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The Red Flag Group

The Red Flag Group
raises the bar with
support from the
Academies

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by Joe Murphy, CCEP, CCEP-I

Gee, I wonder why antitrust compliance programs aren't better?

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The Antitrust Division makes a point of this: no existing compliance program is considered for any purpose.

This is a one-size-fits-all policy: no matter how diligent your compliance program, no matter how hard you tried to prevent violations, if any violation occurred, your program failed, and that was the end of it. It did not matter whether the violator was a junior salesperson out in the field who went out of her way to conceal the violation. If it was an antitrust violation, the compliance program was irrelevant.



Murphy

Also notable: this is the only division in the Justice Department that takes this inflexible approach. The Fraud Section, for example, has been equally outspoken on the importance of compliance programs in its enforcement decisions.

What has been the result?

Recently a senior enforcement official, the Antitrust Division's own Acting Deputy Assistant Attorney General for Criminal Enforcement Marvin Price, made a striking admission. In comments for an ABA Antitrust Section publication, he noted:

"While criminal antitrust fines and prison terms are significant, and the Division has a well-established record for prosecuting both companies and individuals, *antitrust crimes*

often do not appear to garner the same compliance dollars as other types of white-collar crimes.

In our investigations we often see evidence of compliance training programs that contain just a brief mention of antitrust issues after a lengthy discussion of corruption and bribery.¹

The Fraud Section (and the SEC) recognizes and takes into account diligent compliance programs; the Antitrust Division does not.

In the antitrust field, it does appear that companies have devoted less attention and resources to compliance programs. As observed by Professor Danny Sokol, "Current compliance programs in antitrust may now include nothing more than a day of lectures with some PowerPoint slides. However, this does not solve compliance problems, and may, in fact, breed cynicism on the part of employees."² The results of an SCCE survey reflect this same trend, finding that the overwhelming majority of companies lack antitrust auditing that would meet even minimum Sentencing Guidelines standards.³

This is not a difficult concept. Recognize and take something into account, and you nurture it. Ignore it, and you weaken it. If enforcers want to prevent crime before it happens, they need to promote compliance programs by their actions and not ignore them. *

1. Rosman & Price: "Antitrust Division Views on Compliance: Past, Present, Future," *Cartel & Criminal Practice Committee Newsletter* 3, 4, Fall 2017.
2. D. Daniel Sokol: "Cartels, Corporate Compliance, and What Practitioners Really Think About Enforcement," *Antitrust Law Journal*, 2012/78:201-240. Available at <http://bit.ly/2oHp30k>.
3. SCCE Survey: "Antitrust IS a Compliance Concern: Lack of Government Credit to Antitrust Compliance A Disincentive to Diligent Programs?" June 14, 2012. Available at <http://bit.ly/2zyvWRP>.