

## TABLE OF CONTENTS

<i>Foreword</i> .....	xvii
<i>Preface</i> .....	xix
<b>Introduction: An In-House Counsel's View</b> .....	<b>1</b>
A. The Compliance Tripod: Policy, Training, and Controls .....	3
B. The Ultimate Message: Better to be Safe than Sorry .....	5
C. Remember the Employee .....	6
<b>Chapter I</b>	
<b>Starting from Scratch: Why Create an Antitrust Compliance Program?</b> .....	<b>7</b>
A. The Benefits of Competition .....	7
B. The Benefits of Antitrust Compliance Programs .....	8
1. Avoiding a Violation .....	8
2. Avoiding Penalties .....	9
3. Avoiding Civil Remedies .....	11
a. Court Orders Affecting Future Conduct .....	11
b. Civil Fines .....	12
c. Divestiture in Merger Cases .....	12
d. Suspension/Debarment .....	12
4. Avoiding State Enforcement Actions .....	12
5. Avoiding Private Litigation .....	13
C. The Benefits of Early Detection .....	13
1. Leniency .....	13
2. Sentencing Mitigation .....	14
D. The Benefits of a Culture of Compliance .....	14
<b>Chapter II</b>	
<b>The Role and Responsibilities of the Board and Senior Management</b> .....	<b>17</b>
A. The Need for High Level Support for Antitrust Compliance .....	17
B. Corporate Players and Their Role in Compliance .....	18
1. The Board of Directors .....	18
2. Senior Management .....	20

3.	Regional and Line Managers .....	21
4.	Counsel and Compliance Personnel .....	22
C.	Encouraging Support for the Compliance Program from the Board and Senior Management .....	23
1.	Using Fear.....	23
2.	Incentives .....	24
3.	Superior Performance of Companies with Robust Compliance Programs.....	24
4.	Support from Regulators.....	25
D.	Compliance Checklists for Senior Management .....	26

### **Chapter III**

<b>Essential Components of An Antitrust Compliance Program.....</b>	<b>29</b>
A. Consider the Context.....	29
B. Creating Standards and Procedures.....	29
C. Risk Assessment.....	31
D. Management and Ownership of the Program.....	33
E. Antitrust Education and Training .....	33
F. Monitoring and Audits .....	35
G. Evaluating Compliance Programs and Incorporating Lessons Learned.....	35
H. Discipline and Incentives .....	36
I. Plan for Government Investigations.....	37
J. Investigating Allegations.....	37

### **Chapter IV**

<b>Initial Program Design Considerations .....</b>	<b>39</b>
A. Structural Considerations .....	39
1. Who Will “Own” the Program? .....	39
2. Will the Program Be Based on Law or Company Policy?.....	41
B. Operational Considerations .....	42
1. Design and Communicate Standards .....	42
2. Impose Safeguards.....	42
3. Drive Awareness of How Antitrust Principles Relate to Real World Issues Arising in the Business .....	43
C. Considerations for Driving Detection .....	43
1. Audits.....	44
2. Regular Email Combing and Searches .....	44
3. Monitoring Industry Developments.....	45
4. Integrating New Acquisitions .....	46

5. Self-Reporting Mechanisms .....	46
D. Considerations for Responding Appropriately to Violations .....	47
E. Considerations for Documenting and Measuring the Extent and Effectiveness of a Compliance Program .....	48
F. International Considerations.....	49

**Chapter V**

<b>Conducting a Risk Assessment .....</b>	<b>51</b>
A. The Importance of Understanding Where Competition Risks Reside .....	51
B. Who Should Conduct the Risk Assessment?.....	52
1. Lawyers, Risk Assessment and Privilege .....	52
2. The Importance of Business Input.....	54
C. How Frequently Should a Risk Assessment Be Conducted? .....	55
D. What Should the Scope of the Assessment Include?.....	56
E. What Are the Risk Factors?.....	57
1. Country Risk.....	57
2. Market Characteristics and Structure .....	58
3. Sales and Pricing Practices .....	58
4. Frequency of Interactions with Competitors .....	59
5. Employee Turnover .....	59
F. Assessing the Significance of the Risks .....	60
G. Risk Assessment Output.....	60

**Chapter VI**

<b>Incorporating Lessons Learned and New Developments.....</b>	<b>63</b>
A. Incorporating Lessons Learned .....	63
1. Why Lessons Learned Are Important.....	63
2. Gathering Information .....	63
3. Protecting Sensitive Information .....	64
B. Ensuring Continuous Improvement.....	65
C. Keeping Abreast of Developments.....	65
D. Real-Time Reaction.....	66
E. Regular Review .....	67

**Chapter VII**

<b>Evaluating a Compliance Program .....</b>	<b>69</b>
A. Benchmarking Compliance Programs.....	69
1. Domestic and Foreign Agency Guidance .....	69
2. Other Sources.....	72
B. Sources of Information.....	74

1. Reviewing Training Outcomes .....	74
2. Reviewing the Use of Whistleblower Hotlines.....	75
3. Focus Groups and Surveys .....	76
4. Exit Interviews.....	77
5. Other Methods .....	78
<b>Chapter VIII</b>	
<b>Antitrust Training.....</b>	<b>81</b>
A. The Importance of Training .....	81
B. Who Should Be Trained? .....	82
1. Employees Who Almost Always Should Receive Antitrust Training.....	84
a. Senior Executives.....	84
b. Senior and Middle Management and Others in High-Risk Business Units .....	85
c. Sales and Marketing Staff .....	85
d. Other Staff Involved in Bidding.....	86
e. Employees Involved in Trade Association Activities .....	86
2. Employees Who May Need Antitrust Training Depending on Their Risk Profile .....	86
a. Strategy Department.....	86
b. Groups Who Do Benchmarking or Gather Competitive Intelligence.....	87
c. Staff Dealing with Joint Ventures .....	87
d. Staff Who Deal with Competitors Wearing Multiple Hats.....	87
e. Human Resources Professionals .....	88
f. Government Relations Staff.....	89
g. Finance Department .....	89
h. Legal Department.....	89
i. New Hires.....	90
C. What Should Be Covered in an Antitrust Training Session? .....	90
1. Hardcore Antitrust Violations: Illegal Agreements with Competitors.....	91
2. Other Potentially Risky Interactions with Horizontal Competitors.....	92
a. Trade Associations .....	93
b. Joint Advocacy .....	93
c. Joint Ventures.....	94
d. Benchmarking .....	95

e. Price Signaling and Indirect Communications .....	95
3. Vertical Restraints.....	95
4. Exclusionary Conduct and Abuse of Dominance .....	97
D. What Format Should Be Used? .....	99
E. Interactive Techniques in Face-to-Face and Virtual Training.....	99
1. Training for Senior Executives .....	100
2. Cross-Disciplinary Compliance Training .....	100
3. Just-in-Time Coaching.....	102
4. Drafting and Refreshing Training Materials.....	102
F. How Much Time Should Be Allotted for Each Training Session? .....	103
G. Who Should Conduct the Training? .....	104
1. In-House Antitrust Counsel .....	104
2. In-House Commercial or Business Lawyers.....	105
3. Nonlawyer Compliance Professionals .....	105
4. External Antitrust Counsel.....	106
5. Train-the-Trainer Courses.....	107
H. How Often Should Training Be Conducted?.....	107

**Chapter IX**

<b>Online Antitrust Compliance Training.....</b>	<b>109</b>
A. The Advantages of Online Training.....	109
B. The Disadvantages of Online Training.....	110
C. Blended Training.....	111
D. Key Design Parameters .....	112
1. Awareness or in-Depth Training Approach.....	112
2. User Involvement.....	113
3. Testing .....	113
4. Languages .....	115
5. Feedback .....	115
E. Customized Content .....	115
F. Operational Issues and Technology.....	116
G. Other Forms of Digital Communication .....	116

**Chapter X**

<b>Audits and Monitoring .....</b>	<b>121</b>
A. Objectives of Audits.....	121
B. What to Look for in an Audit .....	123
1. Cartels .....	123
2. Other Dealings with Competitors .....	127
a. Trade Associations .....	127

b.	Joint Ventures.....	128
c.	Information Exchanges .....	129
d.	Boycotts.....	129
e.	Interlocking Directors and Officers.....	129
3.	Relationships with Customers and Suppliers.....	130
a.	Resale Price Maintenance .....	130
b.	Non-Price Resale Restraints.....	131
c.	Discrimination Among Customers.....	132
d.	Tying, Reciprocal and Exclusive Dealing.....	133
4.	Patents.....	133
a.	Terms in Patent Licenses.....	133
b.	Cross-Licensing Agreements and Patent Pools.....	133
5.	Monopolization.....	134
C.	Conducting the Audit .....	135
1.	Preserving Privilege.....	135
2.	Planning .....	136
3.	Selecting the Auditors.....	137
4.	The Audit Report .....	137
D.	Compliance Monitoring .....	139

## **Chapter XI**

<b>Internal Investigations.....</b>	<b>145</b>
A. Informal Inquiries into Allegations .....	145
B. Conduct of Investigations.....	146
C. The Final Report.....	151
D. Protecting the Inquiry .....	152
1. The Attorney Client Privilege.....	152
2. Work Product Doctrine.....	157
3. Self-Critical Analysis Privilege .....	158
4. International Inquiries.....	159
5. Protecting Privilege.....	160

## **Chapter XII**

<b>The Antitrust Division’s Corporate Leniency Policy: Practical Considerations for Corporate Counsel .....</b>	<b>161</b>
A. Scope of the Leniency Policy.....	162
B. The Leniency Policy’s Offer of Immunity and the Requirement of Cooperation .....	162
C. Procedures for Applying for Leniency .....	166
1. Obtaining a Marker: the Race to Be First .....	166

2. Perfecting a Marker and Obtaining a Conditional Leniency Letter .....	168
D. Strategic Benefits of Seeking Leniency .....	169
E. Limitations of Leniency .....	171
1. Not Applicable to Civil Conduct .....	171
2. Other Jurisdictions Should Also Be Considered.....	171
3. Coverage May Extend to Former Employees.....	171
F. Losing the Race: Leniency Plus and Penalty Plus.....	172

**Chapter XIII**

<b>Internal Communications—What Not to Say and How Not to Say It.....</b>	<b>175</b>
A. Antitrust Compliance and Internal Document Management.....	175
B. What Is a Document? .....	175
1. Document Retention Policies.....	177
2. Hold Notices .....	178
C. Ordinary Course Materials and Their Effects .....	181
1. Ordinary Course Materials in the Criminal Context.....	182
2. Ordinary Course Materials in the Civil Context.....	183
D. Practical Tips and Guidance.....	184
1. Document Creation Policies and Training.....	185
2. Monitoring Methods .....	188

**Chapter XIV**

<b>Expect the Unexpected: Preparing for Dawn Raids and Search Warrants .....</b>	<b>189</b>
A. The What, Why, When and How .....	189
B. Legal Powers of the Authorities.....	190
C. Advance Preparation: What to Do When Inspectors Arrive .....	192
D. Electronic Searches .....	196
E. Employee Interviews.....	197
F. After the Dawn Raid.....	198

**Chapter XV**

<b>Compliance Before and During Mergers and Acquisitions .....</b>	<b>201</b>
A. The Role of Antitrust Compliance in M&A.....	201
B. Counterparty Due Diligence.....	202
C. Merger Risk Assessment .....	203
1. Merger Review under the Clayton Act, Section 7 .....	204
2. Document Creation.....	205
D. Premerger Notification and Merger Clearance.....	206

1.	Premerger Notification .....	206
2.	Exemptions from the HSR Filing Requirement.....	207
3.	Filing Requirements for Reportable Transactions .....	208
4.	Penalties for HSR Violations.....	210
E.	Competition Compliance in Global Acquisitions.....	213
F.	Information Exchange, Integration Planning, and Gun Jumping ...	213
1.	Information Exchange.....	214
2.	Integration Planning.....	215
3.	Gun-Jumping .....	216

**Chapter XVI**

	<b>Joint Ventures and Other Competitor Collaborations.....</b>	<b>219</b>
A.	Antitrust Compliance and Collaborations with Competitors .....	219
B.	Identification of Joint Ventures and Competitor Collaborations....	220
1.	Fully Integrated Joint Ventures.....	221
2.	Research Joint Ventures.....	222
3.	Production Joint Ventures.....	223
4.	Joint Marketing and Selling Arrangements .....	223
5.	Joint Purchasing Agreements.....	224
6.	Network Joint Ventures .....	225
C.	Other Interactions with Competitors .....	225
1.	Trade Associations and Information Exchanges.....	225
2.	Licensing Arrangements .....	226
D.	Analysis of Joint Ventures and Competitor Collaborations under Antitrust Law.....	226
1.	Whether the Formation of a Joint Venture or Competitor Collaboration is Lawful .....	226
2.	Whether the Activities of a Joint Venture or Competitor Collaboration Are Lawful .....	232
a.	Ancillary Restraints.....	232
b.	Restraints on Competition among JV and Its Participants .....	233
c.	Restraints on Pricing, Output, Territories, and Customers .....	234
E.	Diligence, Legality and Structure.....	235
1.	Handling Competitively Sensitive Information without Facilitating Collusion.....	235
2.	Structural Considerations.....	237
F.	Joint Venture Approvals and Clearance .....	238
G.	National Cooperative Research and Production Act of 1993.....	238

H.	DOJ Business Review Letters and FTC Opinion Letters .....	239
I.	Implementing a Compliance Program in or for the JV .....	239
1.	Rules for Information Sharing .....	240
2.	Document the Rationale for the Joint Venture or Competitor Collaboration, and for Any Ancillary Restraints Adopted .....	240
3.	Identify Reasonable Necessity and Less Restrictive Alternatives.....	241
4.	Provide for a Clean Dissolution of the Joint Venture .....	241

## **Chapter XVII**

	<b>Information Sharing Activities .....</b>	<b>243</b>
A.	The Law Governing Information Exchanges .....	243
1.	The U.S. Approach .....	243
2.	The EU Approach .....	245
a.	Object or Effect of Restricting or Otherwise Damaging Competition.....	246
b.	Procompetitive Rationale? .....	248
B.	Key Principles for Compliance .....	248
1.	Risk Analysis .....	248
2.	Practical Steps to Risk Mitigation.....	249
a.	Training and Compliance Resources .....	249
b.	Identifying Potentially Sensitive Information.....	250
c.	Evaluate Forums for Information Exchange.....	251
d.	Record Keeping .....	251
C.	Key Risk Areas for Information Exchange .....	251
1.	Benchmarking.....	251
2.	Public Announcements/Price Signaling.....	252
3.	Trade Associations.....	254
4.	Interpersonal Exchanges .....	254

## **Chapter XVIII**

	<b>Managing Sales and Distribution .....</b>	<b>257</b>
A.	Understanding the Business .....	257
1.	Pricing Structure .....	257
2.	Nature of Competition .....	258
3.	Market Structure .....	258
4.	Opportunities for Competitor Contacts.....	259
5.	Relationships with Customers .....	260
B.	Controlling and Influencing Resale Prices .....	260
1.	Resale Price Maintenance.....	260
2.	A <i>Colgate</i> Policy Checklist.....	263

3. Minimum Advertised Price (MAP) Restrictions .....	264
4. Most Favored Customer Clauses .....	265
C. Other Restraints on Distribution and Distributor Relations .....	267
1. Exclusive Dealing .....	267
2. Territorial and Customer Sales Restrictions .....	268
D. Compliance with EU Rules Regarding Vertical Restraints.....	269
1. Restrictions Against Minimum RPM .....	270
2. Territorial and Customer Restraints.....	271
3. Vertical Restraints Not Covered by the Block Exemption Regulation.....	273
E. Compliance with the Robinson-Patman Act .....	273
1. Elements of Unlawful Price Discrimination.....	274
a. Two Contemporaneous Sales .....	275
b. Commodities .....	276
c. Like Grade and Quality .....	276
d. Competing Purchasers.....	277
e. Different Prices .....	277
f. Interstate Commerce .....	277
g. Injury to Competition .....	278
2. Compliance Tips to Avoid Unlawful Price Discrimination....	278
a. Meeting Competition.....	278
b. Practical Availability.....	280
c. Cost Justification .....	280
d. Buyer Liability for Inducing Unlawful Price Discrimination.....	281
e. Sham Brokerage Fees and Commissions .....	282
3. Discriminatory Provision of Promotional Allowances and Services.....	282
F. State Franchise and Dealership Laws .....	283
1. Franchisee and Dealer Protection Statutes.....	283
2. Sales Representative Laws.....	285
3. Industry-Specific Dealer Protection Laws .....	285

**Chapter XIX**

<b>Purchasing.....</b>	<b>287</b>
A. Joint Purchasing .....	287
1. Rule of Reason Analysis and Safe Harbor Provisions.....	288
2. Purchasing Cooperatives Versus Buyer Cartels .....	290
B. Key Risk Issues with Joint Purchasing Agreements .....	291
1. Dealing with Other Members of the GPO .....	291

a.	Information Sharing .....	291
b.	Dealing with Non-Members.....	292
c.	Commitments to Purchase.....	293
d.	Other Per Se Unlawful Agreements .....	293
2.	Dealing with Vendors .....	294
a.	Anticompetitive Pricing .....	294
b.	Group Boycott.....	294
c.	Price Discrimination.....	295
3.	Treatment of GPOs Outside the U.S.....	295

**Chapter XX****Participation in Trade Associations and Political Activities..... 297**

A.	Assessing Association Memberships for Antitrust Compliance ....	297
B.	Trade Association Meetings.....	300
1.	Stage 1: Before the Meeting .....	300
2.	Stage 2: At the Meeting .....	303
3.	Stage 3: After the Meeting.....	306
C.	Trade Association Policies and Codes of Conduct.....	306
1.	Restrictions on Price Competition .....	307
2.	Restrictions on Membership and Access to Essential Facilities.....	309
3.	Restrictions on Scope of Business .....	310
4.	Restrictions on Advertising and Comparative Statements.....	312
5.	Restrictions on Bidding and Solicitation .....	314
6.	Group Boycotts and Refusals to Deal.....	315
D.	Lobbying and Political Activity .....	316
1.	Lobbying and the <i>Noerr-Pennington</i> Doctrine .....	317
2.	Application of <i>Noerr-Pennington</i> to Standard Setting Activities.....	318
3.	Prohibited Conduct: the “Sham Petitioning” Exception.....	320
4.	Petitioning European Authorities.....	322

**Chapter XXI****Interlocking Directorships .....** **325**

A.	Prohibitions on Interlocking Directorships: What is Restricted? ...	325
1.	The United States.....	325
2.	The European Union.....	331
3.	Canada .....	337
4.	Rest of the World.....	339
B.	Compliance Measures and Monitoring .....	343
1.	The United States.....	343

2. The EU, Canada, and Other Countries.....	344
---------------------------------------------	-----

**Chapter XXII**

<b>Research and Development and IP .....</b>	<b>345</b>
----------------------------------------------	------------

A. Communications with Engineers and Scientists from Other Companies.....	345
B. Standard-Setting Participation.....	347
1. Common Antitrust Issues That May Arise with SSOs .....	349
a. Disclosure of IP .....	349
b. Royalties.....	351
c. Exclusion of Competitors.....	351
d. Patent Pools.....	354
2. Non-U.S. Jurisdictions.....	356
C. Settlement of IP Disputes.....	357
1. Settlements of Interference Proceedings.....	357
2. “Reverse” Payment Settlements .....	358
3. Guidance in Structuring a Reverse Payment Settlement .....	360

**Chapter XXIII**

<b>Human Resources .....</b>	<b>363</b>
------------------------------	------------

A. The Intersection of Antitrust and Human Resources .....	363
B. Application of Antitrust Laws to Agreements with Labor Unions .....	364
C. Antitrust Considerations in Conducting Exchanges of Compensation Information.....	368
1. U.S. Case Law .....	368
2. Antitrust Agency Guidance .....	371
D. Antitrust Risk Associated with “No-Poaching” Agreements .....	372
1. Naked No-Poaching Agreements.....	373
2. Ancillary Non-Solicitation and No-Hire Provisions.....	376
3. Guidance for Designing Permissible Ancillary Non-Solicitation Agreements .....	376
E. Antitrust Issues Presented by Employee Recruiting and Onboarding Policies .....	377
F. Exchanges of Employment Information in the Premerger Context .....	379
G. Non-U.S. Antitrust Laws Applicable to Employment Practices: Europe .....	381
1. Limited Antitrust Immunity for Collective Bargaining Agreements .....	381

2. Wage-Related and No-Poaching Agreements under EU and National Competition Laws .....	383
--------------------------------------------------------------------------------------------	-----

**APPENDIX**

A. Compliance Guides Written for Nonlawyers.....	387
B. Non-U.S. Guidance Regarding Compliance Programs.....	387
C. Other Useful Resources .....	389
<i>Index</i> .....	387