Voluntary Compliance Programs

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I. INTRODUCTION

In 1890, Congress enacted the first of the statutes now commonly referred to as the antitrust laws. While the oldest of these laws, the Sherman Act, is 80 years old this year, formal voluntary compliance programs as we know them today are of relatively recent vintage. Undoubtedly, this can be attributed to a number of factors. Certainly in the late 19th and early 20th centuries the reach of the antitrust laws, by 1970 standards, was unpredictable. It took years for the courts to sketch out even the broad parameters of some of the offenses which are now viewed as almost illegal per se. While observance of the antitrust laws was warranted, the need for formal voluntary compliance programs was certainly not self-evident to most companies in the early years following their enactment. In addition, acceptance of the underlying philosophy of the antitrust laws was not universal, and the tendency was to interpret them in their narrowest form. The

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4 See Van Cise, The Problems and Procedures of Counsel in Advising on Compliance with the Antitrust Laws, 5 ANTITRUST BULL. 221, 222, 227 (1960).
National Industrial Recovery Act,\(^5\) passed in the 1930's, encouraged practices which were antithetical to the purposes of the antitrust laws, and compromised their aims.\(^6\) To a lesser extent, the aims of the antitrust laws were further compromised in later years when various Chief Executives and Congressmen referred to them as being out of date and unintelligible.\(^7\) Needless to say, this atmosphere was not conducive to the adoption of self-regulating voluntary compliance programs.

By 1959, however, it had become evident that voluntary compliance was a matter of self-preservation to a corporation. In that year Judge Underwood, in *United States v. McDonough Co.*,\(^8\) sentenced four corporate executives to 90 days in jail for violation of section 1 of the Sherman Act. The proclivity of this kind of case for personal tragedy was illustrated, albeit in an uncommonly graphic manner, when one of those executives took his life on his way to serve his sentence.\(^9\) To American businessmen the decision brought about a shocking awareness that executives with otherwise impeccable records can serve jail sentences, and that, for large and small companies alike, antitrust was *real* and not something to be ignored.

The *McDonough* case was only the beginning, however, and in 1961 the importance of voluntary compliance was reemphasized. Federal grand juries in the Eastern District of Pennsylvania indicted most of the leading manufacturers of electrical equipment for price fixing.\(^10\) The cases were so aggravated that many of the defendants ultimately entered guilty pleas. Again, jail sentences were imposed

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On March 11, 1969, House and Senate bills were introduced to establish a Commission on Revision of the Antitrust Laws. See Rockefeller, *Developments in Federal Antitrust Legislation 91st Congress*, 38 ABA ANTITRUST SECTION 547, 551 (1969).


\(^9\) *Time*, Dec. 21, 1959, at 76.

\(^10\) For a discussion of the cases, commonly referred to as the *Electrical Equipment Cases*, see Smith, *The Incredible Electrical Conspiracy I, & II*, FORTUNE, April & May, 1961, at 132 & 161 respectively.
and served. The Department of Justice again made it clear that antitrust violations by large and small corporations alike would no longer be tolerated. The 1,880 civil treble damage suits that followed accentuated the need for antitrust compliance.

Further incentive for voluntary compliance can be gathered from a review of the antitrust laws themselves. The penalties that may be imposed on a party for a violation of the statutes are extensive, expansive, and expensive. The penalties that may be imposed include not only the fines, jail sentences, and treble damage suits previously observed, but also civil decrees with aggravating day-to-day compliance problems, loss of patents, invalidation of contracts.


12 As stated by the then acting Assistant Attorney General in charge of the Antitrust Division of the Department of Justice:

It should now be clear that a deliberate or conscious violation of the antitrust laws is not a mere personal peccadillo or economic eccentricity, but a serious offense against society which is as immoral as any other act that injures many in order to profit a few. . . . Those who are apprehended in such acts are, and will be treated as, criminals and will personally be subjected to as severe a punishment as we can persuade the courts to impose. Recent Developments in Antitrust Enforcement, Address by Lee Loevinger, delivered to the Antitrust Section of the American Bar Association, Washington, D.C., Apr. 7, 1961.

See also Curtis, Pursuit of Happiness Under The Antitrust Laws: Corporate Planning to Preserve Liberty and Property, 7 ANTITRUST BULL. 97, 98 (1962).


loss of statutory rights, mandatory sales to unwanted accounts, divestiture of assets, and numerous others. In addition, crucial government regulations already lie in the legislative wings — some treble damage payments are not deductible under the Tax Reform Act of 1969, and the limits of fines which may be imposed will probably be increased from $50,000 to $500,000. If the business community does not police itself, the possibility increases that Congress will seek to directly regulate business.

It should be emphasized, however, that fear is not the only, or perhaps the best, reason for instituting a voluntary compliance program. The antitrust laws have been part of our economic philosophy for 80 years. As such, good citizenship dictates voluntary compliance if for no other reason than to help preserve our competitive free enterprise system — the basis of the American economy. Notwithstanding an individual corporate executive's differing eco-

violations may also result in the patentee's being unable to enforce his patent against alleged infringers. Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661 (1943). But the court might enter an interlocutory decree against future infringement upon proof that the patentee had terminated its illegal antitrust practices. Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488 (1942); Sylvania Indus. Corp. v. Visking Corp., 132 F.2d 947 (4th Cir. 1943).


Past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, "of preventing people from getting other people's property for nothing when they purport to be buying it."

20 A manufacturer who had entered illegal price maintenance agreements with its dealers was temporarily barred from entering into contracts normally protected under the fair trade laws. Lenox, Inc., [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 18,324 (FTC 1968).


23 See, e.g., 15 U.S.C. § 31 (1964), which denies a violator the right to use the Panama Canal.

24 The Tax Reform Act provides that in addition to the disallowance of deductions for damages paid to the federal government, two-thirds (the penal portion) of all treble damage payments incurred from violations where intent has been proved in a criminal proceeding are not deductible. INT. REV. CODE OF 1954, § 162(g). The provision is effective for all amounts paid or incurred after 1969.

nomic views, the lawyer has an ethical duty to support the antitrust laws and voluntary compliance therewith. This is the kind of job which can easily be put off. It should not be.

There are three basic requisites to the effective implementation of a voluntary compliance program, all of which must be satisfied in order to make the program work. First, the foundation must be laid. Corporate management must be informed and convinced of the need and benefits of the program, with a willingness to support it. Second, key personnel must be informed and educated. They must be educated about those areas of potential antitrust violations within their control. This educational program must be followed up. There should be periodic refresher courses and a procedure to ascertain whether the program is being carried out effectively. Third, new procedures must be adopted, commensurate with the program, to minimize the risk of future antitrust liability. These points are discussed in that order below.

II. ESTABLISHMENT OF COMPANY POLICY

The cardinal principle in any voluntary compliance program is that it must be accepted in letter and spirit by the top management of the company.26 High sounding but empty phrases, and documents backed up only by a desire not to be caught redhanded in the act, will do little, if anything, to protect the company or management. The Government will look behind a compliance program and may even take the cynical attitude that some evil lurks behind it — otherwise it would not have been instituted.27 For the program to be successful, management must be totally committed to the free enterprise system as the way to carry on business.

Counsel can perform a real service in convincing management of the need for voluntary compliance. He can point out the problems of not having such a program. He can structure the program so that it is fair and applies evenly — not merely as a protection for


27 Galgay, supra note 26, at 638-39; Whiting, supra note 26, at 16.
top management.28 Much resistance arises because the law is thought to be uncertain and unclear.29 The most troublesome area — the per se offenses — is clear,30 and counsel should have little difficulty conveying this to management. Above all, counsel should avoid undermining the antitrust laws by referring to them as foolish, unintelligible, or uncertain. Such comments breed a lack of respect for the laws and suggest that they can be avoided.

Once management has accepted the concept of voluntary compliance, the mechanics of drafting and adopting the policy are not difficult. It should be adopted in writing by the company's board of directors.21 It should apply to everyone, clearly state that no intermediate employees have authority to abrogate, amend, or revoke the program, and provide sanctions for violations. Distribution should be carefully reviewed by counsel so that it is sent to every employee who has any reasonable chance of being involved in the matters covered by the program. This will include all em-

28 Withrow, supra note 7, at 882.
30 Special Subcommittee of Sherman Act Committee, The Per Se Rule, 38 ABA ANTITRUST SECTION 731 (1969). The Assistant Attorney General in charge of the Antitrust Division has stated that the Division views the following six practices as illegal per se: agreements not to compete, collusive price fixing, market division agreements, group boycotts, some tie-in agreements, and the pooling of profits and losses by competitors. Loevinger, The Rule of Reason in Antitrust Law, 19 ABA ANTITRUST SECTION 245, 247-49 (1961).
31 The following is a suggested policy, which is based on policies actually used by various companies with which the author has dealt.

POLICY

It is the Policy of the Company to comply strictly in all respects with the antitrust laws. There shall be no exception to this Policy nor shall it be compromised or qualified by anyone acting for or on behalf of the Company.

No employee shall enter into any understanding, agreement, plan or scheme, expressed or implied, formal or informal, with any competitor, in regard to prices, terms or conditions of sale, production, distribution, territories or customers; nor exchange or discuss with a competitor prices, terms or conditions of sale or any other competitive information; nor engage in any other conduct which in the opinion of the Company's counsel violates any of the antitrust laws.

Any clear infraction of the applicable laws or of recognized ethical business standards will subject an employee to disciplinary action, which may include reprimand, probation, suspension, reduction in salary, demotion or dismissal — depending on the seriousness of the offense. Clear-cut price-fixing or bid-rigging acts or illegal activities with competitors to divide or allocate markets or customers will result in dismissal.

In addition, disciplinary measures will apply to any superior executive who directs or approves of such actions, or has knowledge of them and does not move promptly to correct them in accordance with this Guide. Appropriate disciplinary measures also will apply to any superior executive who fails to carry out his management responsibility to insure that employees affected by the Guide are adequately informed about the corporate policy on legal and ethical conduct.
ployees whose duties bring them into contact with prices, costs, or competitive matters, or expose them to contracts with competitors. The policy probably should be distributed periodically with a covering letter from the chief executive officer to put the emphasis in its proper perspective. The recipient should be required to acknowledge receipt of the policy statement.\textsuperscript{32}

III. EDUCATION OF COMPANY PERSONNEL

Once the foundation for antitrust compliance has been established and the administrative details have been worked out, it is necessary to educate the personnel of the company about the policy and the applicable law. This is necessary to help the company regulate its own conduct and recognize antitrust problems in time to obtain legal advice. The education process breaks down into four areas of discussion: (1) what should be covered; (2) who should explain it; (3) how should it be done; and (4) checking the results.

A. What Should Be Covered

The degree of antitrust familiarization to be attained by a particular client's personnel will naturally vary with the client's business operations. To explore all the possible antitrust violations and attempt to relate them to even a few industries would unduly extend this article. As a result, only the major considerations will be discussed and then only briefly.\textsuperscript{33}

(1) The most important point is that the corporate client should exercise independent judgment and act independently in making its decisions.\textsuperscript{34} It should be wary of any agreement or concerted activity with a competitor.\textsuperscript{35} Certain practices should be absolutely prohibited. The most obvious of these are the following:

\textsuperscript{32} Curtis, \textit{supra} note 12, at 101.

\textsuperscript{33} A general summary of the antitrust laws can be found in Bloom, \textit{A Guide to Antitrust}, 20 Bus. Law. 61 (1964). While this summary is very general and occasionally out of date, it will give the layman a basic feel for the antitrust laws. New developments can be reviewed annually in the \textit{ABA Antitrust Section}. See, e.g., Burrus \& Savarese, \textit{Developments in Antitrust During the Past Year}, 38 ABA ANTITRUST SECTION 323 (1969). An excellent discussion of the more pervasive violations appears in the report of the Special Subcommittee of Sherman Act Committee, \textit{supra} note 30.


\textsuperscript{35} Certain activities may be carried on in cooperation with a competitor. Fre-
(a) **Price Fixing.**— Price fixing agreements are illegal regardless of whether the prices fixed are maximum or minimum, reasonable or unreasonable, temporary or permanent. The same rule applies to terms of sale, freight allowances, quantity discounts, and other elements of price. The amount of interstate or foreign trade involved is immaterial.

(b) **Division of Customers or Markets.**— Any agreement among competitors to divide territories geographically, allocate customers, divide markets by fields of use, or otherwise not to compete for any one or more customers is generally considered to be pernicious under the antitrust laws and incapable of legal justification.

(c) **Boycotts.**— Any agreement with a competitor not to deal with another party whether a supplier, customer, or otherwise is illegal in and of itself.

Quently this is done under the auspices of a trade association. For a discussion of permissible activities of this nature, see Hoffman, *Industry-Wide Codes, Advertising, Seals of Approval and Standards: As Participated in by the Trade Association*, 13 *Antitrust Bull.* 595 (1968); Hummel, *Antitrust Problems of Industry Codes of Advertising, Standardization, and Seals of Approval*, 13 *Antitrust Bull.* 607 (1968); Margolis, Recent Developments in Trade Regulation Law Relating to Trade Associations, 13 *Antitrust Bull.* 539 (1968); Miron, Antitrust Implications of the Exchange of Business Information, 10 *Antitrust Bull.* 485 (1965); Wachtel, Products Standards and Certification Programs, 13 *Antitrust Bull.* 1 (1968). See also text accompanying notes 86-88 infra.


42 United States v. General Motors Corp., 384 U.S. 127 (1966); Radiant Burners,
(d) Restrictions on Production.— Similarly, agreements with competitors to limit or divide production fall within the per se category of illegality.\textsuperscript{43} (2) The second point is that, like agreements with competitors, certain agreements with customers or suppliers are or nearly are per se restraints of trade. Vertical price maintenance agreements are illegal per se where there is no applicable fair trade statute.\textsuperscript{44} Restrictions as to the customers to which distributors may resell,\textsuperscript{4} tie-in sales,\textsuperscript{46} and the payment of commissions to persons acting for


\textsuperscript{43} Fashion Originators Guild of America v. FTC, 312 U.S. 457 (1941); Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20 (1912). See also United States v. American Smelting & Ref. Co., 182 F. Supp. 834 (S.D.N.Y. 1960). However, trade association programs to standardize products have been upheld even though the result may be to eliminate or reduce the production of nonstandard products. Structural Laminates, Inc. v. Douglas Fir Plywood Ass'n, 261 F. Supp. 154 (D. Ore. 1966), aff'd per curiam, 399 F.2d 155 (9th Cir.), cert. denied, 393 U.S. 1024 (1969).

\textsuperscript{44} Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 393 (1911). Efforts to achieve a similar result by refusing to deal with price cutters have been notoriously unsuccessful. See United States v. Parke Davis & Co., 362 U.S. 29 (1960). But see Klein v. American Luggage Works, Inc., 323 F.2d 787 (3d Cir. 1963). Similarly, the use of consignment contracts as a method to fix prices of a number of retail dealers has been held to be illegal. Simpson v. Union Oil Co., 377 U.S. 13 (1964). Ohio's fair trade statute was held constitutional in Olin Mathieson Chem. Corp. v. Ontario Store of Price Hill, Ohio, Inc., 9 Ohio St. 2d 67, 223 N.E.2d 592 (1967).

\textsuperscript{46} United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967); United States v. Glazo Group, Ltd., 302 F. Supp. 1 (D.D.C. 1969). Courts have indicated there may be some exceptions to the per se rule. See Perma-Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 136 n.4 (1968); Tripoli Co., Inc. v. Wella Corp., 425 F.2d 932 (3d Cir.), cert. denied, 399 U.S. 1135 (D. Ore. 1964). Similarly, the tie-in need not be express and may be inferred from the surrounding circumstances, including such things as the seller's economic dominance over the buyer's business. See FTC v. Texaco, Inc., 393 U.S. 223 (1968). Unjustifiably large discounts on combination purchases, and presumably other substantial economic incentives to buy a second product, may also produce a de facto tie-in. See Advanced Business Sys. & Supply Co. v. SCM, supra; American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theaters, Inc., 388 F.2d 272, 283 (2d Cir. 1967). In addition, it is no longer necessary that the same seller be the source of the tying and tied product, at least where the seller of the tying product...
a buyer\textsuperscript{47} are virtually illegal per se. Also suspect, albeit less so, are exclusive dealing and requirements contracts,\textsuperscript{48} reciprocal buying,\textsuperscript{49} and full line forcing.\textsuperscript{50} Finally, the termination of distributors should be handled with care,\textsuperscript{51} particularly when another distributor has prompted the action.\textsuperscript{52}


\textsuperscript{47} Robinson-Patman Act \textsection 2(c), 15 U.S.C. \textsection 13(c) (1964). \textit{See} FTC v. Henry Broch & Co., 363 U.S. 166 (1960); Western Fruit Growers Sales Co. v. FTC, 322 F.2d 67 (9th Cir. 1963), \textit{cert. denied}, 376 U.S. 907 (1964). Discounts granted directly to a buyer stand on a firmer footing since they violate section 2(c) only if they are directly attributable to the elimination of the illegal commission. \textit{See} Empire Rayon Yarn Co., Inc. v. American Viscoe Corp., 354 F.2d 182 (2d Cir. 1965), \textit{vacated}, 364 F.2d 491 (2d Cir. 1966), \textit{cert. denied}, 385 U.S. 1002 (1967); Central Retailer-Owned Grocers, Inc. v. FTC, 319 F.2d 410 (7th Cir. 1963); Thomasville Chair Co. v. FTC, 306 F.2d 541 (5th Cir. 1962). For an excellent discussion of section 2(c), see Mezines, \textit{Brokerage — When is it Permitted Under the Robinson-Patman Act?}, 7 B.C. IND. & COM. L. REV. 821 (1966).


(3) Next, discrimination in the prices and services given to a customer must be considered. The Robinson-Patman Act, however, is so complicated that no amount of education will adequately prepare a client to deal with problems of discrimination. Detailed knowledge of the company's operation and the industry are necessary to give reliable advice. Nevertheless, the client should be made aware of the problems inherent in giving different purchasers different treatment on the same or substantially the same goods, and he should be instructed to consult his attorney before engaging in such practices.

(4) As to acquisitions and mergers, the client ordinarily will consult his attorney before he enters into an agreement to buy another business. Because of this, it probably will not be necessary to educate the client in detail about section 7 of the Clayton Act. However, some education is in order, if for no other reason than to allow the client time to think about some of the more esoteric aspects of the antimerger laws before he is directly faced with them.

(5) It should be emphasized that an agreement need not be signed in blood in order to constitute a violation of the antitrust laws. Salesmen should be disabused of any notion that they can skirt liability by remaining silent at a price fixing meeting and by retaining a firm but unspoken mental reservation about "going along." One salesman told me that his company was not in jeop-

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64 See Freedman, supra note 34, at 326.


ardy because he had never been "committed" to any of the prices he had discussed with his competitors and because he fully intended to cut the prices immediately after the discussions. He carefully added that he would not have agreed to any prices because that was illegal. Naturally, the result was disastrous for his employer.

(6) The employees should be warned against participation in "rump" sessions at trade association meetings or, for that matter, attendance at any meetings of competitors who are known to engage in questionable activity.

(7) The client should also be advised to avoid engaging in practices which may create the appearance of evil and which may be misconstrued. The exchange of price lists and cost data by competitors can cause undesirable inferences. Surreptitious telephone calls from unlisted numbers and memos mailed from unusual places in unmarked envelopes can only magnify the problem. In a less bizarre context, it has been held that the exchange of trade statistics is more likely to be justifiable if it is done openly and the results are made available to all, rather than only to competitors.

(8) A short course in writing is also in order. Salesmen

58 See Withrow, supra note 7, at 884-85.
59 Mere membership in an association coupled with actual or constructive knowledge that others are acting unlawfully may be the basis for a finding of liability. Phelps Dodge Ref. Corp. v. FTC, 139 F.2d 393, 396 (2d Cir. 1943). But see Vanderwelde v. Pur & Call Brokers & Dealers Ass'n, 43 F.R.D. 14, 17 (S.D.N.Y. 1967).
60 See Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925); Tag Mfrs. Institute v. FTC, 174 F.2d 452, 463-65 (1st Cir. 1949); Freedman, supra note 34, at 326-27. But see American Column & Lumber Co. v. United States, 256 U.S. 377 (1921).
63 See cases cited note 60 supra.
frequently write unfortunate memos. A letter which referred to prices of “the entire industry” and to attempts to “stabilize the industry” was found to be strong evidence of a conspiracy. A letter which ended “please destroy” was extremely damaging to defendants. This principle applies equally at the executive level. Annual reports, proxy statements, and government filings should all be scrutinized for adverse antitrust implications.

(9) Personnel should be advised about how to handle requests from government agents for interviews or information. They should be instructed that upon such a request the lawyer should be notified first and the matter referred to him.

(10) It is extremely helpful to explain the principles and purpose of the antitrust laws and perhaps some of their history. Only then will the law be put into proper context and its broader implications become apparent to the employees. They probably will remember this information for a longer period than specific violations. Undoubtedly, a clear understanding of the purpose of the antitrust laws will help to avoid unwitting violations at a later date.

B. Who Should Conduct the Educational Program

Obviously, the educational program requires that someone with a detailed knowledge of antitrust law do the teaching. However, it also requires a more than general familiarity with the client’s business — the problems are most effectively handled in the context of actual situations which are familiar to the employees. The logi-

66 Esco Corp. v. United States, 340 F.2d 1000, 1010 (9th Cir. 1965); see Casket Mfrs. Ass’n, 52 F.T.C. 958, 969 (1956); Beckstrom, Destruction of Documents with Federal Antitrust Significance, 61 Nw. U.L. Rev. 687 (1966).
67 The definition of a submarket for purposes of antimerger laws was decided adversely on the basis of “puffing” in annual reports. Abex Corp. v. FTC, 420 F.2d 928 (6th Cir. 1970).
69 See Steadman, Twenty-Four Years of the Robinson-Patman Act, 1960 Wis. L. Rev. 197; Seventy-five Years of the Sherman Act, 27 ABA ANTITRUST SECTION 1 (1965); Fifty Years of the FTC and Clayton Acts, 24 ABA ANTITRUST SECTION 14 (1964); The Robinson-Patman Act — Retrospect and Prospect, 17 ABA ANTITRUST SECTION 295 (1960).
cal choice is house counsel. If the job falls to outside counsel, he should familiarize himself with the company’s antitrust history, its distribution system, how its prices are set, its membership in trade associations, and other pertinent information. It is doubtful that the job can be effectively delegated to a layman or that the message can be disseminated through “channels.”

C. How Should It Be Done

It is important that personnel of the company at all levels know the company policy, that management fully endorses it, and that violations will not be tolerated. It is basically management’s job to accomplish these results. The issuance of the policy bulletin by itself will not do the job. Followup and repetition are vital. In addition, actual imposition of sanctions for violations is probably the best manner in which to establish the firmness of management’s position.

It is counsel’s job to educate company personnel about the details of the applicable law. While a general education program is important, it is neither possible nor desirable to make antitrust lawyers out of businessmen. Counsel should probably limit itself to giving the black letter rules on per se violations and a general feel about the other problem areas so that the personnel will call when they encounter problems. A written list of the do’s and don’ts is helpful. To the extent possible, the presentation should be related to illustrative examples using the company’s particular industry. Do not be afraid to parade the horribles. The presentation should be oral, with a sufficient time allowed for questions and answers. This should help develop an understanding of the problems. The meetings should start with the top management and work down the corporate hierarchy.

D. Checking the Results

It is unlikely that your message will be completely effective in the first instance. It is desirable to check the results to assess the

70 See Gavin, supra note 26.
71 "Where an employee has engaged in unfair methods of competition, contrary to company policy, the company’s opposition to such conduct would be unmistakably indicated by some appropriate disciplinary act." Van Cise, Mechanics of Compliance, in How To Comply With The Antitrust Laws 331, 337 (J. Van Cise & C. Dunn eds. 1954).
72 See J. FULLER, supra note 62.
While executives will only reluctantly bare their "personal" pricing files, a review of such files will be extremely helpful. Certainly, discussions should be held with key people. When counsel is being consulted on a specific problem, it is often possible to expand the discussion to cross-check some other problems. Some companies require various certificates to be filed by persons who may be setting prices or meeting with competitors as a means of checking compliance with the program.


Suggested forms are set forth below.

Date __________________________

Division and Department Managers must execute this Certificate within ten days of the end of each quarter.

I have caused an investigation to be made of all prices quoted, bid, or charged by my division, and I have satisfied myself that all prices, quoted, bid, or charged since _______________ on the sale of products for which I have responsibility have been determined independently by the Company's personnel, without collusion or discussion with competitors, in accordance with the Company's policies respecting legal and ethical conduct, and in full compliance with the law, including antitrust and trade regulation laws.

I have personally checked the current list of persons in my division who are required to complete Certificates respecting any contact by them with a representative of a competitor, or any meeting attended by them at which a representative of a competitor was present, to make sure that such list is complete and up to date and that all persons listed thereon understand and are complying with company policy respecting these certificates.

In addition, I have personally checked compliance by the Division with the provisions of any Federal Court or government agency orders or decrees which refer or relate to products or business of the Division to make sure that we are operating in full compliance with all their requirements.

Signature _________________________________________

Location _________ Title ___________________________

Date __________________________

This Certificate must be submitted by all personnel who have authority to set prices, or terms, or conditions of sale, following their attendance at any type of meeting at which a representative of a competing company was present.

On ______________ I attended a meeting or gathering at __________________________

Date __________________________

for the purpose of ____________________________________________________________________
or to discuss ________________________________________________________________________ at which representatives of competing companies were present. The gathering was: Sponsored by ________________________, or Called by ________________________, or Casual or Coincidental ________________________________

Representatives of competing companies with whom I had personal contact were: ____________________________________________

DATE ______________

REMARKS: ____________________________________________
IV. AVOIDING OR MINIMIZING THE RISK

Once the program has been introduced and personnel educated, the lawyer should seek to aid his client in eliminating old procedures and adopting new ones which will minimize the risk of exposure to antitrust liability. The approach to this problem will vary with each corporation, depending upon how the client operates his business, how large the business is, and the extent to which the business can afford to adopt certain procedures. Because of these variables, it is difficult to be specific; however, generalizations about a few programs are set forth below.

A. Documenting the Reasons for Business Decisions

Business decisions are often made for perfectly valid reasons, but they can become suspect years later for lack of a record or recollection which will completely establish those reasons. The most obvious example is a contemporaneous price increase which was necessitated by an increase in costs.\(^5\) Another example is a price increase which was based upon an announced increase by a competitor.\(^6\) Years later it is always difficult to establish whether the chicken or the egg came first — did the client receive his competitor's price list and then decide to raise prices or did he decide to

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I certify that while I was in attendance, there was no discussion (other than set out above under "Remarks") relating to fixing prices, terms or conditions of sale to be quoted, bid or charged in connection with the sale of products to any third party, or relating to choice of customers, or allocation of business, or to fixing the market shares for any product or products, or relating to any other matter inconsistent with the complete independence of the Company in its commercial activities.

I further certify that in connection with the meeting or gathering referred to I did not participate in any incidental, collateral or other discussions of any of the above matters (other than set out above under "Remarks") in any informal gathering, "side bar discussion," "rump session," social or unofficial meeting, conference or conversation.

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\(^5\) Contemporaneous increases are justified where companies have common raw material costs and their labor costs are standardized by union contracts. See Pevely Dairy Co. v. United States, 178 F.2d 363 (8th Cir. 1949), cert. denied, 339 U.S. 942 (1950). But see C-O-Two Fire Equip. Co. v. United States, 197 F.2d 489 (9th Cir. 1952).

raise prices (perhaps after talking to the competitor) and then obtain the competitor's list.\(^7\) A memorandum detailing the circumstances may be extremely helpful.\(^8\) A third example involves a price cut to meet competition.\(^9\) Where the discounts have been made to meet competition, it is important to document the details carefully, particularly in a fluid market.\(^10\) It is also helpful, if not mandatory, to have available a cost study to justify any discounts which are given because of a savings in cost.\(^11\)

B. Documenting the Reasons for Contact with Competition

Price fixing cases are frequently based on circumstantial evidence. Such evidence may consist of a meeting between competitors, general statements that prices were mentioned at the meeting, and a price increase shortly after the meeting.\(^12\) Since evidence of a meeting with competition will normally be memorialized in the company's expense vouchers, the company should take steps to negate unfortunate inferences arising from such a meeting. A company should require personnel who have authority to set prices to state in writing the reasons for any contact with the competitor and

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\(^7\) See Pittsburgh Plate Glass Co. v. United States, 260 F.2d 397, 400 (4th Cir. 1958); Hale, supra note 56, at 392-93.

\(^8\) See Van Cise, supra note 71, at 335.


\(^11\) The cost justification defense is provided for in section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1964). The proviso states:

[N]othing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . .


\(^12\) Esco Corp. v. United States, 340 F.2d 1000 (9th Cir. 1965); Pittsburgh Plate Glass Co. v. United States, 260 F.2d 397, 400 (4th Cir. 1958), aff'd, 360 U.S. 395 (1959).
that prices were not discussed if that be the fact.\textsuperscript{83} Any such state-
ment should be written promptly after the contact. If the person
who attended the meeting cannot make such a statement unequivoc-
ally, prompt remedial action should be taken under the company's
compliance policy, and that fact documented.

C. \textit{Adoption of a File Retention Policy}

There is no need to store indefinitely the thousands of files
which a corporation may accumulate. The files take up valuable
space and create tremendous mechanical problems if the company
is required to search them pursuant to a court order. An analysis
should be prepared of the company's documents setting forth the
reasonable file life of each category of documents.\textsuperscript{84} Under coun-
SEL's guidance, the company should probably adopt a policy which
provides for the retention of the documents during the period est-
established by the analysis, and which calls for routine and periodic
destruction of documents which are outside the indicated period.\textsuperscript{85}

D. \textit{Examination of Trade Association Memberships}

Every corporation should undertake a thorough examination of
its trade association memberships. Such memberships unquestion-
ably raise some substantive antitrust issues.\textsuperscript{86} In addition, they in-
crease the risk that questionable conduct outside the association
will be exposed.\textsuperscript{87} The corporation, with the advice of counsel,
must consider whether the benefits to be received from the associa-

\textsuperscript{83} See note 74 supra. This type of record was required by the decree entered in
United States v. FMC Corp., 5 TRADE REG. REP. (1970 Trade Cas.) \$ 73,258 (E.D.
competitor, see the articles cited in note 35 supra.

\textsuperscript{84} For sample record retention programs, see DIEBOLD, INC., HOW TO PLAN A
SUCCESSFUL RECORD RETENTION AND DESTRUCTION PROGRAM (1952); RECORD
CONTROLS, INC., RETENTION AND PRESERVATION OF RECORDS WITH DESTRUCTION
SCHEDULES (7th ed. 1961); REMINGTON RAND, INC., A BASIC PLAN FOR RECORD
RETENTION AND DESTRUCTION.

\textsuperscript{85} Selective destruction of damaging records is not recommended. See Beckstrom,
supra note 66; Galgay, Corporate Plans and Policies for Voluntary Antitrust Compli-
ance, 19 BUS. LAW. 637 (1964); Hale, supra note 56.

\textsuperscript{86} See, e.g., C-O-Two Fire Equip. Co. v. United States, 197 F.2d 489 (9th Cir. 1952);
1969 Trade Cas. 86,571 (E.D. La. 1968); FTC Advisory Opinion Digest No. 273, re-
printed in [1967-1970 Transfer Binder] TRADE REG. REP. \$ 18,472 (Aug. 17, 1968);
Hale, supra note 56, at 393; Monroe, Practical Antitrust Considerations for Trade Associa-

tion outweigh the risks and the expenses of being a member. In reaching such a determination certain basic questions should be asked. These include: (1) whether there are any tangible business benefits to be derived from the association; (2) if so, whether the benefits are available without joining the association; (3) whether the dues and other expenses of joining are commensurate with the commercial benefits; (4) whether the association conducts its business in such a manner as to minimize antitrust exposure; and (5) what is the real motive in joining the association?88

V. CORPORATE ATTORNEY-CLIENT PRIVILEGE AS APPLIED TO A COMPLIANCE PROGRAM

One final point which deserves consideration is the attorney-client privilege. In carrying out a program of voluntary compliance, it is important for counsel and the corporate client to realize the limited extent to which the program is protected by this privilege.89

The attorney-client privilege generally prevents the disclosure of communications between an attorney and his client where the communications relate to legal advice sought in confidence by the client.90 The privilege applies to communications between corporations and outside counsel,91 and it probably also applies to house counsel.92 However, if the house counsel’s duties primarily in-

88 See Monroe, supra note 86, at 631-32.
89 There are a number of other rules which, in a specific situation, may protect specific material. The most frequently cited is the work-product doctrine. See Hickman v. Taylor, 329 U.S. 495 (1947); Monroe, Discovery and Other Pretrial Matters, 38 U. CIN. L. REV. 289, 301-03 (1968). Another is the so-called joint defendant rule. See Fluhmelee v. United States, 355 F.2d 183 (9th Cir. 1965); Leonia Amusement Co. v. Loew’s, Inc., 15 E.R.D. 438 (S.D.N.Y. 1953); Note, Waiver of Attorney-Client Privilege on Inter-Attorney Exchange of Information, 63 YALE L.J. 1030, 1032-36 (1954). A third is a privilege extended to certain confidential information. See, e.g., Continental Oil Co. v. United States, 330 F.2d 347 (9th Cir. 1964) (communications between parties under joint investigation); Garrison v. General Motors Corp., 213 F. Supp. 515 (S.D. Cal. 1963) (communications between corporation’s rearrangement group). These doctrines and privileges deal basically with preparation for trial. As a result, they are outside the scope of this article.
90 J. WIGMORE, EVIDENCE § 2292 (McNaughton rev. 1961); see Burnham, The Attorney-Client Privilege in the Corporate Arena, 24 BUS. LAW. 901 (1969). Unless waived by the client, the privilege permanently protects the communication from disclosure by the client or by the attorney. See Note, supra note 89. The privilege may be withdrawn upon a showing that the lawyer’s advice was intended to help his client violate antitrust law. Union Camp Corp. v. Lewis, 385 F.2d 143 (4th Cir. 1967).
volve business matters, he may lose his right to the attorney-client privilege (and perhaps to the work-product doctrine). In addition, the privilege does not protect the passage of preexisting documents or papers from the client to the attorney. Finally, although communications to and from the management group of the corporation may be entitled to the privilege, it is doubtful whether communications to other employees are so entitled. It is doubtful therefore that the attorney-client privilege will be applicable to the majority of the documents and communications made in the routine carrying out of the program.

It is always possible that documents generated by the program to record business information will reveal a violation of the anti-
trust laws. The attorney and client should be aware that there is a serious question as to whether the privilege applies to such a document. It is mandatory that prompt remedial action be taken to rectify the violation, and a second document should probably be made to reflect that action.

VI. Conclusion

Most companies need a compliance program. In some cases the program can be relatively simple and uncomplicated, while in others it will require more formality. What will suffice for one company will not necessarily suffice for another. However, there are at least two common denominators to all programs. First, it is vital to have the program fully accepted by the top management. Second, no matter what the form of the program, its success will be directly proportionate to the amount of effort that is put into it on a regular and continuous basis. As an adjunct to the compliance program, it is appropriate to adopt other programs which will conserve the company's time and expense, and which may minimize its risk of exposure. These include, among others, programs to document important business decisions which have antitrust significance, and a file retention program to cover the disposition of unneeded documents.

The well-adapted compliance program will help to improve communications between the lawyer and his client. Not only will the client gain insight into the antitrust laws, but counsel should also gain greater insight into the client's business and be more helpful to him in areas other than antitrust. The adoption of such a program should also pay dividends to the client in other ways. From the financial point of view alone, it is much less expensive in the long run to stay out of trouble than to incur the harsh penalties resulting from antitrust violations.

In short, the effects of noncompliance are so harsh that the corporate executive who is unaware of, or deliberately negligent in observing, antitrust legislation places his corporation in continuing jeopardy. It thus becomes important for the corporate attorney not only to educate the ignorant, but to persuade the unwilling client that voluntary compliance is both economical and profitable. It must be reemphasized, however, that no compliance program can be based

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on fear alone. It must be based on respect, understanding, and willing observance by businessmen of the principles upon which both the antitrust laws and the American economy were founded.
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