Antitrust is a potential high-risk area for many companies, both big and small. This is especially true in recent years with increased criminal enforcement efforts by the Department of Justice Antitrust Division. In the last five fiscal years alone, the Division has obtained almost $5 billion in criminal fines and the fines per company have significantly increased. Since 2010, 40 companies have paid criminal fines of $10 million or more. The Division is also prosecuting more individuals and those individuals are being sentenced to prison terms with more frequency and for longer periods of time. Almost twice as many individuals are going to prison for antitrust violations when compared to the 1990s and the average prison sentence is over three times longer than in the 1990s. Add in the potential civil liability, and the consequences of an antitrust violation are even more severe and substantial. Given the high stakes for both companies and individuals, it is important that companies take a proactive approach to mitigating their antitrust risk. Below are some preemptive ways for companies to reduce and manage their antitrust risk and ensure that their employees are steering clear of antitrust violations.

- **Implement an effective compliance program.** Compliance programs have two overarching objectives: prevention and detection. An effective compliance program should aim to educate employees, issue-spot risks, deter risky conduct, and encourage employees to report potential issues. An effective compliance program should also be tailored to a company’s particular areas of risk, regularly reviewed and updated, endorsed by senior management, and consistently enforced. It is also beneficial to create incentives for identifying and disclosing questionable conduct, such as tying compliance and oversight to reviews, career progression or compensation decisions.

- **Develop and circulate a written policy statement and guidelines.** Communication is key to any effective compliance program and developing a written policy statement and guidelines can help in that regard. The policy statement should express the company’s commitment to complying with the antitrust laws and should be accompanied by guidelines that lay out the practical “do’s and don’ts” in clear language that is easy to understand. Each employee should be required to acknowledge receipt, understanding, and compliance with the statement and guidelines, and be directed to experienced counsel should they have any questions.

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1 In fiscal year 2013, the Division filed 50 criminal cases and obtained $1.1 billion in criminal fines. Department of Justice Antitrust Division, “Criminal Enforcement: Fine and Jail Charts Through Fiscal Year 2013,” available at http://www.justice.gov/atr/public/criminal/264101.html.


- **Institute mandatory employee training.** Employee training sessions should be conducted in-person by knowledgeable counsel, but can also incorporate additional video or web-based training tools. Counsel should use practical examples to educate employees on the do’s and don’ts, especially as it relates to their specific business. Effective training sessions educate employees on the consequences of antitrust violations for both the company and the individuals involved. It is also important to dispel employees of the notion that the government would never be able to detect their conduct. A useful method is educating employees on the government’s paths of detection, such as the use of dawn raids and the amnesty program.

- **Conduct regular antitrust audits.** An effective antitrust audit reviews and evaluates a company’s potential antitrust risk areas, and provides recommendations for ways to eliminate or reduce those risks. Generally, an antitrust audit will involve employee interviews and/or questionnaires and will include a collection and review of employees’ email and documents. The scope of the interviews and document collection and review will depend on the purpose and goals of the audit, and should be specifically tailored to the company’s pre-identified antitrust risk areas.

- **Involve antitrust counsel in high-risk meetings with competitors.** Certain meetings with competitors pose high antitrust risks for companies. Such meetings are lawful as long as they are not used to reduce competition, but the meeting discussion must remain within the boundaries of the antitrust laws. Antitrust counsel involvement can help to achieve this objective. Meeting agendas should be reviewed by counsel and adhered to during the meeting, and accurate meeting minutes should be kept and reviewed by counsel following the meeting. It is also advisable to have antitrust counsel present at the meeting to re-direct risky discussions and to certify, should questions later arise, that the discussions remained within the antitrust boundaries.

By taking a proactive approach to antitrust compliance, companies can mitigate and manage their antitrust risks, which can save millions of dollars in the long run and also protect the company and employees from potential criminal prosecution. Antitrust counsel can help companies develop and implement a compliance strategy that is tailored to their business and targets their unique antitrust risks.

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