KIRKLAND & ELLIS LLP

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Now Is The Time for all Good Companies To Implement An Effective Antitrust Compliance Program

Now is a good time for corporations to examine whether their compliance programs are effective and make necessary changes. Recently, the United States Sentencing Commission stressed the importance of corporate legal compliance programs in implementing a new guideline — Section 8B2.1 — for what constitutes an "effective compliance and ethics program." (The Sentencing Guidelines can be found at http://www.ussc.gov/2004guid/tabcon04_1.htm).

The Sentencing Guidelines now contain very specific requirements for implementing an "effective" compliance program. There is a strong incentive for implementing such a program: a substantial reduction of penalties — by as much as 95 percent — if criminal conduct occurs notwithstanding the existence of a compliance program. *See An Overview of the Sentencing Guidelines*, Paula Desio, Deputy General Counsel, United States Sentencing Commission (The link is at http://www.ussc.gov/TRAINING/corpover04.pdf).

As you know, corporations can be criminally liable for an employee's actions, even if the employee "acted against company policy." While corporations are not subject to prison sentences, courts can impose substantial fines (**note:** Marsh & McLennen's recent $850 million "agreed fine"). Courts can also debar firms from future government contracts. There are other "collateral consequences" as well. The most obvious is the often virulent adverse publicity and resulting damage to the company's reputation with customers and the public generally, even if there are only allegations of a serious crime such as price fixing.

Price fixing is the Antitrust Division's "top priority." The Assistant Attorney General for Antitrust, Hew Pate, announced recently that the DOJ has decided to devote even more resources this year to price fixing investigations. The DOJ's long-held belief — generally accepted by jurors — is that "price fixing is like selling drugs to school children."

The fines for price fixing can be staggering. Recent legislation has increased the Sherman Act statutory penalty to $100 million (per violation). The Antitrust Division regularly employs the "Alternative Sentencing Provision" — U.S.C. Section 3571 — to calculate fines based on "twice" the loss from the "offense," measured by "all industry" (not just the company's own) sales. Thus, to date, there has been no upper limit on the dollar amount of price-fixing fines. One company was fined over $500 million and many companies have agreed to fines over $100 million.

Accordingly, it makes sense to establish an effective antitrust compliance program. To meet the Commission's new guideline for "an effective compliance and ethics program," a company needs to exercise "due diligence to prevent and detect criminal conduct" and "promote a culture that encourages ethical conduct and a commitment to compliance."

This requires — at a minimum — the establishment of an antitrust compliance program structured to include Corporate Directors and Senior Executives who:

- are knowledgeable about the content and operation of the compliance program;
- exercise "reasonable oversight" of the implementation of the program; and
- monitor the effectiveness of the program to send a message to the organization that the company's "corporate culture encourages ethical conduct and compliance with the law."

This means that Corporate Directors and Senior Executives must be *actively* involved in the process of establishing and implementing the antitrust compliance program. Accordingly, the Board of Directors should — annually — review the company's antitrust and other ethical compliance programs to ensure that they have been implemented and are functioning effectively.

In addition, the Guidelines state that a company must:

- appoint a specific person to be responsible for the day-to-day operation of the compliance program and to have that person report — directly and regularly — to the company's Senior Executives and the Board of Directors about the effectiveness of the program;
- provide that "compliance officer" with adequate resources and appropriate authority to take corrective and disciplinary action;
- take appropriate action in the hiring, firing and promotion of people who may have engaged in antitrust misconduct (it must be apparent that the culture of the company is one that does not tolerate conduct in violation of the antitrust compliance program or other unethical conduct);
- "periodically" — probably best annually — conduct effective and practical *training* programs (the programs should be targeted to the individual's responsibilities and conducted for the Board of Directors, Senior Executives, employees engaged in potentially antitrust sensitive activities like sales and marketing, *and* for "independent contractors acting on the company's behalf," which detail the company's standards, procedures, and provide specifics about how to comply with the law);
- take reasonable steps to ensure that the compliance policy is followed, including *auditing* to evaluate the effectiveness of the program and possibly detecting any early stage criminal conduct;
- have a means for employees — anonymously and confidentially — to report suspected criminal conduct and seek guidance about the legal implications of their own conduct; and
- provide *incentives for compliance* and impose disciplinary measures, including firing first offenders, for engaging in criminal conduct or for failing to take reasonable steps to prevent or detect criminal conduct.

The Sentencing Commission made clear that companies must periodically — again, best annually — assess the risk of criminal conduct and make appropriate revisions in their compliance program to address these risks. The Commission identified several factors to assess in determining the risk that criminal conduct may occur:

(1) the nature of the industry and its potential for criminal conduct, *i.e.*, are there many or only a

few competitors in any line of business;

(2) the prior history of the company and the industry; and

(3) the seriousness of any particular prior criminal conduct.

The Sentencing Commission acknowledged that it had different expectations for what constitutes an "effective" antitrust compliance program for *larger* versus *smaller* corporations. *Larger* companies are expected to spend more resources and have more formal procedures and training than *smaller* organizations. The Commission noted that smaller companies can train through informal staff meetings and monitoring can be done by observation.

There is no requirement for any company — large or small — to use outside personnel, although the training and monitoring *can* be "out-sourced," if desired.

One tool that we have developed to assist companies in their antitrust compliance effort is a "Businessperson's Guide to the Antitrust Aspects of Mergers, Acquisitions and Joint Ventures" that, in addition to providing the reader with practical advice on aspects of the acquisition, divestiture and joint venture process, also provides a basic primer on the serious criminal risks involved in communications with competitors. **Link to the Businessperson's Guide.** Its bottom-line message is that there should be NO communications with competitors without prior Legal Department approval.

We would be happy to answer any questions about the Sentencing Commission's requirements for compliance programs or your company's existing compliance program and share our ideas for how to maximize your company's ability to achieve its business objectives with minimized antitrust risks.
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