The Metropolitan
Corporate Counsel®

www.metrocorpcounsel.com

Volume 18, No. 7 July 2010

Recent U.S. And U.K. Developments Affecting Competition Law Compliance Programs

J. Brady Dugan and Allison Walsh Sheedy

AKIN GUMP STRAUSS HAUER & FELD LLP

Government organizations on both sides of the Atlantic have, in recent weeks, taken steps that highlight the importance of having a competition law compliance program that is overseen by individuals at the highest levels of the company. In mid-May, the United Kingdom's competition enforcer, the Office of Fair Trading (OFT), issued a report finding that a commitment to competition law compliance from the top down is a key motivating factor of compliance in an organization as a whole. In the United States, the U.S. Sentencing Commission recently submitted proposed amendments to the Federal Sentencing Guidelines (FSG) that would allow companies to get credit for having an effective compliance program, even where senior executives participated in the wrongdoing, so long as the person responsible for the program reports directly to the board of directors or an appropriate subgroup of the board. These developments in the United States and United Kingdom serve as a reminder that companies must regularly review and, where necessary, revise their compliance programs to stay current with developments in the United States and abroad.

The OFT Report

The OFT's lengthy report studied what leads to a company's compliance or non-compliance with the competition laws. The agency interviewed larger businesses with existing competition law compliance programs to learn from their experiences and "build a picture of current best practices." The OFT found that companies with effective compliance programs took an individualized, risk-based approach to competition law compliance. In recognition that "one size does not fit all" when it comes to navigating antitrust laws, the OFT report recommends a four-tiered approach to compliance involving risk identification, risk assessment, risk mitigation and review.

The OFT sought to better inform itself of the importance of various "drivers" of deterrence, including sanctions, negative publicity and commitment by upper management to compliance. In the past, the OFT had even toyed with penalizing antitrust violators that had compliance programs in place, on the theory that those firms that know better should be punished more severely. Fortunately, the OFT has since recognized the wrongheadedness of such a policy. The OFT's report clarifies that only in "exceptional circumstances" – for example, where a compliance program is used to mislead the OFT during an investigation – will a pre-existing compliance program be regarded as an aggravating factor, and that, in many instances, the OFT will treat a compliance program as a mitigating factor in assessing fines for violators by reducing financial penalties up to 10 percent. This new guidance from the OFT emphasizes the need for cognizable competition law compliance programs that accurately reflect businesses' real antitrust risks and involve commitment from upper management.

The Sentencing Commission's Proposal

In a similar vein, the United States Sentencing Commission announced on May 1 a new formula for calculating corporate fines such that companies may receive credit for their compliance programs, even if high-level personnel in the company were involved in wrongdoing. This is a change from the existing FSG, which create a rebuttable presumption that the program is ineffective when senior executives within the company participate in a violation.

Under the existing FSG, the effectiveness of a corporation's compliance program is factored into the organization's "culpability score," which contributes to the calculation of the criminal fine that may be imposed on a corporation. If the organization has an effective compliance program, its culpability score may be lowered, which would result in a lower fine range. Under the proposed amendments, a compliance program may still be deemed effective, even though high-level personnel participated in the violation, as long as the person(s) responsible for compliance report(s) directly to the company's governing authority (such as the board of directors), and any offense was detected and properly reported to the government. The amendments are scheduled to go into effect in November, unless Congress intervenes.

Conclusion

The recent actions by the OFT and the Sentencing Commission serve as a reminder of the dynamic nature of compliance efforts. Companies must review their programs to stay abreast of changes in U.S. law. But equally importantly, companies must continually evaluate their compliance risk. Where a company may come under scrutiny for actions in a foreign country, it must ensure that its compliance program is robust enough to account for that risk. Both the United States and United Kingdom have expressed a strong preference for a top-down approach to promoting compliance within an organization, with compliance managers reporting to the highest levels of the company. Compliance managers and company counsel should take this opportunity to review their programs to ensure that they are in sync with current preferences of enforcement authorities and that they adequately account for the company's compliance risks.

***J. Brady Dugan** is a Partner and **Allison Walsh Sheedy** is an Associate in Akin Gump's Antitrust Practice Group in Washington, D.C.*

Please email the authors at bdugan@akingump.com or asheedy@akingump.com with questions about this article.