



Why Your Compliance Program Doesn't Work

Ken Alexander

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Compliance Programs are popular . .

■

- but are they effective?
- If not, why not?
- Many companies have programs for
 - Antitrust
 - FCPA
 - OSHA
 - Environmental
 - Sarbanes - Oxley

“Antitrust Compliance” is a useful model

- Many companies have antitrust compliance policies
- Wide applicability to different industries
- Good opportunity to evaluate success of antitrust compliance programs

“Hard Core” Antitrust Crimes:



- **Price Fixing** - agreements between competitors on prices to charge customers or pay suppliers
- **Market Division** - agreements between competitors not to compete
- **Bid Rigging** - agreements between competitors not to bid, share information on bids, or to arrange who wins the bid.

Examples of Conduct That *Sometimes* are Civil Antitrust Problems

- **Tying** - “You’ve got to buy our repair parts if you want our equipment.”
- **Refusals to deal** - “If you do that, we won’t sell to you.”
- **Mergers and acquisitions**
- **Price discrimination** – Selling at different prices to companies that compete with one another

Consequences of Antitrust Claims

- Jail Time (up to 10 years in federal prison for executives)
- Criminal fines of \$1 million for individuals, \$100 million or more for companies
- Triple damages and attorneys' fees in private civil suits
- Very expensive lawsuits, even if you win!

Nobody would want to be targeted for that, right?



Did these antitrust targets have compliance programs?





Were their antitrust compliance programs effective?

INDUSTRIALS

Whirlpool, Panasonic Charged with Price Fixing, Will Pay \$141M Fine

By Ken Sweet

Published September 30, 2010 | FOXBusiness



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Two home appliance makers – Japanese company [Panasonic](#) and U.S.-based [Whirlpool](#) – pleaded guilty Thursday to charges of price fixing and will pay a combined \$140.9 million in fines in an agreement with U.S. federal regulators.



Were the antitrust compliance programs of these targets effective?

“guilty plea and \$50 million fine by UniRoyal”

THE WALL STREET JOURNAL 6/22/04
Price-Fixing Investigations Sweep Chemical Industry

Corporate Whistle-Blowers Win Prosecutors' Amnesty, Help Widen Scope of Probes

By JOHN R. WILKE

A two-year-old price-fixing probe that began in an obscure corner of the chemical industry has snowballed into a series of international investigations involving industry giants such as Dow Chemical Co., DuPont Co. and Bayer AG.

scrutiny are a widely used plastic, urethane, and a synthetic rubber known as neoprene, lawyers close to the case said.

In pursuing the alleged conspiracies, U.S. and European prosecutors are showing that granting amnesty from criminal charges to the first company to blow the whistle on a conspiracy can be a potent weapon against cartels. Companies granted amnesty can escape huge fines and sometimes avoid jail time for executives.

So far, the inquiry has resulted in one guilty plea and a \$50 million fine for UniRoyal and its parent, Crompton Corp., of Middletown, Conn. in the case that in-

European investigators, gaining criminal immunity in those markets, lawyers close to these cases said. Other companies followed suit, racing to be first to report more alleged price-fixing in exchange for lenient treatment or amnesty.

Consequently, the original rubber-chemicals investigation that began two years ago has led to new federal investigations in the markets for widely used plastics, plastic additives and synthetic rubbers, with broad industrial uses and combined sales of billions of dollars a year. Civil suits alleging overcharges are pending in U.S. courts in San Francisco, Pittsburgh, New York and Hartford, Conn.,

“Dow Chemical, DuPont, and Bayer AG”

PORTER HEDGES LLP

“U.S. and European prosecutors are showing that granting amnesty from criminal charges to the first company to blow the whistle on a conspiracy can be a potent weapon Companies granted amnesty can escape huge fines and sometimes avoid jail time for executives.”

Top Ten List

10

9

8

7

4

5

6

3

2

1

Top Ten Signs Your Antitrust Compliance Program Doesn't Work

6. Salespeople say, “What, Me Worry?? It's Only the Company's Money.”
7. Favorite topic at industry golf tournaments: “Don't steal my customers!”
8. Salesman begins every telephone conversation with competitors, “Hope this line isn't tapped.”
9. Regional Manager has sign over desk, “Just Do It. . .But Don't Get Caught.”
10. Sales Manager confused Sherman Act with Mann Act, only prohibited employees from crossing state lines for immoral purposes.

Top Ten Signs Your Antitrust Compliance Program Doesn't Work

1. Snoring in back row of antitrust compliance program.
2. Company e-mails talk more trash than the New York Jets.
3. VP - Sales says, "What the CEO don't know won't hurt me."
4. Manager says, "This customer will never sue us."
5. CEO says, "Our competitors are our friends. Our customers are the enemy."

Consequences of FCPA Claims

- Jail Time (up to 5 years in federal prison for executives)
- Criminal fines of \$5 million or twice gross gain or loss for individuals, \$25 million or twice gross gain or loss for companies

Nobody would want to be targeted for that, right?



Noble Drilling



- "Although Noble ***had an FCPA policy in place***, Noble lacked sufficient FCPA procedures, training, and internal controls to prevent the use of the paper process and making of payments to Nigerian government officials. . . ."
 - Disgorgement \$4,294,933 and pre-judgment interest \$1,282,065
 - Criminal fine of \$1,500,000



Tidewater



- ***"Tidewater's compliance program,*** including training provided to its employees, did not adequately address the applicability of the FCPA to customs, tax, and regulatory issues . . . until March 2007."
 - Disgorgement \$7,223,216 and pre-judgment interest \$881,146
 - civil penalty = \$3,217,000
 -

Do Compliance Programs Work?

- **Many obviously have failed.**
- **Why?**

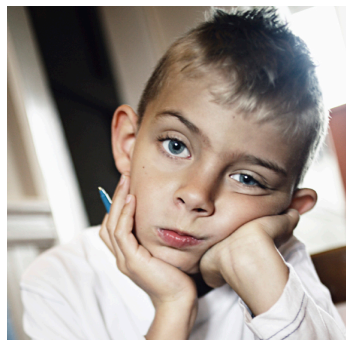
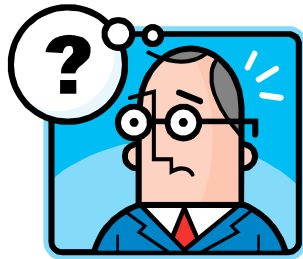


Ten Reasons Compliance Programs Fail

1. Ignorance
2. Chutzpah
3. “Just did what we always do”
4. Desperation
5. “Not my problem”
6. “We won’t get caught”
7. Sloppy writing
8. Management inattention
9. Overreaching
10. Boredom

How to Overcome These Reasons That Programs Fail?

- **10 ways to make your Company's compliance programs more likely to succeed**



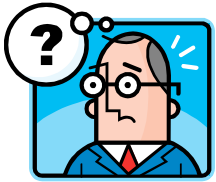
Top Ten Qualities of Effective Compliance Programs



1. Targeted



6. Risks, not “violations”



2. Justified



7. Participatory



3. Tailored



8. Coordinated



4. Senior-led



9. Refreshed



5. Positive



10. Documented



1. “Targeted” - What’s the Goal?

- Many “programs” lack a goal, or have one that is not realistic.
- CYA is not a helpful goal, and almost never succeeds for the ***Company***.
- Some sound like law school.
- Who *specifically* is your audience? Executives? Sales staff? (Usually not lawyers.)





Some Reasonable Goals



- ✓ Alert and educate sales force
- ✓ Issue-spot risks
- ✓ Encourage reporting of issues
- ✓ Deter risky conduct

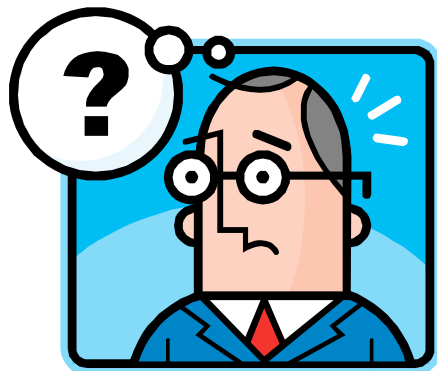


Unrealistic Goals



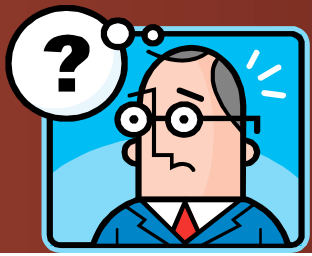
- ❑ Replace legal advice
- ❑ Cover *every* risk
- ❑ Eliminate need for compliance review
- ❑ CYA (or the Company's)

2. “Justified” – Why should they care?



Good compliance programs

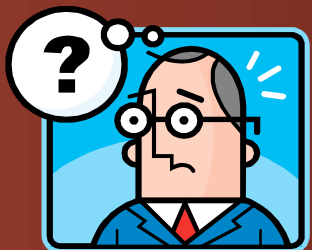
- personalize exposures
- persuade, not just threaten
- identify real costs and risks



Personalize exposures

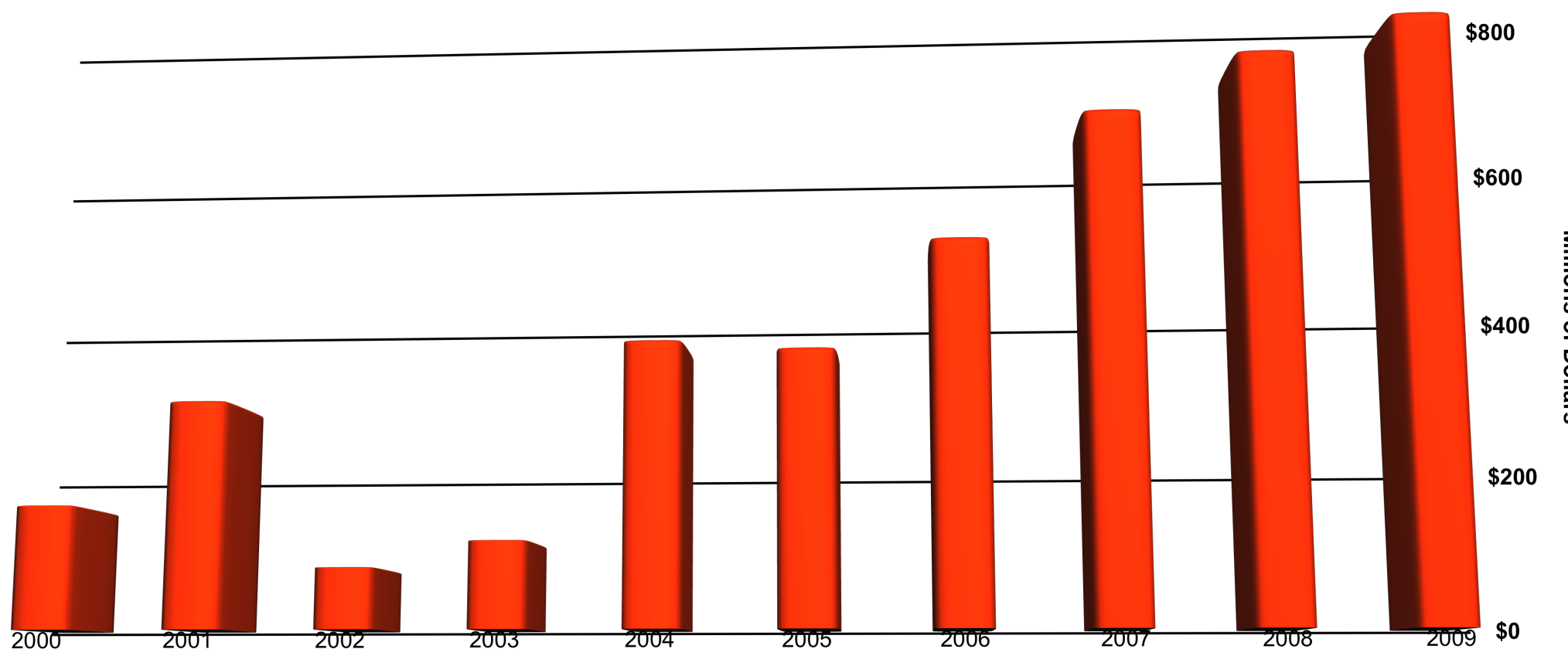
How do people like me get in trouble?

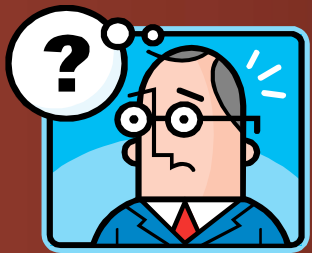
- “I just did what we’ve always done.”
- “We were just trying to restore margins to a decent level.”
- “I was just ‘talking tough’ in that memo to impress my boss.”
- “It’s the Company’s problem. The government won’t come after a small fish like me.”



Persuade, not just threaten

Federal Antitrust Fines

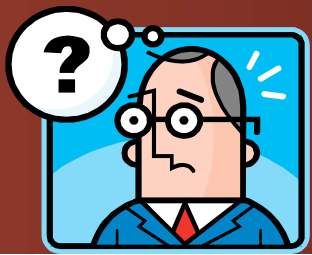




Persuade, not just threaten

Antitrust Div., Justice Dept.:

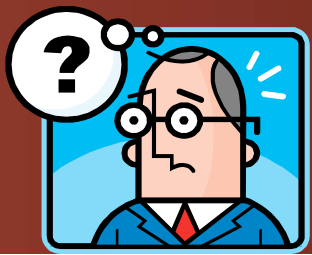
“At the close of fiscal year 2008, the Division had 137 pending grand jury investigations, the greatest number . . . since 1992. . . . The Division maintained a high average prison sentence of 25 months for fiscal year 2008.”



Identify real cases and costs

- Identify peer companies and executives that have been
 - Investigated
 - Sued
 - Fined
 - Jailed
- Incentives to sue





Big Companies Bring Antitrust Cases, Too

► LAW360 HOME

COMPETITION **LAW360**

Urethane Suits Against BASF, Dow Win Green Light

Law360, New York (January 26, 2010) -- A federal judge has allowed chemical companies to proceed with two putative class actions accusing BASF SE, the Dow Chemical Co. and Huntsman International LLC of price-fixing in the urethane market,

3. “Tailored” – Does program fit *your Company*?



- Don't use “off the rack.”
- Risks vary by company.
- Programs can't be “one size fits all,” even within same company.
- An ill-fitting program won't be remembered or followed.



Tailored to Fit

- ✓ Identify *particular* risks for your Company
- ✓ Exclude immaterial information
- ✓ Make it “real world” to your audience



Tailored to Fit

What are your Company's particular **risk factors**?

- Competitive bidding
- Public contracts
- Industry “history”
- Litigious customers
- Trading with competitors



Pop Quiz: Who said this?

“People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”

☐ Bill Clinton, former antitrust professor

☐ President Barack Obama

☒ Adam Smith, ***The Wealth of Nations***,
published 1776

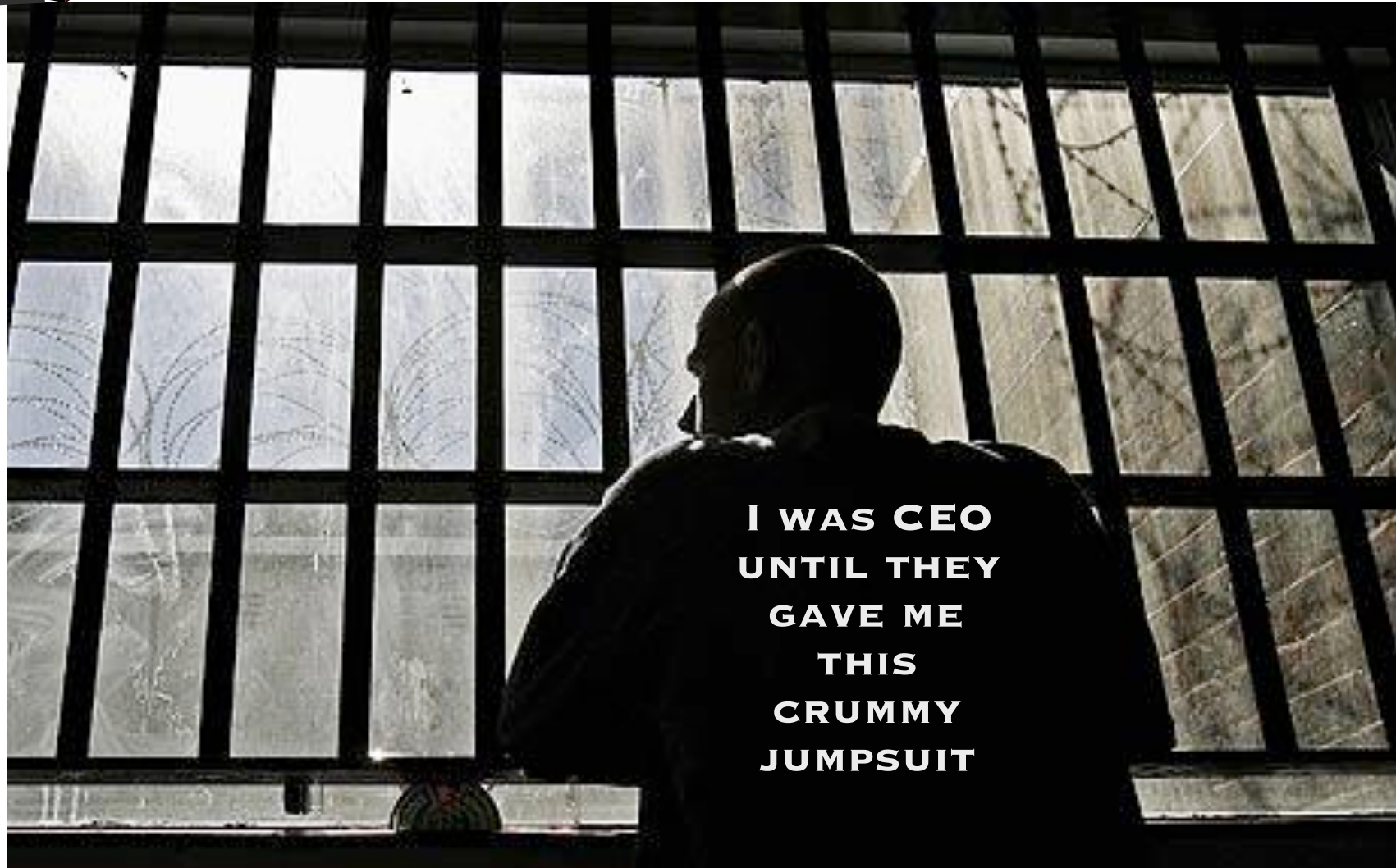
4. “Senior-led” – Who’s talkin’?



- Senior executive endorsement crucial
- Senior management participation crucial
- Attitude toward compliance starts at the top



What's it like to be this guy's GC?



4. “Senior-led” – Who’s talkin’?



“The second most startling characteristic of . . . cartels is that they typically involve the most senior executives at the firms involved – executives who have received extensive antitrust compliance counseling, and who often have significant responsibilities in the firm’s antitrust compliance programs.”

U.S. Dept. of Justice, Antitrust Div.

5. “Positive” – What *can* I do?



- Program should include what's *OK* to do
- Programs that are only about “Don'ts” aren't listened to
- Programs that help staff know what they can do get their attention



Permissible Activities

Example:

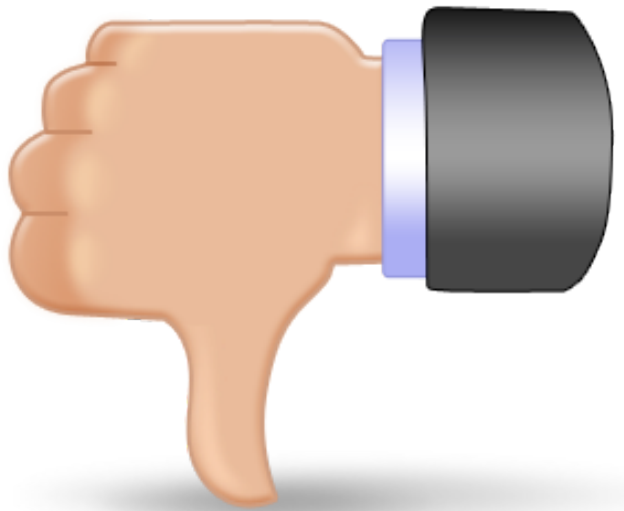


- **“It’s OK to talk to customers or suppliers (who are not competitors) about prices charged or paid by our competitors.”**

6. “Risks, not violations”

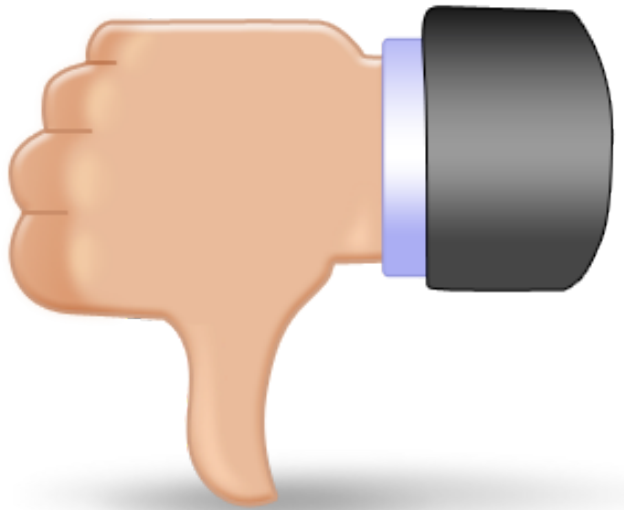


✓ Identify *risks*, more than legal violations



✓ Describe company *policy*, not statutory requirements

Why?



✓ Goal is prevention, more than legal compliance

✓ Policy should explicitly be more conservative than law requires



Easy to allege, expensive to defend



“The [plaintiff] buyers allege few manufacturers make the chemicals they need for their businesses and that the market is highly concentrated.

. . . The buyers also allege that the defendants often would announce or implement similar price increases at about the same time, and those prices can't be explained by changes in the price of raw materials or by changes in demand. . . . Lyondell said in its annual report that it believes ‘it has valid defenses to all the claims and is vigorously defending them.’”

Example



“Our Company prohibits . . .”

- **“Do not talk or write to competitors about anything that might affect your competition with them**
 - prices or terms to other customers**
 - plans for bidding”**

Example



- **“Consult the legal department before entering contracts with competitors concerning”**

Identify “Risks” that increase antitrust exposure



- Margins under pressure
- Efforts to “discipline” price cutting
- Customers who “cheat” on prices
- Price discrimination perceived by customers as “unfair”

7. “Participatory” – Avoid the Circular File



- Who reads this stuff??
- A written “Policy” *alone* is **not** a “compliance program.”
- Q & A is very valuable.
- Avoid misunderstandings that deter compliance

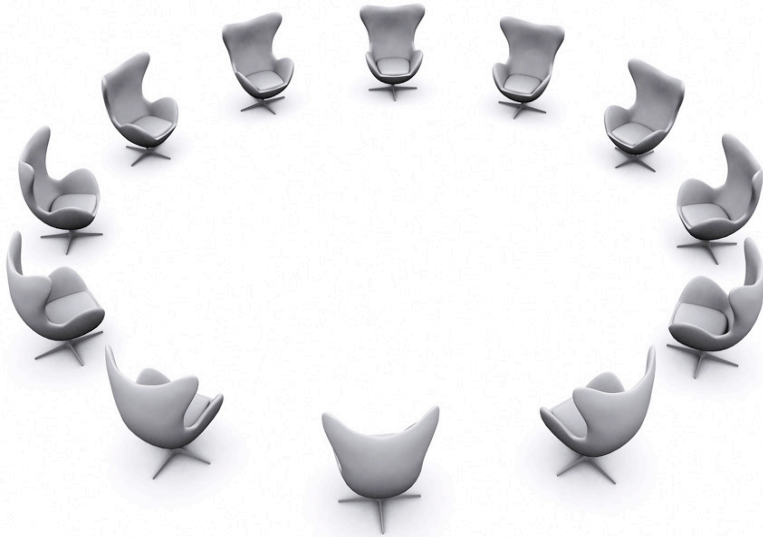
7. “Participatory” – Avoid the Circular File



“A policy statement is only the beginning. The company should have an active training program that includes in-person instruction by knowledgeable counsel.”

U.S. Dept. of Justice, Antitrust Div.

8. “Coordinated” – with other policies



- FCPA
- Records retention
- E-mail practices
- Securities law compliance
- Internet use



8. “Coordinated” – with other policies

“Anonymous” Posting on Yahoo! Finance:

“The writing is on the wall. The end game is now underway for (Wild Oats) Whole Foods is systematically destroying their viability as a business -- market by market, city by city.”

Who? John Mackey, CEO of Whole Foods!

“Let’s flush these turkeys.”

“We can stop this cutthroat competition.”

9. “Refreshed” – is it up-to-date?



- How long has it been since you made it “new”?
- Are they still listening? (They aren’t reading.)



Some tools to keep compliance programs fresh

- New speakers
- Effective compliance programs on video
- Question & answer sessions
- Updates on enforcement actions and industry “gossip”

10. “Documented”



- Provide written Company Policy at conclusion of Compliance Program
- Signed by employees

One more thing - “Monitored”



- Compliance just begins with the program.
- What is the Company doing to assure compliance in fact?

One more thing - “Monitored”



“It is critical that the company’s lawyers regularly attend management meetings and regularly visit the company’s facilities so that employees know whom to call if they have a question or problem.

“A company should conduct regular antitrust audits, preferably unannounced, to monitor compliance.”

U.S. Dept. of Justice, Antitrust Div.

Do compliance programs actually help?

Ineffective compliance programs can do more **harm** than good

Good compliance programs:

- Stimulate constructive questions before action
- Sensitize employees to entire industry actions
- Make the Legal Dept. the friends of managers, not the “enemy”

Do compliance programs help?



“A compliance program can do little, if anything, to persuade the Antitrust Division not to prosecute.

“A strong compliance program can, however, help at the sentencing stage, so long as the employees who committed the violation were not ‘high-level personnel.’”

U.S. Dept. of Justice, Antitrust Div.

Do Your Compliance Programs Get a Passing Grade?



1. Targeted

YES

NO

2. Justified

YES

NO



3. Tailored

YES

NO



4. Senior-led

YES

NO



5. Positive

YES

NO

Do Your Compliance Programs Get a Passing Grade?



6. Risks, not “violations”

YES

NO



7. Participatory

YES

NO



8. Coordinated

YES

NO



9. Refreshed

YES

NO



10. Documented

YES

NO

Does Your Compliance Program Get a Passing Grade?



... and are
the lawyers
assisting
compliance,
not just
marking
attendance?

YES

NO



Questions:

Ken Alexander

Porter Hedges LLP

713-226-6614

kalexander@porterhedges.com

www.porterhedges.com