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Targeting Antitrust Compliance Efforts to Mitigate Risk

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I. Introduction

Traditional corporate antitrust compliance programs are typically broad in scope and often standardized. Compliance progams canvas a company's organizational structure, identifying all personnel that are likely to have contacts with competitors. Those personnel attend compliance programs to learn antitrust principles where basic policies are laid out and lists of do's and dont's are circulated. Audits, if conducted at all, often focus on reviewing documentation from trade association meetings or surrounding sales transactions with competitors. An active general counsel's office may also sample executive email for improper contacts with competitors. A good program effectively communicates management's commitment to compliance and demonstrates to employees that there is an internal risk of detection.

Programs that stop there, however, miss an important and efficient compliance technique by ignoring external information. A targeted compliance approach, using information about competition authorities' current enforcement efforts, can be used to pinpoint potential misconduct and mitigate exposure by increasing the likelihood that the company receives complete amnesty for any misconduct or obtains early advantage in a breaking investigation.

Some antitrust problems and future government investigations are predictable. Future enforcement efforts, especially those of the U.S. Department of Justice ("DOJ"), often grow from existing investigations for two principle reasons. First, the DOJ awards companies implicated in existing investigations lower fines in exchange for being the first to disclose a separate undisclosed conspiracy. Companies, therefore, race to identify and disclose new conduct in which they have engaged. The policy, known as amnesty plus, has been extremely successful in encouraging targeted companies to "clean house" and disclose any additional misconduct they have taken.[1] For example, the original lysine cartel, famous for its videotape of a cartel meeting and for the movie starring Matt Damon, led to the prosecution of four additional cartels with fines and fines totaling $225 million. Second, even if the incentives of amnesty plus are insufficient to generate disclosure, the DOJ will likely pursue predictable leads. The DOJ employs a practice of cartel profiling. It has found that individuals and companies that fix prices in one area tend to fix prices in other areas. By following the employment histories of the individuals and the markets in which the companies participate, the DOJ is able to increase its chances of discovering additional conspiracies.

A company, therefore, can predict the markets the DOJ will target in the near term – those in which current targets participate or key individuals have had responsibility. By focusing its compliance efforts in those areas, a company can beat the DOJ and the current targets seeking amnesty plus to the punch and gain leniency. For example, if the DOJ is investigating the market for widgets and Companies A, B, and C compete in the widget market. It is likely that the DOJ will be focusing its resources on investigating markets in which employees previously or subsequently had responsibility. Similarly, one or more of the three companies likely will be

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[1] Other governmental authorities similarly encourage targets to reveal new investigations. Like the DOJ, the Canadian Competition Bureau both offers complete leniency for the first company to disclose conduct and takes into consideration disclosures of additional conduct when negotiating fines for subsequent companies. Competition Bureau Canada, Immunity Program: Frequently Asked Questions 15, http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Immunity-Program-FAQ-e-2010-06-10.pdf/$FILE/Immunity-Program-FAQ-e-2010-06-10.pdf (last accessed Jan. 9, 2012).

conducting internal investigations into the other markets in which they compete to avail themselves of the amnesty plus policy. An outside company can determine whether it competes with Companies A, B, or C and target its compliance efforts in those markets. If any misconduct can be identified quickly, it may be able to disclose the conduct before Companies A, B, and C and win the race for leniency.[2]

Failure to get ahead of DOJ's enforcement efforts and instead receiving a grand jury subpoena (or even worse, being subject to an FBI search) can cause significant harm to the company and its employees. Fines are severe and being the first to disclose competition violations can save millions of dollars. Three recent DOJ investigations into the markets for LCD panels, air cargo transportation, and DRAM yielded twelve fines in excess of $100 million. The European Commission ("EC") issued additional fines in these markets of € 649 million, € 799 million, and € 322 million, respectively.

Virgin Atlantic appears to be one company that has already employed this targeted compliance strategy for maximum benefit. In February 2006, the DOJ and antitrust authorities from around the world launched comprehensive dawn raids and searches of airline cargo operations.[3] Press releases trumpeted the international effort by several enforcement authorities.[4] A number of airlines were targeted in United Kingdom, including British Airways. Virgin Atlantic had not been a target of the investigation, but it appears to not have taken false hope from having been spared. Instead within four months, it appears to have investigated and obtained leniency from U.K.'s Office of Fair Trading ("OFT") and the DOJ for price fixing with British Airways the fuel surcharges that were charged to passengers. In June of the same year, the OFT publicly launched its investigation into the passenger business.

By getting out ahead of British Airways and the investigators, Virgin Atlantic avoided all fines and prosecution. British Airways, on the other hand, paid a record fine of £ 121.5 million to the OFT[5] and pleaded guilty in the United States to a criminal violation of the Sherman Act in the passenger business and paid a $100 million fine.[6]

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[2] Scott Hammond recognized this possibility in a 2004 speech, "Cornerstones of an Effective Leniency Program." Scott D. Hammond, Dir. of Criminal Enforcement, Antitrust Div., U.S. Dep't Justice, Cornerstones of an Effective Leniency Program (Nov. 22-23, 2004), http://www.justice.gov/atr/public/speeches/206611.htm (last accessed Jan. 9, 2012).

[3] Vicki Kwong and Heejin Koo, *Japan Air, Cathay Pacific in EU's Air Cargo Probes (Update2)*, Bloomberg News, Feb. 15, 2006, at http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aanRkKkQl7Xk&refer=japan (last accessed Jan. 9, 2012).

[4] *Airlines hit by dawn raids*, Global Competition Review, Feb. 14, 2006, http://www.globalcompetitionreview.com/news/article/6417/airlines-hit-dawn-raids/

[5] Press Release, Office of Fair Trading, United Kingdom, "British Airways to pay record £121.5m penalty in price fixing investigation," 113/07 (Aug. 1, 2007), http://www.oft.gov.uk/news-and-updates/press/2007/113-07.

[6] Plea Agreement, United States v. British Airways PLC, 07-cr-183 (D.D.C.Aug. 23, 2007). British Airways also pled guilty to fixing prices for air cargo transportation and paid an additional $200 million in the United States.

II. Traditional Compliance Programs

Traditional antitrust compliance programs are blunt, standardized instruments. Corporations are generally advised that a compliance program consists of a policy, a training program, and periodic audits.

Policy. Companies are advised to implement a policy statement for compliance with the antitrust laws. It typically is placed in the beginning of a compliance manual and can take various forms. Sometimes it is a short direct statement, other times it is a foreword explaining the purpose of the compliance manual. Longer policy statements sometimes include an explanation of the illegal conduct most pertinent to the company, a recognition that multiple jurisdictions laws apply to the company, a statement of the effect of violations on the company, and instructions to contact the legal department if there is doubt as to whether a course of action contravenes competition law. The essential element in any statement indicates that the company supports the competition laws and its policy is that all employees abide by them.[7]

Training Program. Compliance training typically begins with a more detailed compliance manual that builds on top of the policy. Manuals contain an explanation of the various types of hard-core antitrust or competition violations, including price fixing, bid rigging, customer allocations, market or territory allocations, and agreements restricting output. They often also explain other violations like resale price maintenance, group boycotts, tying arrangements, and exclusive dealing. Manuals identify and explain common situations in which these violations may occur. For instance, trade associations provide a common forum for extra-legal competitor contact.[8] Similarly, the negotiation of joint ventures, mergers, and intellectual property transfers often involve contact with competitors where antitrust violations may arise. Not surprisingly, the portions of the manual that make the most impact with employees are the explanation of the penalties, both fines and jail terms, and a list of specific, practical do's and dont's. Finally, manuals contain instructions on who to contact to report illegal conduct. As recommended by the U.S. Sentencing Guidelines, companies often set up an anonymous reporting system to encourage reporting.

It is standard practice to augment the manual with antitrust training for all employees in sales, purchasing, and other groups engaging in activity that provides the opportunity to collude.[9] Programs review the standards in the guidelines, explain practical examples, and provide a forum for questions from employees. The training programs also allow employees to become familiar with the compliance officers, which increases the likelihood that employees will approach the legal department with questions as they conduct the company's business. Oftentimes, compliance officers play video scenarios underscoring or testing some of the guidelines. Among the most effective videos contain footage from actual FBI surveillance tapes obtained in prosecuted cases. Seeing actual executives sitting around a conference room fixing prices, laughing about how competitors are friends and customers are not, typically makes the

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7 *See* Materials on Antitrust Guidance §1:3 (Thompson Reuters/West, 3d ed. Feb. 2011).

8 Scott D. Hammond, Dep. Assistant Attn'y Gen., Antitrust Div., U.S. Dep't Justice, Caught in the Act: Inside an International Cartel (Oct. 18, 2005), http://www.justice.gov/atr/public/speeches/212266.htm (last accessed Jan. 9, 2012).

9 *See* Materials on Antitrust Guidance §1:3 (Thompson Reuters/West, 3d ed. Feb. 2011).

compliance lesson come to life – particularly, when informed of the real-life jail terms that were served by the executives.[10]

At the end of the training program, it is customary to have employees sign a certification that they have received the policy and the manual and agree to abide by the company's antitrust policy. Some certifications require disclosure of any conspiracies of which they are aware. Such certifications have been viewed favorably by courts as a way of demonstrating that the company is seeking to terminate and effectively prevent violations of the antitrust laws.[11]

Periodic Audits. The final piece of the traditional compliance program is the competition audit. It generally focuses on the sales and marketing department (as well as the corporate development department for merger and joint venture) by reviewing sales files, collections of competitor information, and documentation from trade association meetings or surrounding sales transactions with competitors.[12] They may also sample email from a select group of executives or managers to identify any communications with competitors.

Compliance programs like those described above are designed to educate a broad audience on conduct prohibited by competition law. Audits target activity where enforcement authorities traditionally have found collusive conduct. These practices are valuable for their own purposes, but often are akin to trying to find a needle in a haystack.[13]

III. Enforcement Methodologies and Policies

The DOJ has built its criminal antitrust enforcement efforts on its leniency program.[14] Pursuant to DOJ's leniency policy, in return for disclosing an antitrust conspiracy, a company fulfilling a few minimum criteria will receive complete leniency – no corporate fines and no prosecution of executives.[15] A less well-known but vital part of the program – and one that has proven most effective – is a variant called the amnesty plus policy. The amnesty plus policy is triggered when a company is already subject to investigation and prosecution. That company can receive a

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[10] See Transcript of Video Tape of March 10, 1994 Cartel Meeting in Maui, Hawaii Co-Conspirator Explains How End-of-Year Compensation Scheme Eliminates Incentive to Cheat on Cartel, http://www.justice.gov/atr/public/speeches/4489-7.htm (last accessed Jan. 9, 2012). The video from the March 10, 1994 meeting in Maui, Hawaii containing the portion relating to competitors being friends is publicly available at http://www.youtube.com/watch?v=atojWdNVKSkj (last accessed Jan. 9, 2012).

[11] Memorandum and Order, U.S. v. Stolt-Nielsen SA, No. 06-cr-466 (E.D. Pa Nov. 29, 2007)

[12] William J. Kolasky, Deputy Assistant Attn'y Gen., Antitrust Div., U.S. Dep't. of Justice, Antitrust Compliance Programs: The Government Perspective (July 12, 2002), http://www.justice.gov/atr/public/speeches/224389.pdf (last accessed Jan. 9, 2012).

[13] Many of the traditional compliance practices flow from the U.S. Sentencing Guidelines, which look to whether a company has an "effective" compliance and ethics program as a mitigating factor in determining an organization's fine. Although the Guidelines state that a compliance program need not be perfect to be effective, the DOJ has set standards for its plea negotiations that come close to requiring a company to identify violations before it does, thereby making a targeted compliance program based on the DOJ's own actions all the more important.

[14] For example, 75% of the DOJ's cases since 2004 have been assisted by a leniency applicant. U.S. Gov't Accountability Office, GAO-11-619, Criminal Cartel Enforcement Stakeholder Views on Impact of 2004 Antitrust Reform Are Mixed, but Support Whistleblower Protection 59, note 4 (July 2011), *available at* http://www.gao.gov/new.items/d11619.pdf (last accessed Jan. 9, 2012).

[15] Antitrust Div., U.S. Dep't of Justice, Corporate Leniency Policy, http://www.justice.gov/atr/public/guidelines/0091.htm (last accessed Jan. 9, 2012).

reduction in fines and more favorable treatment of its executives by disclosing a second conspiracy – for which the company also receives the benefit of complete leniency. The policy is described in the DOJ's "Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters" from November 19, 2008.[16] The FAQs note that the policy is a direct result of the tendency of new investigations to arise out of existing ones. The DOJ uses it to "induce[] firms that are already under investigation to clean house and report violations in which it may be involved in other markets."

History, including the success of the amnesty plus program, has taught the DOJ that cartel behavior generally is not limited to one product or one sales department. A competitor engaging in price fixing in one market or product line is more likely to engage in price fixing in a second market or product line. It therefore employs an investigative technique called "cartel profiling." Scott Hammond discussed this technique a decade ago, explaining that the Division "will not relax and wait for companies to come forward and report new violations. Instead, the Division has had success engaging in 'cartel profiling' aimed at ferreting out these violations. The Division will target its proactive efforts in industries where we suspect cartel activity in adjacent markets or which involve one or more common players from other cartels."[17] In 2004, he explained that the DOJ will also look at individuals implicated in known conduct: "When we are able to identify culpable executives, we begin digging deeper to determine whether they had pricing authority on other products over time and then for indicia of collusion in those products as well. We might investigate who mentored the culpable executives and what other products they were responsible for overseeing."[18]

The DOJ's techniques and policies, especially the amnesty plus policy, have played a major role in the DOJ's success in prosecuting cartels. In 2006, roughly half of the Divisions international cartel investigations had been initiated by evidence from investigations into different markets:[19]

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[16] Scott D. Hammond & Belinda A. Barnett, Antitrust Div., U.S. Dep't of Justice, Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters (November 19, 2008), http://www.justice.gov/atr/public/criminal/239583.htm#N_10 ("A large percentage of the Division's investigations have been initiated as a result of evidence developed during an investigation of a completely separate conspiracy. This pattern has led the Division to take a proactive approach to attracting leniency applications by encouraging subjects and targets of investigations to consider whether they may qualify for leniency in other markets where they compete.").

[17] Scott D. Hammond, Dir. of Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How do you Put a Price Tag on an Individual's Freedom? (Mar. 8, 2001), http://www.justice.gov/atr/public/speeches/7647.htm (last accessed January 9, 2012).

[18] Scott D. Hammond, Dir. of Criminal Enforcement, Antitrust Div., U.S. Dep't Justice, Cornerstones of an Effective Leniency Program (Nov. 22-23, 2004), http://www.justice.gov/atr/public/speeches/206611.htm (last accessed January 9, 2012).

[19] Thomas O. Barnett, Assistant Attn'y Gen., Antitrust Div. U.S. Dep't of Justice, Criminal Enforcement of Antitrust Laws: The U.S. Model (Sep. 14, 2006), http://www.justice.gov/atr/public/speeches/218336.htm ("The Division's 'Amnesty Plus' program serves the same purpose. 'Amnesty Plus' refers to benefits that prosecutors can offer to a cartel member who discloses previously undetected antitrust offenses involving a cartel different from the one that first brought that cartelist to the prosecutors' attention. Amnesty Plus induces firms that are already under investigation to clean house and report violations in which it may be involved in other markets. Roughly half of the Division's current international cartel investigations were initiated by evidence obtained as a result of an investigation of a completely separate market. Most of the corporate defendants in international cartel cases are multinational companies selling hundreds of different products. The Division's experience is that if a company is

Vitamins. The DOJ's largest investigation was the vitamins cartel. The DOJ started investigating misconduct affecting sales of vitamins B3 and B4 vitamins.[20] Its efforts led to evidence that there were also conspiracies affecting vitamins A, C, and E. The evidence prompted Rhone Poulenc – a producer of vitamins A and E to apply for leniency. Its cooperation resulted in plea agreements from F. Hoffman LaRoche and BASF of $500 million and $225 million, respectively for misconduct affecting not only vitamins A, C, and E, but also vitamins B2 and B5, vitamin premix, and beta-carotene.[21] In all, the DOJ assessed fines in excess of $900 million against 12 companies for conspiratorial conduct for nine different products.

Lysine and Progeny. The most publicized antitrust cartel, the lysine cartel – resulted in the prosecution of four additional cartels. As is well-known in antitrust lore, the mid-1990s investigation into the lysine cartel uncovered conduct in the citric acid cartel. As Scott Hammond explained in 2001, it also lead to prosecutions for conduct affecting sales of sodium gluconate, sodium erythorbate, and maltol. One investigation lead directly into the next and resulted in fines of over $225 million[22] over the five conspiracies.[23]

Rubber Chemicals and Progeny. Similarly, in March 2004, Crompton pled guilty to conspiring to fix prices for various rubber chemicals and agreed to pay a $50 million fine, which was below the fine range recommended by the U.S. Sentencing Guidelines. The DOJ agreed to move for a reduction from the Guidelines range because Crompton substantially assisted not only the rubber chemicals investigation but also investigations into other chemical industries.[24] Mr. Hammond explained in his 2006 speech titled, "Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations," that Crompton had earned amnesty plus cooperation credit for disclosing conspiracies in ethylene propylene diene monomers (EPDM), heat stabilizers,

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fixing prices in one market, the chances are good that it is doing so in other markets, and that the executives involved in one cartel have likely been involved in others, or have worked with other executives who taught them the tricks of the collusion trade. The Division has had great success pursuing a strategy of 'cartel profiling,' in which one investigation eventually gives root to prosecutions in a half-dozen or more different markets. Through Amnesty Plus, exposure of a single member of a single cartel has the potential to bring a series of cartels tumbling down like a house of cards.").

[20] Scott D. Hammond, Dir. of Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How do you Put a Price Tag on an Individual's Freedom? (Mar. 8, 2001), http://www.justice.gov/atr/public/speeches/7647.htm (last accessed January 9, 2012).

[21] *See* Government's U.S.S.G §8C4.1 Motion for Departure and Memorandum in Support, United States v. F.Hoffman-La Roche Ltd, 99-cr-184 (N.D. Tex. May 20, 1999) *and* Antitrust Div., U.S. Dep't Justice, Sherman Act Violations Yielding a Corporate Fine of $10 Million or More, http://www.justice.gov/atr/public/criminal/sherman10.html (last accessed Jan. 9, 2012).

[22] ADM paid $100 million for its roles in the lysine and citric acid cartels. Kyowa Hakko Kogyo, Co., Ltd. and Ajinomoto Co., Inc. each paid $10 million for the lysine cartel. Haarmann & Reimer Corp ($50 million), F. Hoffmann-La Roche, Ltd. ($14 million), and Jungbunzlauer International AG ($11 million) pled guilty for their roles in the citric acid cartel. Fujiswa Pharmaceuticals Co. ($20 million) and Akzo Nobel Chemicals, BV & Glucona, BV ($10 million) pled guilty for their roles in the sodium gluconate conspiracy. Pfzier paid $20 million for participation in the maltol and sodium erythorbate conspiracies. Antitrust Div., U.S. Dep't Justice, Sherman Act Violations Yielding a Corporate Fine of $10 Million or More, http://www.justice.gov/atr/public/criminal/sherman10.html (last accessed Jan. 9, 2012).

[23] Scott D. Hammond, Dir. of Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How do you Put a Price Tag on an Individual's Freedom? (Mar. 8, 2001), http://www.justice.gov/atr/public/speeches/7647.htm (last accessed January 9, 2012).

[24] Plea Agreement, United States v. Crompton Corporation, 04-cr-0079 (N.D. Cal. Mar. 28, 2004), available at http://www.justice.gov/atr/cases/f214400/214448.htm (last accessed Jan. 9, 2012).

acrylonitrile-butadiene rubber (NBR) and polyester polyols. These additional markets yielded fines over $45 million.[25]

Air Cargo/Freight Forwarding. The air cargo investigation appears to have spurred investigation into the freight-forwarding industry (as well as the long-haul passenger business in the United Kingdom). In February 2006, the DOJ and European Commission made public their investigations into the air cargo industry through unannounced visits to various cargo carriers. The focus of the investigation was certain surcharges charged to freight forwarders. In many instances freight forwarders acted as an intermediary between the carriers and the end customers and passed costs along. The next year (in October 2007), both the DOJ and the EC conducted surprise investigations of freight forwarders.[26] The DOJ issued a subpoena to Expeditors in October 2007, and by November 2010, seven freight forwarders – EGL, Inc., Kuehne + Nagel International AG, Geologistics International Management Limited, Panalpina World Transport Holding Ltd., Schenker AG and BAX Global Inc. – had pled guilty to several conspiracies fixing a variety of fees and charges in connection with the provision of freight forwarding services for international air cargo shipments.[27] The EC conducted its own investigation and issued a Statement of Objections in February 2010 related to the provision of freight forwarding services by air.[28]

IV. Using Current Enforcement Efforts to Target Compliance Efforts and Mitigate Risk

Targeting compliance efforts and mitigating exposure using current enforcement activity requires timely information and prompt assessment of businesses that may become subject to investigation. DOJ's and other antitrust authorities' policies are designed to de-stabilize cartels and create a race to disclose misconduct. The targets of the investigation will be seeking amnesty plus benefits, the leniency applicant will be searching for additional conduct to limits its exposure, and the DOJ will be expending resources to independently expand its investigation. All have a head start searching for additional improper conduct and possess greater knowledge of

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[25] Zeon Chemicals paid a $10.5 million fine and Bayer AG paid a $4.7 million fine for their participation in the NBR cartel. Antitrust Div., U.S. Dep't Justice, Sherman Act Violations Yielding a Corporate Fine of $10 Million or More, http://www.justice.gov/atr/public/criminal/sherman10.html (last accessed Jan. 9, 2012) *and* Plea Agreement, United States v. Bayer AG, No. 04-cr-0331 (N.D. Cal. Dec. 8, 2004), *available at* http://www.justice.gov/atr/cases/f206800/206845.htm. Bayer also paid $33 million for the polyester polyols conspiracy. Antitrust Div., U.S. Dep't Justice, Sherman Act Violations Yielding a Corporate Fine of $10 Million or More, http://www.justice.gov/atr/public/criminal/sherman10.html (last accessed Jan. 9, 2012).

[26] UTi responded to a grand jury subpoena related to pricing practices in the freight forwarding industry in 2007. In the same matter, the DOJ executed a search warrant on Uti's offices in Long Beach, California. UTi also received inquiries from the European Commission, South Africa, and Brazil related to freight forwarding investigations. UTi Worldwide Inc., Form 10-Q at Note 8 (June 6, 2011), *available at* http://www.sec.gov/Archives/edgar/data/1124827/000095012311057010/c16012e10vq.htm (last accessed Jan. 9, 2012)

[27] Press Release, Antitrust Div., U.S. Dep't Justice, Six International Freight Forwarding Companies Agree to Plead Guilty to Criminal Price-Fixing Charges, 10-1104 (Sep. 30, 2010), http://www.justice.gov/atr/public/press_releases/2010/262791.htm (last accessed Jan. 9, 2012) *and* Plea Agreement, United States v. Panalpina Work Transport (Holding), Ltd., No. 10-cr-00270 (D.D.C. Nov. 4, 2011) *available at* http://www.justice.gov/atr/cases/f277200/277283.pdf (last accessed Jan. 9, 2012).

[28] EC Statement: Antitrust – Commission confirms sending Statement of Objections to alleged participants in freight forwarding cartel, Mlex (Feb. 10, 2010), http://www.mlex.com/EU/Content.aspx?ID=89336 (last accessed Jan. 9, 2012).

facts to guide their searches. In some cases, the expansion of cases happens rapidly (within months). In other cases, it can take years.

A company that is not involved in an existing investigation but is looking to protect itself from the expansion of these investigations needs a number of tools: (i) a reliable method to learn about new developments ; (ii) a system to quickly investigate whether it has any exposure; and (iii) the infrastructure to assess the results of the investigation and determine how to proceed.

New developments in antitrust investigations can be uncovered through several avenues. The most obvious, but oftentimes least helpful, are press releases from a governmental authority. The DOJ, the EC and other governmental authorities throughout the world issue press releases at critical stages of their investigations, including when plea agreements are reached (U.S.), a Statement of Objections is issued (EU), and occasionally unannounced inspections are conducted/search warrants executive (EC/US). Governmental press releases often are less helpful than other information sources because investigating authorities generally maintain as much confidentiality as possible. The information also tends to be fairly bare-bones and can be quite late in the investigation.[29]

News reports, on the other hand, generally are quite helpful. They often occur when the EC or other authority conduct surprise investigations or when the U.S. executes a search warrant or issues a subpoena. They often provide a company with the earliest notice of an investigation. Trade press often reports on these events, as do competition law news outlets.

Once a company learns of an existing investigation, it needs to be able to quickly identify any connections. The industry being investigated and the competitors involved will help identify areas to explore. The key is to identify the businesses of the company that compete or deal with companies being targeted, as well as any related businesses. Limiting the search only to businesses that are closely related to the publicized investigation is a mistake. The policies and enforcement practices are meant to require a complete "cleaning of house" -- so any business that competes with company under investigation should be evaluated for antitrust risk.

To assess the risk, the company needs the infrastructure in place to effectively interview employees with sales and pricing responsibility and review relevant documents. A critical piece that is easily overlooked is having IT support in place necessary to capture and search electronic documents, which often provide the most reliable information.

Finally, if misconduct is uncovered, the risk analysis needs to be completed quickly for the company to make a decision on whether to bring the misconduct to the relevant governmental authorities. Much of this decision will depend on factual questions about the extent of the conduct, when the conduct occurred, the jurisdictional reach of the various authorities, and the volume of commerce likely affected. The information will develop over time, but a decision needs to be made as quickly as practicable.

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[29] Similarly, mandatory company disclosures – generally arising out of securities regulations – tend to provide as little information as possible as late as possible.

V. Conclusion

Traditional compliance programs are broad based and rightfully so. They need to be able to detect issues whether or not there are current enforcement actions in those areas. However, failing to monitor and assess risks created by criminal investigations of competitors and in neighboring markets increases the likelihood that a company will fail to detect antitrust misconduct. By keeping abreast of regulatory authorities' activity, a company can augment its compliance efforts and increase the likelihood of avoiding severe penalties for itself and its employees.