



# CPI Antitrust Chronicle

## February 2012 (1)

### **Antitrust Compliance—It's All About the Culture**

Theodore L. Banks

Schoeman Updike Kaufman & Scharf

## Antitrust Compliance—It’s All About the Culture

Theodore L. Banks<sup>1</sup>

### I. INTRODUCTION

What does it take to develop an antitrust compliance program that works? There are a lot of pieces. The employees must be presented with materials that are directly relevant to each of their jobs. It must be done in a way that is easily understandable. It must be ubiquitous, so that little or no effort is needed to gain access to information. There should also be business controls so that violations are not easy to accomplish—or difficult to detect.

We’ve known these things for a long time. In antitrust, which in many ways is the grandfather (or perhaps the godfather) of corporate compliance programs, we’ve had detailed policies, handbooks, training courses, videos, slides. No shortage of information—yet the violations continue. The Justice Department seems to have given up on compliance when it comes to antitrust. Their main method to control cartel behavior is not to encourage prevention (i.e., compliance), but to encourage confession (i.e., the amnesty program). In fact, they are apparently so disgusted with the sorry state of compliance<sup>2</sup> that they got a carve-out from the Federal Sentencing Guidelines when it comes to antitrust. If convicted of a violation of any other federal criminal law, the company can get credit for good intentions if its compliance program met the definition of an “effective” program. But not true for antitrust.

It is not as if antitrust is the only area where compliance programs do not seem to be making continuous improvement. The recently released 2011 National Business Ethics Survey from the Ethics Resource Center is not very encouraging. It showed an increase in companies that employees thought had a “weak ethics culture” and where employees felt pressured to ignore the company’s own ethical policies or break the law. Employees perceive there is more retaliation against employees that report wrongdoing, and more employees thought their managers were unethical. And what do they think of senior management? More perception of self-interest without being guided by ethics.

Interestingly, the failures that were identified were not ones of lack of knowledge, but were failures of culture. No program—in antitrust or any other area—will succeed if it is not supported by the culture of the corporation. The Federal Sentencing Guidelines recognize this, and state that:

§8B2.1 To have an effective compliance and ethics program . . . an organization shall –

---

<sup>1</sup> Counsel, Schoeman Updike Kaufman & Scharf; President, Compliance & Competition Consultants, LLC; Adjunct Professor, Corporate Compliance, Loyola University Chicago Law School. My thanks to Jeff Kaplan and Joe Murphy for their helpful suggestions.

<sup>2</sup> Nobody at the Antitrust Division has ever said this, so I’m just guessing. Their stated reason for the antitrust carve out from the Sentencing Guidelines, that antitrust goes to the “heart” of a company, is nonsense. Antitrust violations no more go to the heart of a company than any other major federal crime, be it tax evasion, bribery, worker safety, etc.

- (1) exercise due diligence to prevent and detect criminal conduct;
- and
- (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

It seems that after years of working on training programs, manuals, dramas, videos, games, and other clever communications devices, when it comes to antitrust we need to work on culture. The term “corporate culture” has been thrown around in a variety of ways, and while it is imperative that the compliance program be supported by the corporate culture, it is necessary that one first understand what makes up the corporate culture. While there are no hard and fast rules here, I would like to suggest five major dimensions of corporate culture that go into compliance: geographic, management, industrial, professional, and structural. All of these need to be addressed by a chief compliance officer (“CCO”)<sup>3</sup> to ensure an effective compliance program in antitrust, or in any other area.

## II. THE “GEOGRAPHIC” CULTURE

Enterprises take on different attributes that are often correlated to the predominant culture of the country from which the company<sup>4</sup> originates. No compliance program will succeed unless it is attuned to the geographic culture of the enterprise. A good starting point is to identify what type of geographic culture predominates at the company. I will admit at the outset that the formulation that follows is simplified, perhaps even over-simplified, but it is necessary to devise a compliance program that fits with, rather than fights with, the prevailing geographic culture, which will define the style of management and communication in the company.<sup>5</sup>

Consider the four basic types of corporate cultures, as follows:

- a) *The “Incubator.”* This is an organization that places itself secondary to individual fulfillment, and promotes self-expression by its employees. It is very egalitarian, and has a minimal corporate hierarchy. It defines itself by an emotional commitment, and thinks of itself (and its employees) as creative and innovative. This might be considered the Swedish model. Antitrust compliance messages should stress how the self-actualizing individual should behave in a way that will be best for him- or herself as well as being best for the organization.
- b) *The “Family.”* This is an organization that emphasizes personal and close relationships. It is very hierarchical, promotes respect for elders, and is power-oriented (you follow your leader). Loyalty is valued, and there are usually long-term relationships between the employee and the company. The atmosphere in the company is set by the “father” or the “elder brother.” Companies of this kind can be found in Japan, Singapore, South Korea, Spain, Italy, and India. Antitrust compliance messages should stress the importance of

---

<sup>3</sup> For brevity, I’ll refer to the chief compliance officer, or CCO, as having primary responsibility for compliance. In some companies, this responsibility may fall to the general counsel, and while there is controversy about where this responsibility should lie, that subject is beyond the scope of this article. The main point is that *someone* needs to be responsible, and who does it becomes less important as long as whoever does it is effective.

<sup>4</sup> Unless indicated to the contrary, enterprise, corporation, business entity, and company all mean the same thing.

<sup>5</sup> This scheme is from Charles Tidwell, *Intercultural Communication and Business*, <http://www.andrews.edu/~tidwell/bsad450/oldBSAD450/Lect11.htm>

independent competition in showing loyalty to the company, as well as following the guidance of the leader and never colluding with competitors.

- c) *The “Guided Missile.”* This enterprise is highly egalitarian, task-oriented, and somewhat impersonal. It emphasizes the team approach, and will often use a cross-disciplinary or matrix organization. The emphasis is on performance, and loyalty tends to focus on a profession or project rather than on the company. Employees are expected to have an intrinsic motivation to perform in these companies, which are often found in the United States, United Kingdom, and Canada. The antitrust message can discuss self-interest, and how employees that master the antitrust rules are most likely to accomplish their business goals and advance their careers.
- d) *The “Eiffel Tower.”* This type of company has a hierarchical structure that places more emphasis on a person’s position than their function. The leader is boss, not the father, and relationships on the organization chart are very specific. One’s role in the enterprise determines their status, and it is highly bureaucratic. Rules dominate this company, and careers may depend upon one’s professional qualifications. Companies with these attributes might be found in Germany or Austria. Antitrust compliance messages can be more in the form of directives from the top, but should also touch on antitrust compliance as an attribute of professional competence.

As with all simplified models, there is probably no company that fits precisely into one of these four kinds of geographic cultures. The key is not to pigeonhole a company and then use that characterization to guide everything that is done. Instead, one should identify the attributes that are present, and use that learning to guide how a compliance program is implemented. For example, if a company is highly individualistic and not rules driven, then imposing an antitrust policy by fiat is unlikely to work. Instead, as noted, one might approach the policy communication by stressing how compliance with the antitrust laws are in an individual’s self-interest, and how following the rules will facilitate career advancement and will enable superior performance by the company.

### III. THE MANAGEMENT CULTURE

The second piece of cultural analysis requires a look at the CEO and how he or she runs the organization. There are severe danger signs for antitrust compliance when it becomes clear that nobody can say no to the CEO about anything. Huge salaries to the CEO, which may or may not be tied to corporate performance, provided by a rubber-stamp board, are another warning sign.

This kind of company is marked by an environment where the CEO can say “La compagnie, c’est moi.” When there is a cult of the personality, there is a risk that the CEO can and will squash procedures (including compliance rules) to do what he or she wants to do at any given moment. In some companies there are no rules, except what the CEO decides. This situation may have come about since the CEO was very successful, or it may be due to a board hoping that a strong leader can rescue a company in trouble. Or it may be due to a board that is dominated by the CEO’s friends or relatives and, in order not to threaten their cushy seats, they do not exercise any meaningful corporate governance.

Unfortunately, examples of this kind of CEO abound. The excesses of Bernie Ebbers and Dennis Koslowski led to the passage of the Sarbanes-Oxley Act in an effort to impose statutory controls on their otherwise uncontrollable behaviors. The biography of Steve Jobs reveals that his successes, as well as his failures, were due to his stubborn personality that unhesitatingly

discarded people or ignored voices that disagreed with his. Several examples revealed that Jobs had no interest in competition where agreements with competitors<sup>6</sup> or destruction of competitors were possible. And Jon Corzine at MF Global, with a history of taking huge risks, ignored warnings of excessive risk that ultimately led to the bankruptcy of his company.

In a situation like this, it is going to be very difficult to bring about effective compliance rules, because the CEO is not accustomed to any rules other than his or her own. Therefore, the CCO must, to the extent he or she can, use the CEO's personality to bring about good results even if he or she doesn't really want it. For example, since most CEOs have big (and strong) egos, the compliance program can be presented as a way to gain the CEO publicity as a leader, and to gain respect among his or her peers. The compliance messages to the work force can be tailored to reflect well on the CEO, so that his or her ego is always massaged. A key job of the CCO may be to find someone who has the ear of the CEO, and use that person, with subtlety where possible, to make sure the important messages about compliance get through.

The egocentric CEO may not be evil in the conventional sense, but the attitude verges on sociopathic. These CEOs just don't care. In other corporations, the culture of not caring about legal rules may be pervasive—each person is invited to take advantage of whatever opportunity is available, regardless of compliance issues. This was the situation at ADM, as related by Mark Whitacre, that resulted in antitrust litigation involving lysine and other commodities. Whitacre saw that other employees had little “side deals” going on where they were able to profit and, if they were caught, there was little or no punishment. In such an environment, why not join in? This was combined with an attitude that “the competitor is my friend; the customer is my enemy” that supported the rampant antitrust violations.

Communicating the business benefits of compliance—and the costs of noncompliance—may help. Fines and treble damages imposed on other companies, and jail sentences imposed on executives involved in antitrust violations, may help convince the egocentric CEO that paying attention to the antitrust laws is a good idea. Particularly with consumer products, damage to a company's ethical reputation is immediately reflected in lost sales, even if there is no problem with the products as such. With social media communications dominating, news about a problem will spread instantly, and consumers never hesitate to express their opinions, including inviting their friends to boycott the company. Publicity about whistleblowing, whether internal or external, can help provide an avenue for employees to report violations and help put a brake on a culture of antitrust violation.

Studies show that employees work harder and are more creative when they are proud of their company. Using the CEO as a role model to inspire the employees to be ethical in everything they do can put a halo on the CEO that he or she might like—and be afraid to lose. Getting awards for being the “most ethical” company, or having the best code of conduct, helps solidify an image that one would be reluctant to tarnish.

---

<sup>6</sup> See, for example, *In re: High Tech Employee Antitrust Litigation*, No. 5:11-cv-02509-LHK (N.D. Cal.), a complaint filed in 2011 on behalf of employees of Adobe Systems, Inc., Apple, Inc., Google Inc., Intel Corp., Intuit Inc., LucasFilm Ltd., and Pixar, that alleges that the defendants conspired to fix and suppress the compensation of their high tech employees through interconnected agreements, and required that these companies agree: (1) not to recruit one another's employees, (2) notify one another when making an offer to another company's employee, and (3) when offering a position to another company's employee, none of the companies would counteroffer the initial offer.

Controlling the excesses of the CEO requires educating both the CEO and the board of directors. This, of course, may be easier said than done, since big ego directors and executives, to be charitable, have limited time available to attend training sessions or, to be less charitable, think they already know all they need to know about such subjects as antitrust. (“Yeah, I’ve heard about that for 25 years.”) The problem is that the risks often are not translated well. These executives do not understand how what they do implicates the antitrust laws because the training has been so bad. A result of poor training over the years has resulted in the executive “turning-off” when it comes to hearing more about antitrust. An additional complication is the usual situation on the board of directors where the antipathy to more antitrust training is combined with a lack of understanding of corporate compliance. Board members do not understand what compliance officers do, what the risks are to the corporation, how the Sentencing Guidelines work, etc.

All of this presents a challenge to the CCO to be more effective in communicating this information. The antitrust risks must be couched in examples that are directly relevant to both the position of the CEO and the nature of his or her business. Directors need to understand that this is part of their oversight duty, including, in the most extreme cases, personal liability for failing to exercise that duty.

As will be discussed in the next section, the CCO needs to create messages the CEO can use. There must be a message sent to all levels of management, from the very top, that ethics are important, and that there are no business goals that will justify doing something illegal or unethical. There should be a strong statement that management means what it says, and examples provided of employees who were disciplined or terminated for not obeying the rules. One might pick up on the message from Warren Buffett: “If you lose dollars for the firm by bad decisions, I will be understanding. If you lose reputation for the firm, I will be ruthless.” It is not by accident that Buffett and his company are so well respected.

#### **IV. INDUSTRIAL**

Some industries are marked by an intense identification among the industry, the companies that are in the industry, and the individuals who work for those companies. In industries of this kind, employees may move among companies frequently, and there is usually an active trade association that brings together the players, often including their families. In industrial cultures like this, antitrust compliance needs to focus on the cultural risks that are constantly present. The executives and lower-level employees must be educated as to what they can and cannot talk about. All trade association activities need to be tracked, and attorney presence at trade association meetings becomes important.

#### **V. PROFESSIONAL**

Just as some industries may be marked by a culture that does not support competition, there are certain professions that encourage communication and sharing that may run counter to the dictates of the antitrust laws. Often these are found among scientists or academics, for whom the free sharing of information is part of the culture of advancing learning. Here, violations may occur innocently at professional association meetings, where employees deliver papers or engage in spirited discussions with colleagues. The antitrust compliance controls should stress education of these already very educated employees about what they can, and cannot, talk about. Pre-reading of papers that are to be delivered can catch inadvertent antitrust violations, as well as releases of proprietary information, which is the other big risk with employees of this type.

## VI. THE STRUCTURAL CULTURE

Assuming there is a CEO who will be supportive of the compliance message, the job is just beginning. One cannot assume that antitrust compliance will happen automatically. The CCO must provide the tools to each level of management to ensure that compliance happens. Every manager must have compliance goals, developed jointly with the CCO, that are part of the annual compensation system. Every manager needs to be responsible for ensuring that his or her staff takes required training. The CCO must provide a blueprint for each level of management that outlines the risks for that job area, and what the compliance plan should be. This might also include subjects to discuss at meetings, such as examples of peer group companies that got into antitrust trouble and an explanation of why.

The key to successful cultural inculcation of antitrust compliance is to provide information that is relevant to each person's job. The focus should not be on the statutes or the cases, but on the life of the employee. What does the employee see, hear, do, every day? How might antitrust risks pop-up in that environment? The Sherman Act cannot be explained to employees with the expectation that they will automatically understand it means they cannot talk about prices to their buddy at a competitor. But one can incorporate antitrust messages into other kinds of training that employees receive, so they won't even realize that they are getting compliance training; they will just be learning how to do their jobs. Antitrust compliance depends on consistent cultural support—top, middle, and bottom.

The CCO does not need to be the one doing all of this communicating, but should facilitate it. This means that the CCO needs to be involved in senior management meetings, and be aware of major strategic moves. For example, before an acquisition is made or staff is reduced, there should be an examination of what the impact on antitrust compliance might be.

Employees follow the leads of their managers at all levels, and the CCO needs to make sure that those managers are sending the right messages by making sure they have the right materials. With an ambivalent CEO, the CCO can create a great tone at the top even if the CEO doesn't realize what is happening. But the CCO needs to listen carefully to the corporate mission and goals, understand the style of management, and craft the ethics message to fit.

## VII. CONCLUSION

Antitrust compliance depends on several components. It may be impossible to fight a complete jerk as CEO, but one can try to flatter him or her into doing the right thing. And assuming there is at least minimal support from the top, it is the job of the CCO to make sure that the right information gets to the right people in a way consistent with the corporate style. As long as human nature is fallible, there is never a guarantee of perfect behavior, but by being smart about using the corporate culture, there is a much better chance of achieving corporate compliance.