Compliance & Ethics Professional

July/August
2012

A PUBLICATION OF THE SOCIETY OF CORPORATE COMPLIANCE AND ETHICS

www.corporatecompliance.org

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The FTC and antitrust compliance programs

» The Antitrust Division ignores compliance programs; the Federal Trade Commission (FTC) does not.

» A strong compliance program can be evidence of good faith for the FTC in determining penalties.

» The FTC could have more impact by following the USSGs compliance program standards.

» The FTC could take the lead in issuing guidance on antitrust compliance programs, like competition authorities in other countries have done.

» Both the Antitrust Division and FTC should embrace compliance programs as a means to promote competition and protect consumers.

In the antitrust field, there are essentially two kinds of compliance issues. One deals with complicated matters, like monopolization, distribution issues, discrimination, and mergers. The other deals with per se violations or cartels. These are agreements among competitors to limit or avoid competition, and are subject to criminal enforcement in the U.S. In this article, we deal primarily with anti-cartel compliance programs.

Murphy

In most enforcement areas, the federal government recognizes the value of compliance programs. It gives compliance programs appropriate credit, imposes them on violators, and offers guidance on what should be in effective programs. But, in a somewhat mysterious pattern, the Antitrust Division of the Department of Justice (DOJ) does not even seem interested. Alone among DOJ's criminal enforcers, the Antitrust Division gives no recognition, permits no sentencing credit, and does not impose any kind of program for admitted violators who enter its leniency program. Even in settling cases where other prosecutors require compliance programs, the Division ignores them.[1]

Is this antagonism to compliance programs just some odd feature of antitrust law? To test this out, we looked at the Federal Trade Commission (FTC) which, through its Bureau of Competition, enforces the competition laws in the civil area for conduct violations and unlawful mergers. We discovered that the FTC does not follow the same approach. In fact, the FTC has a much more nuanced approach to the topic.

A bit about the FTC

To understand how the FTC fits into this picture, it is important to start with a little background. Like other government agencies, the FTC is divided into different units, including the Bureau of Competition. This is the one we focused on for this article. The Bureau of Competition shares non-criminal antitrust jurisdiction with DOJ. In addition, it has exclusive jurisdiction to enforce the FTC Act, which is a civil—not criminal—law intended to prevent and remedy anticompetitive conduct and unlawful mergers. The FTC Act also covers "unfair or deceptive acts or practices," (i.e., consumer protection), but this is beyond the scope of this article, which deals only with anticompetitive conduct violations.

When it addresses anticompetitive conduct, the focus of the Bureau of Competition is to remedy competitive harms and to prevent

recurrence, not to punish. However, it does have authority to pursue punishment for violations of orders, including consent orders that companies have entered into with the FTC, and (jointly with DOJ) violations of the law requiring advance notifications of certain mergers and acquisitions.

Outside of antitrust, other parts of the FTC also address consumer protection, including privacy issues. In these other areas, the FTC has occasion to deal with compliance programs as well. In fact, in the privacy area, the Commission has issued guidance under the Red Flags Rule that draws directly from the field of compliance and ethics.

The FTC has shown flexibility and interest in the topic of company compliance programs.

The DOJ Antitrust Division and the FTC Bureau of Competition do work cooperatively on certain competition law matters, such as jointly developing guidance on mergers and in representing the U.S. in international dealings, such as participation in the Organization for Economic Cooperation and Development's (OECD) Competition Committee.

The FTC's approach

To gain insight into the FTC's approach to compliance programs in the antitrust field, I interviewed Dan Ducore, the Assistant Director for Compliance (in the FTC context, "compliance" means enforcement). This interview was a follow-up to a similar interview published about 15 years ago. As is usual with government officials, Mr. Ducore explained that his comments were his personal views, not those of the Commission. (Mr. Ducore was not part of any discussion involving the proposals in this article, or any matters related to the activities of the Antitrust Division.)

Mr. Ducore explained the remedial focus of the FTC's enforcement actions, but recognized that there are circumstances where the FTC will seek penalties from offending companies. As noted, this occurs when companies violate the FTC's administrative orders (whether issued by consent agreement or after administrative trial) and when they violate the pre-merger notification requirements. Mr. Ducore, who confined his comments to practical points in FTC practice, did not dismiss compliance programs as mere "failed programs" (not his term) if any employee breaks the law, in contrast to the rhetorical flourishes of Antitrust Division spokespersons. Rather, he pointed out that the Commission considers a company's good faith in determining penalties for violations of orders, and that institution of a strong compliance program could be evidence of that good faith. In Mr. Ducore's straightforward words, if a company committed a violation of an order, "a good compliance program would work to their benefit."

The FTC has also required compliance programs, as appropriate, in some recent cases. However, on this point Mr. Ducore expressed two concerns. First, he observed that members of the FTC staff are "not the experts" and therefore would be reluctant to specify too much detail for a program. Second, if the FTC imposed a specific list of "compliance requirements," and the company did these and yet committed a serious order violation, it might argue in its defense something like "We did what you said to do, so you can't punish us."

Mr. Ducore noted that the Commission has evolved in its approach. He said that for many years the FTC's orders frequently simply required respondents to send out copies of the

order and assure that key employees received them, relying on that to educate employees. The FTC and its staff, however, have more recently recognized that such publication was probably not focused enough, and have moved to require some actual training.

In the author's view, the terms of settlement in one FTC case, the National Association of Music Merchants (NAMM),[2] stand out in this regard. This order, which settled a collusive agreement case against a trade association, did list some very specific elements, more reminiscent of the decrees imposed by the DOJ's Criminal Division. For example, NAMM had to have an antitrust compliance officer, it had to train the board annually along with employees and agents, and there had to be a procedure for reporting violations confidentially and without fear of retaliation. Although there were a number of ways an experienced compliance and ethics professional could have improved the program standards (e.g., having the compliance officer only removable by the board, making incentives part of the program, requiring periodic evaluation of the program), it nevertheless reflected a determination by the FTC to ensure that NAMM changed its approach and did not repeat the violation.

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A way forward for the FTC

The FTC has shown flexibility and interest in the topic of company compliance programs. The model set in the NAMM case is a good start, but with room to improve. Most notably, the FTC could get more impact by following the excellent standards and management principles captured in the Federal Sentencing Guidelines. Although the Guidelines were originally only applicable to criminal cases, they have since evolved as the template for all forms of compliance programs, whether addressed to criminal, civil, or ethical misconduct. We have learned, over time, that the elements of an effective compliance program are common across all risk areas and all forms of violations. The Sentencing Guidelines thus offer the best model for the FTC, even though its enforcement is limited to civil matters.

The FTC staff could begin by recognizing compliance and ethics as a field of study, making a point of learning more about this emerging field, and developing increased expertise. Courses, programs, and literature are available. For example, the Antitrust Section of the American Bar Association (ABA) has developed a bibliography on antitrust compliance and most recently included three sessions on compliance programs at its Spring 2012 Meeting (attended in at least one instance, the author is happy to report, by representatives of the FTC), and the SCCE has a great deal of information available on its website for free. Another possible step was demonstrated by the Securities and Exchange Commission (SEC). When it launched a boot camp on anticorruption for its own staff, it included a module on compliance programs (the author was one of the instructors). The FTC is well suited to have at least some staff members with compliance program expertise, who would then be available to other antitrust enforcement officials.

What is particularly notable, however, is that the Bureau of Competition has been absent from the discussion, even though they have more expertise than the Antitrust Division. Division spokespersons use meetings of lawyers and compliance professionals primarily to tout the Division's leniency program, but the FTC

has not been there—not at SCCE programs, not at the Practicing Law Institute, and not in the ABA programs. No expertise from the FTC is provided in the seminars, webinars, blog postings, or the literature.

The FTC's Bureau of Competition should be taking the lead in this area where it has experience and an open-minded approach. By contrast, the Antitrust Division evidently has no interest, no experience, and no expertise. Its overwhelming focus is its leniency program. The Bureau of Competition could also draw from its sister bureau, which already deals with the nitty-gritty details of compliance programs in the privacy area.

The FTC should set the policy that compliance programs count, and that diligence will be considered. The Antitrust Division should then officially buy in to this policy, which already exists in the rest of the DOJ. Other enforcement and regulatory agencies have also pursued this policy, such as the SEC, Federal Energy Regulation Commission (FERC), and Health and Human Services Office of the Inspector General. It makes sense to house this issue in an agency like the FTC. The FTC, working with the Antitrust Division's support, can also set the policy that compliance programs will be imposed on violators to prevent and deter violations. This step can send a very important message to the business community, and through the terms of administrative orders, settlement agreements, and consent decrees, set examples for what should be included in diligent antitrust compliance programs.

By requiring programs for antitrust offenders, the FTC would be acting to prevent recidivism, and this should be part of the normal resolution of cases. For the Antitrust Division, this would occur when companies plead, as in the Bridgestone bid rigging and price fixing case,[3] and especially for companies coming into the Antitrust Division's leniency program. Even when companies have voluntarily disclosed violations, there still needs to be some accountability on their part. It is little to ask of companies that have broken the law that they reform their ways through implementing rigorous compliance programs. In this task, the FTC and the Antitrust Division could coordinate their approach, imposing and monitoring programs consistently across both agencies.

The FTC could also take the lead in issuing guidance for the business community on antitrust compliance programs. There are many examples on how to do this. Indeed, the FTC staff did take this step on a modest basis before, in a 1983 publication on antitrust compliance programs (Federal Trade Commission, "FTC's Model Antitrust Compliance Audit Program").

Mr. Ducore's concern about practitioners arguing that they followed the guidance and are therefore bullet-proof is a legitimate point, but one that has been effectively addressed by agencies in various risk areas around the world. There are very practical remedies for this that have worked effectively for others. These include adding appropriate disclaimers that the decision to give credit for a program is discretionary, and providing that the burden of proof is on the company. Moreover, the mere fact that a party makes an argument does not mean that the argument prevails. The Criminal Division of DOJ has been imposing relatively detailed compliance programs for years without any apparent concern that a company that engages in foreign bribery despite such a program will escape punishment. Other agencies have issued guidance on compliance programs and imposed programs without interfering with their enforcement agendas.

There are numerous examples of agencies giving compliance program guidance that the FTC could consider in going forward. The Competition Bureau Canada, in issuing its bulletin on compliance programs, first exposed a draft for public comment and then took the

comments seriously in crafting an excellent model. The UK's Office of Fair Trading conducted studies and met with practitioners to seek input. The French Competition Authority commissioned a detailed study and sought public comment. In the U.S., FERC held public hearings on compliance programs. The U.S. Sentencing Commission publishes its proposed standards, holds hearings, and seeks public comment. It has even established advisory groups to review the standards.

In developing guidance for antitrust compliance programs, the FTC should start with the existing US standard set forth in the Sentencing Guidelines. This is a generally accepted benchmark, and there is no need for the FTC to reinvent this excellent work. But, the FTC could then adapt the standards to address specific characteristics of the risks of anticompetitive conduct. Ultimately, the FTC could follow the international lead of the DOJ's Criminal Division in promoting anti-corruption programs globally, by working with the OECD Competition Committee to establish a strong global model. This is especially important because so many cartels are international. Governments need to recruit the private sector into this battle internationally. Although these efforts should be led by the FTC, they should be done in conjunction with the Antitrust Division, so there is one, coordinated approach.

Finally, the FTC needs to include this issue in its role as a competition policy advocate. The FTC and the Antitrust Division are already vocal advocates of policies to promote competition. Promoting antitrust compliance programs should be a core part of their missions.

The FTC staff should be talking with practitioners to help them up their game and develop more diligent programs. It has been a serious mistake for the Commission and the Antitrust Division to ignore this crucial mission. Governments across the board should be seeking to enlist companies in the fight against corporate violations of all types, including cartels.

But, enforcers need to come to terms with a simple truth. If an agency has a policy of ignoring programs, like the Antitrust Division does, it is tough to convince practitioners to take that same agency's advice seriously. In this respect, the FTC would start with more credibility than the Antitrust Division.

In the future, the FTC needs to be at the Practicing Law Institute (PLI) programs, the SCCE webinars and programs, and the ABA Antitrust Section functions when the topic is antitrust compliance programs, but coordinate its approach with the Antitrust Division. In this way the government can be giving a consistent, effective message to companies, and do what is necessary to promote improved compliance program steps designed to prevent and detect anticompetitive conduct.

On a deeper level, the government needs to recognize that its role is not just to be the cops catching antitrust lawbreakers after the victims have been robbed. They need to embrace the role of preventing robbery in the marketplace before the money is stolen. Promoting competition comes from helping people do the right thing, not just from playing "gotcha" when a violation is discovered. Just as a robust program of preventive medicine can save billions in healthcare costs, the FTC and Antitrust Division should embrace the opportunity to save the American consumer billions by understanding and advocating effective antitrust compliance. ✳

1. See Jeffrey M. Kaplan: "*The Justice Department, Miss Havisham, and a Wish for the New Year.*" The FCPA Blog, Dec. 28, 2011. Available at http://www.fcpablog.com/blog/2011/12/28/the-justice-department-miss-havisham-and-a-wish-for-the-new.html
2. Federal Trade Commission: National Association of Music Merchants, Inc, Docket No. C-4255 FTC File No. 001 0203; 2009. Available at http://www.ftc.gov/os/caselist/0010203/index.shtm
3. *United States v. Bridgestone Corporation*. Case 4:11-cr-00651 Document 21 Filed in Southern District of Texas on 10/05/11. Available at http://www.justice.gov/criminal/fraud/fcpa/cases/bridgestone/10-05-11bridgestone-plea.pdf

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