUCKER ELLIS & WEST LLP

ATTORNEYS AT LAW

CLIENT ALERT

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ANTITRUST COMPLIANCE PROGRAMS

The Obama Administration's espoused – and now demonstrated – aggressive antitrust enforcement policies have caused many companies to refocus on internal compliance efforts. Corporate counsel have good reason to heighten employee awareness of the competition laws. Avoiding the focus of the antitrust enforcers (and inevitably private plaintiffs) will lower legal costs.

To aide these efforts, over the next few months we will publish a series of Client Alerts with ideas and guidelines for your consideration in the antitrust compliance area. In this first installment we offer some general principles and ideas for implementing an effective antitrust compliance program:

- **Proactive:** Federal enforcers have repeatedly stressed that that passive, “paper” compliance programs are not sufficient. A vigorous compliance program must include affirmative steps to detect price fixing, bid rigging and other serious offenses.
- **Prioritize:** Get *vocal and ongoing* senior client support. Employees listen best to those to whom they report.
- **Live:** A good place to highlight this support is at *live presentations*. There is no better way to underscore the importance of compliance than through an interactive, in-person session.
- **Quick:** Presentations need not be long. It is the exceptional client group that cannot be covered in 10 to 15 minutes. Accommodate your clients' schedules by getting on the agendas for existing meetings.
- **Relevant:** Throw out the generic compliance programs. They create a false sense of security. “So long as I don't talk to Bob about prices on the golf course I'll be OK.” Effective compliance programs are customized to address the specific activities engaged in by your clients – with examples to which your clients can relate. And they are based upon current legal precedent, not outdated, overly-conservative clichés.
- **Simple:** Do not try to make antitrust attorneys out of your clients. It may be useful to explain the antitrust laws, but also consider a list of specific activities and situations that merit legal consultation prior to proceeding. Even if they don't remember the law, they should remember the list.
- **Perspective:** On the flip side, advise your clients not to forgo business opportunities because they believe there are antitrust implications. The better advice is to consult with counsel if they believe there may be

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antitrust issues. Maybe there are, maybe there aren't.

- **Inclusive:** Do not forget anyone. For example, while your corporate development or strategic planning groups may not deal directly with competitors, they often create documents with significant antitrust implications. They regularly identify and define markets, assess levels of competition and competitors, and analyze potential ventures. These groups should be trained on document creation including a lesson on antitrust terms of art – i.e., words that mean one thing to you and another to the Justice Department.
- **Outside the Company:** What about your outside consultants? Do they understand basic antitrust principles? Do they have acceptable document retention programs for your materials? Do the materials they provide your company clearly indicate that they contain the thoughts and opinions of the consultant and not your company?

Finally, a few words of wisdom from prior compliance presentations:

In my 20 years as an antitrust lawyer, both in-house and outside, representing both private industries and the federal government, I have never once heard a witness or target say “Gee, I really wish I had created an email rather than just making a phone call.”

Getting your boss deposed is not a particularly career-enhancing strategy.

There often are multiple paths to the same destination. Heading, unadvised, down the wrong path, may foreclose you from your destination, even if you are willing to change paths.

Sometime in the future you may find yourself standing in your General Counsel's office and he or she is going to ask you: “Did you talk to the antitrust attorney before you did this?” Your answer to that question is going to determine how the whole rest of your day goes.

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