

Antitrust:

A Dangerous but Underappreciated Compliance Issue

March & April 2012

A survey by the Society of Corporate Compliance and Ethics



**SOCIETY OF CORPORATE
COMPLIANCE AND ETHICS**

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Introduction

Antitrust laws present one of the oldest and most vexing compliance issues. While other, newer legal areas may garner headlines and cause companies to frantically look for solutions—social media is an example—antitrust continues as a critical risk area to manage.

To assess how organizations are managing antitrust compliance, the Society of Corporate Compliance and Ethics fielded a survey in March and April 2012. Its objective was to determine what companies are and aren't doing, as well as how enforcement authorities might be able to further antitrust compliance programs.

Executive Summary

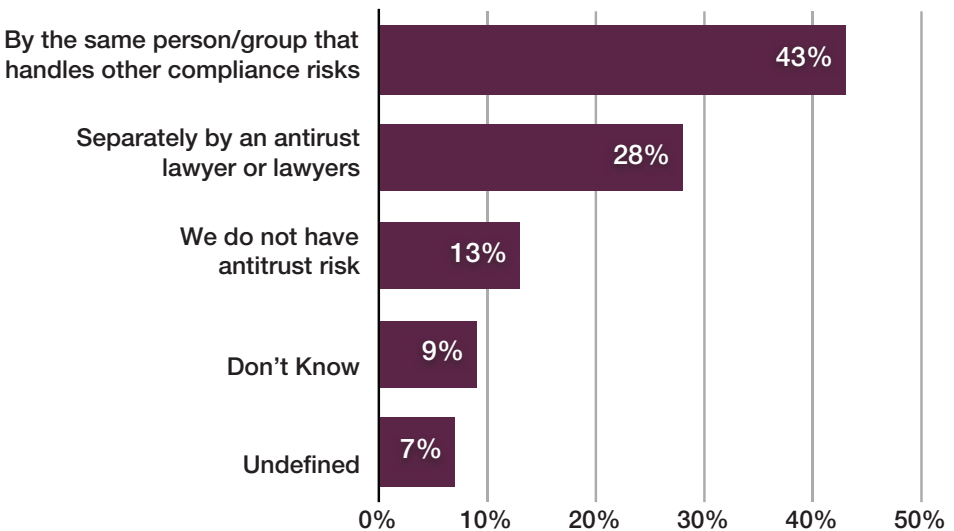
Despite the long history and permanence of the issue, and the severity of the consequences of an antitrust violation, many organizations have seemingly underdeveloped compliance solutions in place. Management of antitrust compliance is often undefined and potentially in a silo. Auditing is often less comprehensive than it could be.

Perhaps more would be done if stronger incentives were in place for compliance programs, as they are in other enforcement areas. The Department of Justice, at present, does not take compliance programs into account in its charging decisions or sentencing recommendations, as it does for other crimes. This is likely driving the perception by survey respondents that compliance programs would benefit from greater governmental direction and incentives for effective antitrust compliance programs.

Key Findings

- o **Management of antitrust compliance is not as clearly defined as it might be.** For 43% of respondents, it is owned by the compliance department, and for another 28% it is the responsibility of the legal department. Yet, for the balance of individuals surveyed, ownership of antitrust compliance was either undefined, unknown, or there was the belief that there was no antitrust risk to manage.

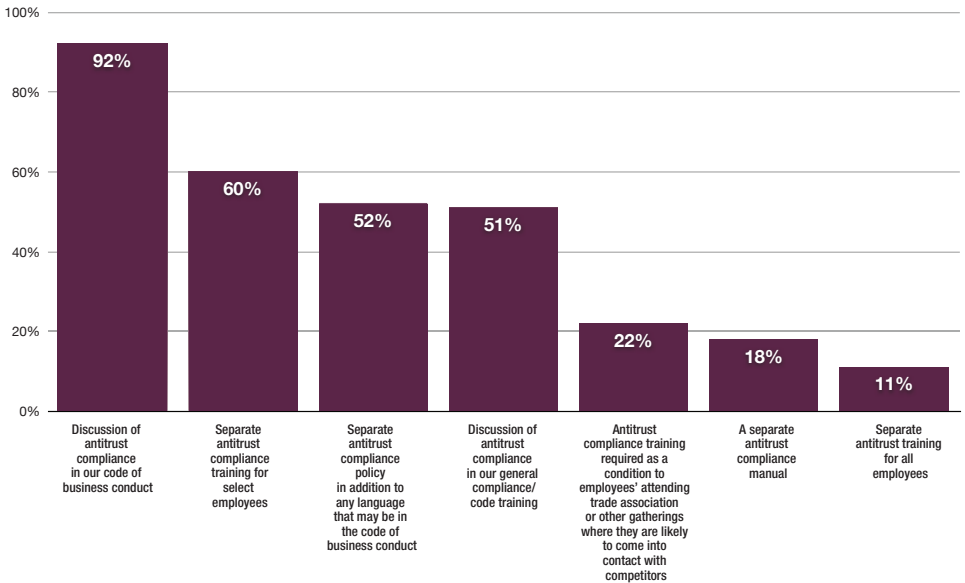
How is antitrust compliance handled in your company?



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- o **Organizations generally rely on multiple communications vehicles to educate employees on antitrust risk.** Antitrust policies are included in almost all codes of conduct (92%). In addition most respondents reported that their employer also has an additional antitrust policy document, includes it in their code of conduct training and/or offers antitrust compliance training for select employees. However, most companies do not require training as a condition for attending high-risk gatherings of competitors, such as trade associations.

Antitrust compliance training and awareness efforts at my organization include the following (please check all that apply)



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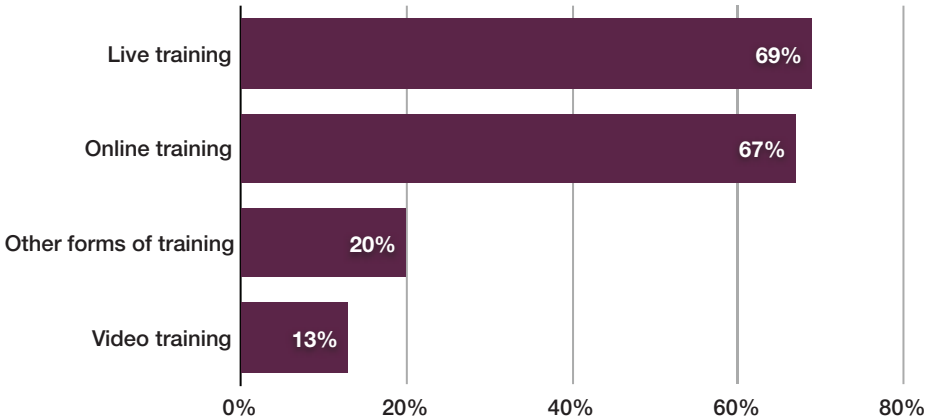
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- o **Live and online antitrust training are used by the majority of organizations surveyed.** Live training is used by 69% of respondents, and online training by 67%.

With respect to the format of your organization’s antitrust compliance training, which types of training do you utilize, if any? (Please check all that apply.)

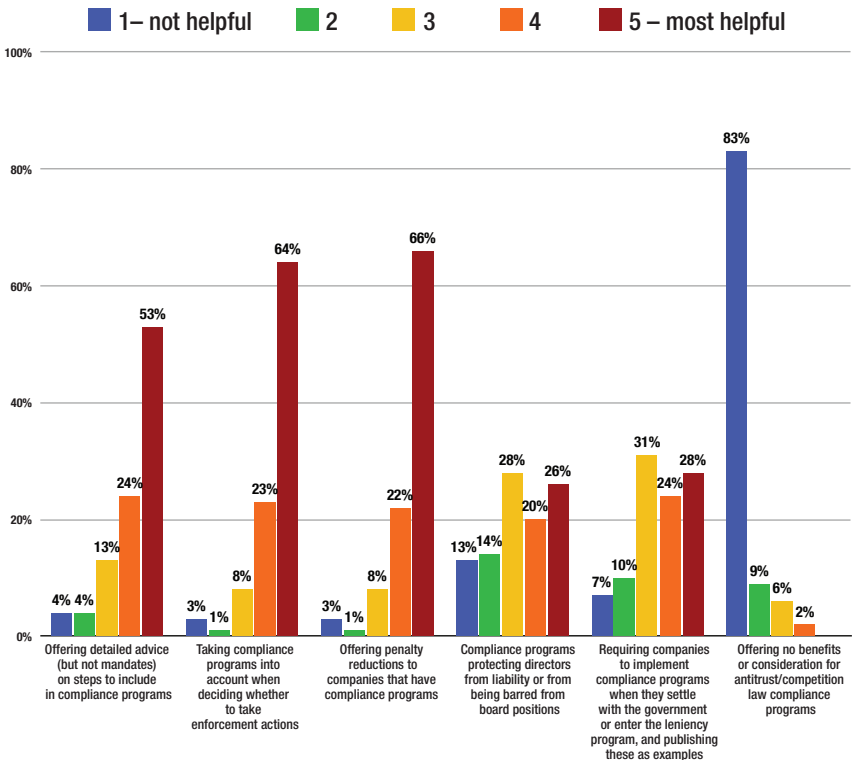


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- o **For a surprisingly large number of companies, antitrust audits are either not comprehensive or nonexistent.** Twenty six percent of respondents reported that their organization performs neither antitrust compliance audits nor administrative checks of their antitrust compliance program. Another thirty-eight percent report that they do not perform antitrust compliance audits other than administrative checks of their antitrust compliance program—checking training records and employee certifications.

- o **An overwhelming majority of survey respondents felt that government actions to better define compliance programs and provide incentives for them would be of substantial or great value.** Detailed advice on steps to include in compliance programs, taking compliance programs into account when deciding whether to take enforcement actions, and offering penalty reductions to companies that have compliance programs were all given high ratings for value by survey respondents—77% for advice and 88% for some form of incentives. Of lesser value were protecting directors from liability or being barred from board positions (under 50%) and requiring compliance programs as a part of settlements (52%).

On a scale of 1 to 5, with 5 being most helpful, which of the following government actions would be most helpful for your compliance program



Conclusions/Implications

- o **Placing responsibility for this specific area in legal rather than the compliance department may suggest that the approach to antitrust may be somewhat siloed from other risk areas.** While other compliance areas enforced by the Department of Justice are generally housed in the compliance department, for many organizations antitrust risk is not. This may lead to overlap and gaps in antitrust compliance efforts.
- o **The approach to auditing suggests a strong need to reexamine antitrust compliance.** An astounding 64% do not report performing the types of antitrust compliance audits that would meet the minimum standards under the Sentencing Guidelines. To be sure, one could argue that the lack of an audit is not surprising given the lack of incentives from the Department of Justice for having an effective program. Nonetheless, given the dangers of an antitrust compliance failure, not conducting more comprehensive audits appears highly risky.
- o **Greater attention to antitrust compliance by the government could help change this equation.** Current Department of Justice policy is to give credit only to the first corporation that confesses to an antitrust crime, regardless of any compliance program. Unlike other areas of enforcement, no credit is given for having an effective compliance program. This may be providing a disincentive for corporations to have strong compliance programs in this important risk area.

Methodology

The survey was conducted during March and April. Responses were solicited from contacts in the Society of Corporate Compliance and Ethics database, who are primarily compliance officers, attorneys, consultants, accountants, and academics in the compliance fields. The 118 responses represent all segments of U.S. business, and were collected via Zoomerang, an online third-party survey mechanism.