

# AMERICAN ANTITRUST INSTITUTE

Corporate Compliance Programs: Enforcers  
Perspectives

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J. Robert Kramer II  
General Counsel, Antitrust Division



# Effective Compliance Programs

- Prevent violations from occurring by educating employees
- Facilitate early detection of violations
- Increase likelihood of being first to report illegal conduct/request leniency
- Avoid possible obstruction of justice charges by reducing chances of document destruction

# Antitrust Division Leniency Program

- Allows corporations and individuals to avoid criminal conviction and associated penalties
- Only first participant to come forward can qualify
- Effective compliance program may increase discovery of violation and chance of being “first-in”

# Effective Compliance Programs

- Promote “Culture of Compliance”
- Enable early detection and self-reporting
- Do not rely on only “paper” policies
- Include provisions for internal auditing and monitoring
- Follow requirements set forth in U.S. Sentencing Guidelines

# Effective Compliance Programs

- Company's governing authority should be knowledgeable about compliance programs and exercise "reasonable oversight."
- Day-to-day responsibility delegated to an individual who reports to senior management and has direct access to the governing authority.
- Respond appropriately to criminal conduct: improve the program; self-report; cooperate.

## Even With a Compliance Program...

- Goal should be to avoid violations
- Failed compliance program will not influence decision on whether or not to prosecute
- A compliance policy that leads to leniency is more generous than what a firm would get under the Sentencing Guidelines

# November 2010 Guidelines Updates

- New U.S.S.G. § 8C2.5(f)(3)(C) may allow fine reduction even with high-level personnel involved only if:
  - Individual(s) responsible for compliance program have direct reporting obligations to governing authority or appropriate subgroup;
  - The compliance program “detected the offense before discovery outside the organization or before such discovery was reasonably likely”;

# November 2010 Guidelines Updates Continued...

- New U.S.S.G. § 8C2.5(f)(3)(C) may allow fine reduction even with high-level personnel involved only if:
  - “The organization promptly reported the offense to appropriate governmental authorities”; and
  - “No individual with operational responsibility for the compliance and ethics program participated in, condoned, or was willfully ignorant of the offense.”



# Corporate Probation Requirements in AUO

- ATR requested and Court approved placing AUO on probation and creation of a corporate compliance program and use of an independent outside monitor:
  - Clear policy, standards and procedures; training; reporting systems and discipline/termination procedure.
  - Monitor for 3 years to assess policy and procedures; make recommendations and written reports; AUO duty to implement recommendations.

# Corporate Probation Requirements in AUO

- Monitor to be a recognized lawyer with substantial relevant legal practice (antitrust compliance programs) , paid for by AUO, but with no attorney/client relationship with AUO and reporting duties to the Probation Office
- This case was an easy call to seek compliance program. AUO joined the conspiracy from the very beginning of its existence.
- AUO had no history of lawful conduct or antitrust compliance.
  - Essentially starting from scratch to attempt to create a culture not hostile to antitrust enforcement.

# Civil Compliance

- Consent decrees compliance is most comparable to cartel compliance programs
  - Decrees prohibit specific practices
  - Decrees may have monitoring trustees
  - Decrees always have inspection clauses that can be used proactively or reactively
  - Agencies directly involved in monitoring decrees