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How Banks Can Build Strong Antitrust Compliance Programs

By **Jeff Zalesin**

Law360, New York (May 9, 2016, 4:21 PM ET) -- With regulators on high alert for conspiracies in the financial markets, there's no time like the present for banks to add new preventive measures against antitrust violations such as benchmark-rigging and collusive bidding, experts say.

Like all companies, financial institutions should aim for a top-to-bottom culture of antitrust compliance, driven by a combination of positive incentives and individual accountability. But banks may face special challenges in achieving that goal, given the complicated competitive dynamics of the industry and the relatively recent surge in attention paid to financial antitrust conduct.

Here, antitrust lawyers share four must-dos for banks looking to improve their compliance programs.

Treat Different Transactions Differently

Unlike some companies that sell a single type of product or service, financial institutions are engaged in a wide variety of transactions that could be tainted through different forms of collusion. To maximize the effectiveness of their antitrust compliance programs, banks need to take a detailed look at the risks presented by specific financial products and business practices, attorneys said.

Paula G. Lin, an antitrust partner at Mayer Brown LLP, pointed to the deal-making conducted by banks' trading desks as one important focus for antitrust compliance training. Alleged collusion by bank traders has been central to the enforcement actions and civil litigation over manipulation of the Libor and the foreign exchange market, among other examples.

In the years leading up to those manipulation cases, traders may not have learned enough about their antitrust obligations, Lin said.

"I'm not sure that there's historically been a lot of education to employees about what to do when you're speaking with a broker and the broker starts talking about issues related to prices or rates or markets that one of your competitors is involved in," she said.

While some divisions of banks participate in setting rates and benchmarks, others compete for business through bidding, Lin said. Compliance programs should recognize that bidding-heavy desks present their own types of characteristic antitrust risks, including the potential for a bid-rigging conspiracy.

Banks should also keep in mind that new types of antitrust conduct can emerge with new technologies

and business platforms, according to Howard Iwrey, a member at Dykema Gossett PLLC. Outside the banking sector, the U.S. Department of Justice has taken action over an alleged plot to fix the online retail prices of posters by aligning the price algorithms of rival vendors, Iwrey pointed out.

“On the retail end where you have people applying for mortgages [online], I could see how that might be a vulnerability for financial institutions,” Iwrey said.

Writing down antitrust compliance instructions for different types of transactions may be a place to start, but communicating that information to bank employees is an important next step.

Iwrey recommended holding in-person training sessions where bank employees can ask specific questions about the kinds of situations they might encounter in their work.

Let Market Realities Guide Tracking

Attorneys agreed that some effort to monitor the communications with competing banks is an important element of a strong financial antitrust compliance program. But deciding which communications to keep tabs on can be tricky, and it requires an understanding of the complicated relationships among banks.

Identifying communications with “competing” banks may not be as simple as it sounds, since the relevant competitors tend to vary from segment to segment, Lin said. Compliance officers might need to spend time speaking with employees on each desk to find out which other banks they regard as their rivals.

“There are certain circumstances where on Desk A, Company 1 and Company 2 will be competing directly for the same business,” she said. “But then, on Desk B, you might have Company 1 going out and getting hedges from Company 2. They’re not necessarily competing in that scenario. They’re just transacting their own business.”

To the extent that bank officers require employees to report their communications with staff at competitor banks, the officers may want to clarify that they don’t want a heads-up every time the bank negotiates a business trade with another bank, Lin said. Otherwise, they could be inundated with information that is hardly useful for keeping track of antitrust compliance.

Compliance officers can also use their understanding of the market dynamics in each business area to help come up with efficient search terms for email monitoring, Lin said. For example, if Company 1 and Company 2 are competitors in commercial lending, Company 1’s compliance department might want to search for any emails between its commercial lending employees and their counterparts at Company 2.

Banks can also manage their communication-monitoring burden by identifying certain kinds of “routine and benign communications among competitors” that don’t require specific preapproval every time they occur. More unusual communications, such as discussions of a potential joint venture, should be precleared and reported to the compliance department, Iwrey said.

Meanwhile, it might make sense to ban certain methods of communication altogether, he said. For example, banks might not want their employees participating in online chat rooms like the ones where foreign exchange traders allegedly hashed out their plans to manipulate benchmark rates.

“You may want to limit the means of communication to a business-sponsored server, rather than communicating through LinkedIn messages or through chat rooms, because those are very hard to monitor,” Iwrey said. “I think, frankly, that people tend to be less careful on social media than they are on a business system.”

Make Sure It Comes From the Top

DOJ officials have repeatedly said that a robust antitrust compliance program needs the active involvement of the company’s top executives. That principle holds true in practice, including in the financial sector, attorneys said.

“It really has to be sponsored by top-level management to show that it is a priority from the top down,” Iwrey said.

Roxann Henry, a partner at Morrison & Foerster LLP, said that high-ranking executives can undermine compliance efforts by speaking about them dismissively.

“There are examples, historically, where a program is put on, but then the key executive comes in and says, ‘That’s all very well, but we know how business has to be conducted,’” Henry said.

When that happens, employees are bound to follow the direction of their boss. But when the top executive gets involved in delivering compliance training, that involvement can signal to employees that the company as a whole is taking compliance seriously, she said.

For companies too large for the chief executive to appear in person at every compliance presentation, Henry suggested playing a compliance video featuring that executive.

Lin said that getting senior banking officials to participate actively in an antitrust compliance program may take some time and effort. Top bankers might not be used to spending much energy on antitrust law, since the DOJ’s focus on antitrust enforcement in the financial sector is a relatively new phenomenon and banks previously focused on other legal areas such as securities regulation, she said.

“I don’t think that anyone is taking antitrust lightly, especially not at this point," Lin said. "I do think the focus has been elsewhere."

Read Employees the Riot Act

Education may go a long way toward antitrust compliance, but a strong program also relies on employees knowing that they could be punished for antitrust violations, lawyers said.

Some employees, in banking and beyond, might be tempted by the short-term rewards they think they can reap from an antitrust conspiracy, Henry said. But those who are caught fixing prices can be convicted of a felony in the U.S.

“The consequences of being a convicted felon are huge and, certainly in terms of one’s long-term career, not good,” Henry said. “That is something that it is important to convey.”

Iwrey said that making employees aware of the potential for individual legal consequences is especially important in the wake of the Yates memorandum, a September 2015 document in which U.S. Deputy

Attorney General Sally Yates called for the DOJ to focus more on individual accountability for corporate wrongdoing.

But there is nothing new or speculative about the possibility of individuals facing antitrust enforcement actions in the U.S. According to Henry, the DOJ's Antitrust Division has had a policy of taking action against culpable individuals since long before the Yates memo.

In any case, employees should know that legal penalties are not the only consequences they could face for violating the bank's antitrust compliance policy, Iwrey said. If the bank has a policy requiring reporting of certain communications with competitors, then a failure to report one of those communications should carry some penalty within the company, even if the communication itself was harmless, he said.

"Similarly, if you are aware of a violation and do not report it, there should be some corporate responsibility there," Iwrey said. "It's just a way to incentivize the employees, who are the eyes and ears of the company, to take compliance seriously."

--Editing by Jeremy Barker and Edrienne Su.

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