

# Under the Antitrust Microscope

## Steps to avoid increasing scrutiny and penalties

**C**riminal prosecutions and punishments for corporate executives involved in antitrust violations are on the rise. In the 1990s, the U.S. Department of Justice (DOJ) prosecuted on average only one individual for every company it prosecuted for antitrust violations. In the last five years, the DOJ prosecuted almost three times as many individuals (352) as corporations (123). But a growing chance of prosecution is not the only risk to corporate executives.

Monetary fines and prison sentences for individual antitrust offenders also are growing in size and frequency. The average prison sentence for antitrust offenders in the last five years was 24 months, triple the eight-month average in the 1990s.

For example, both the president and executive vice-president of a Taiwanese manufacturer of LCD screens currently are serving 36-month jail sentences for their involvement in the LCD price-fixing cartel—the longest U.S. antitrust sentences imposed against foreign nationals. And executives involved in the coastal shipping cartel recently were sentenced to 60 months and 48 months in prison—the longest sentences ever imposed in the United States for antitrust offenses.

This upward trend in scrutiny and punishment for individual antitrust offenders is likely to continue. In September 2015, the DOJ published a memorandum, known as the Yates Memo, that signaled a new level of commitment to holding all white-collar criminals accountable and called on all DOJ investigators and prosecutors to “focus on individual wrongdoing” and “on building cases against individual wrongdoers.”

Following the Yates Memo, a DOJ antitrust official in February 2016 announced the DOJ Antitrust Division’s increased emphasis on individual accountability and to “holding accountable the highest-level culpable executives at conspirator companies.”

The Antitrust Division’s increased commitment is based on two key beliefs: (1) that “compliance with antitrust laws must be ingrained in a corporation’s culture—one that is established from the

top down;” and (2) that “prison time for individuals [i]s the single most effective deterrent to the temptation to cheat the system and profit from collusion,” even more than the billions of dollars in fines imposed by the DOJ on corporations and their employees.

Antitrust compliance is becoming much more personal for corporate executives and employees. However, the risks of a criminal antitrust violation can be minimized by adopting and following a few basic steps.

### Adopt and follow an antitrust compliance program

The DOJ is right: the best way to avoid antitrust violations is to establish and maintain a corporate culture of antitrust compliance, which starts with a commitment by senior management. Every company should develop, adopt, implement and follow a robust and up-to-date antitrust compliance program. While such programs should be tailored to the needs of each company, compliance programs should include, at a minimum, regular antitrust training of senior management and all sales personnel; monitoring and testing the effectiveness of the antitrust training; a system of prior approval, and follow-up reporting, of contact with competitors; a robust policy and procedure for detecting and reporting antitrust violations; and a clear policy for disciplining violators.

### Scrupulously avoid basic antitrust violations

Federal, state and international antitrust laws are complex, and their application can vary based on the circumstances. However, corporate executives and employees can adopt four guiding principles to avoid most criminal antitrust violations.

First, do not agree with your competitors to fix prices. Agreements—even tacit agreements—between competitors to set, raise, lower or stabilize prices are unlawful.

Second, do not make express or tacit agreements with your competitors

that may affect prices. For instance, it is unlawful for competitors to agree to restrict outputs, to agree to set discounts or rebates, or to agree to adhere to unilaterally published prices or terms.

Third, do not agree with competitors to allocate customers or territories. Competitors violate antitrust laws when they expressly or tacitly agree to divide up customers, classes of customers or geographic territories.

Fourth, do not make express or tacit agreements with competitors to refuse to deal with others. For example, agreements between competitors not to sell to particular customers, or not to buy from particular suppliers, are unlawful.

### Avoid compromising contact with competitors

Antitrust laws are not intended to eliminate the benefits of trade associations, joint ventures or other legitimate competitor interactions. However, trade association meetings and other competitor contacts increase the potential for unlawful information sharing or collusion. Competitors must avoid exchanging sensitive business information (such as price lists) and should avoid even the appearance of anticompetitive collusion. In addition, experienced legal counsel should be hired to attend and monitor meetings and activities attended by competitors to help avoid improper topics and discussions. **UB**

*This article highlights key antitrust issues, but is not a comprehensive summary of all civil and criminal antitrust issues. It is not legal advice, and readers should consult their legal counsel for their individual circumstances.*



*Jeremy Stewart is an attorney in the Salt Lake City office of Snell & Wilmer. His practice is concentrated in commercial litigation, with a focus on antitrust litigation, compliance and regulatory enforcement.*