

Effective Antitrust Programs: What Does the Government Really Want?

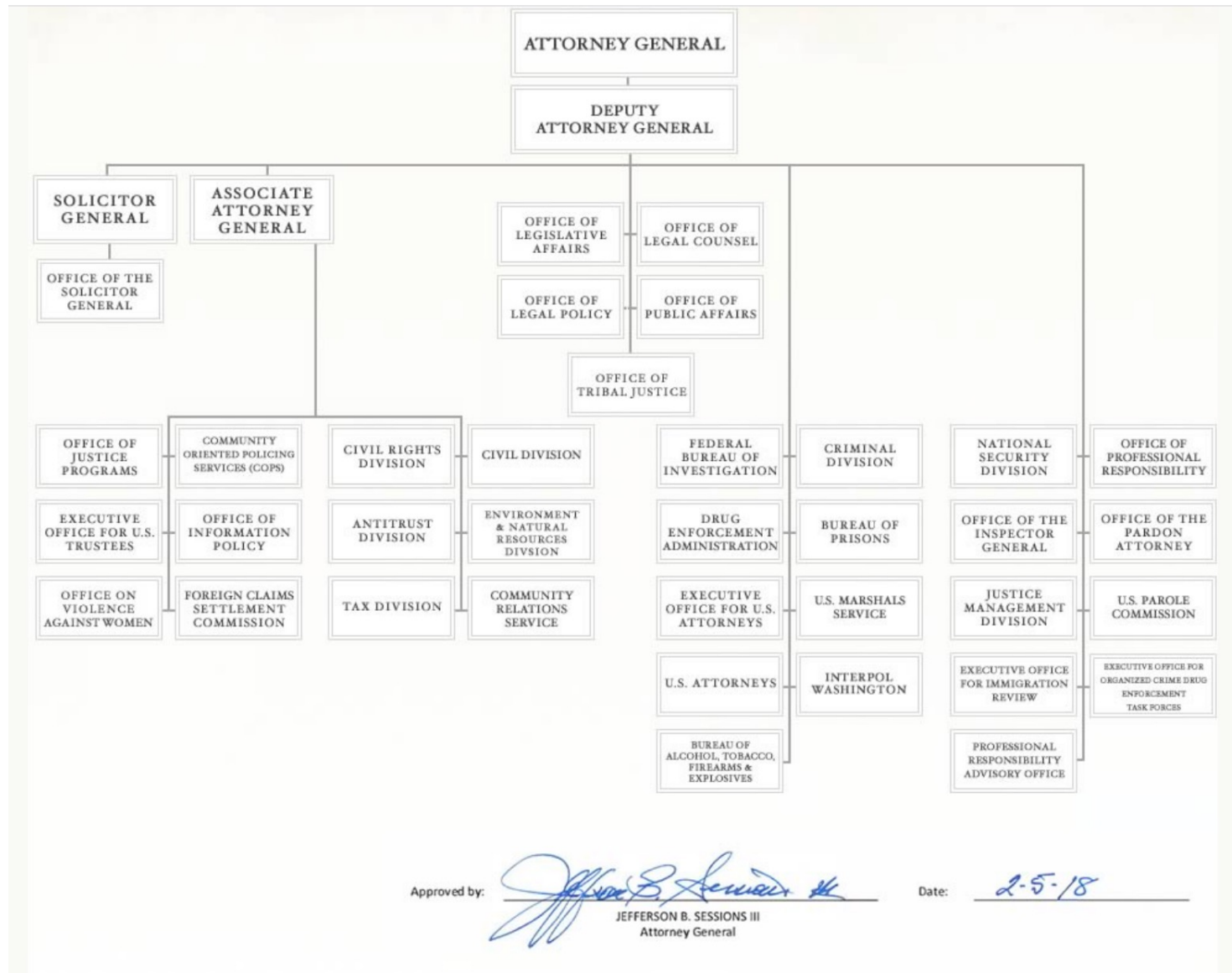
**Ted Banks
Christian Liipfert**



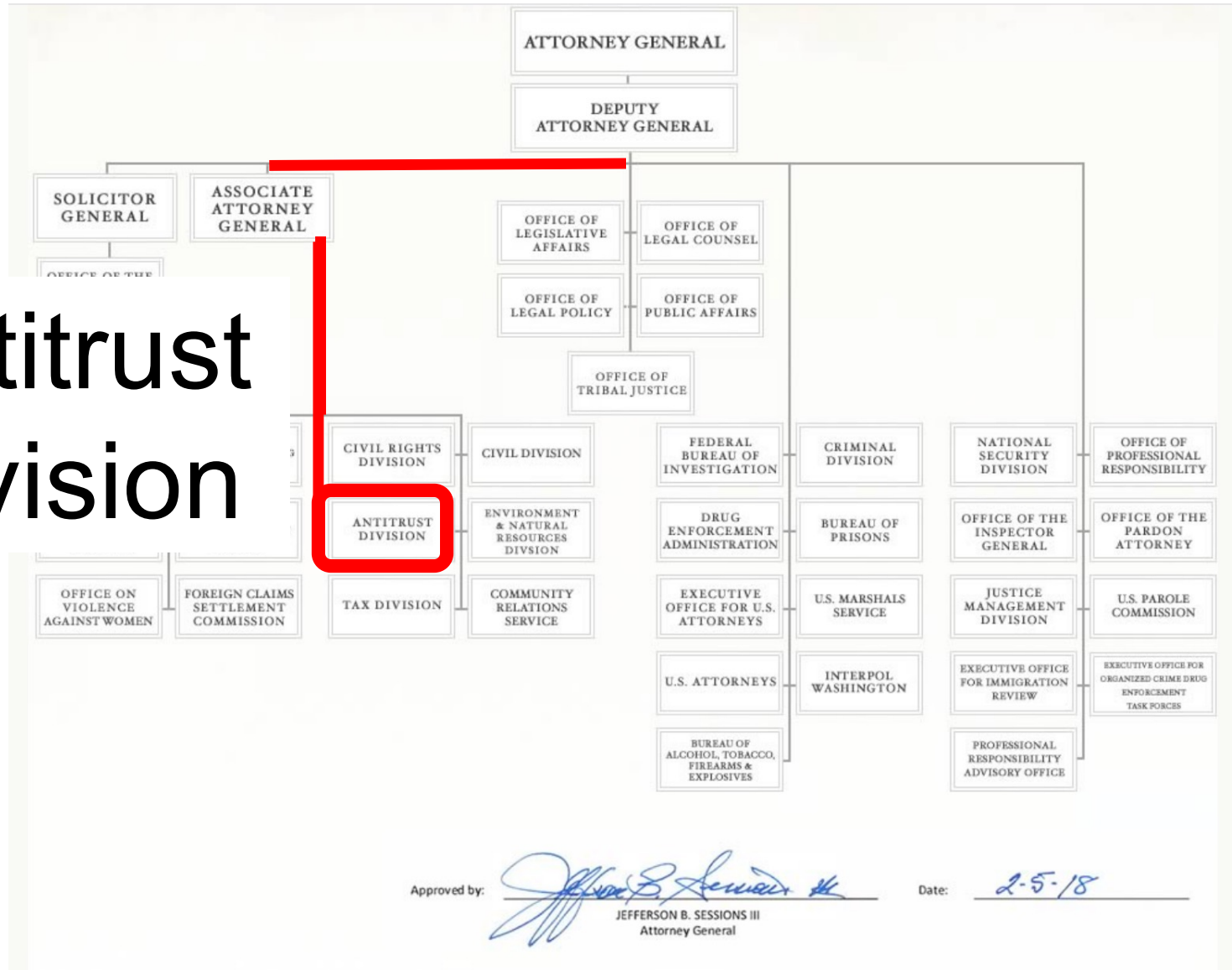
Before we begin

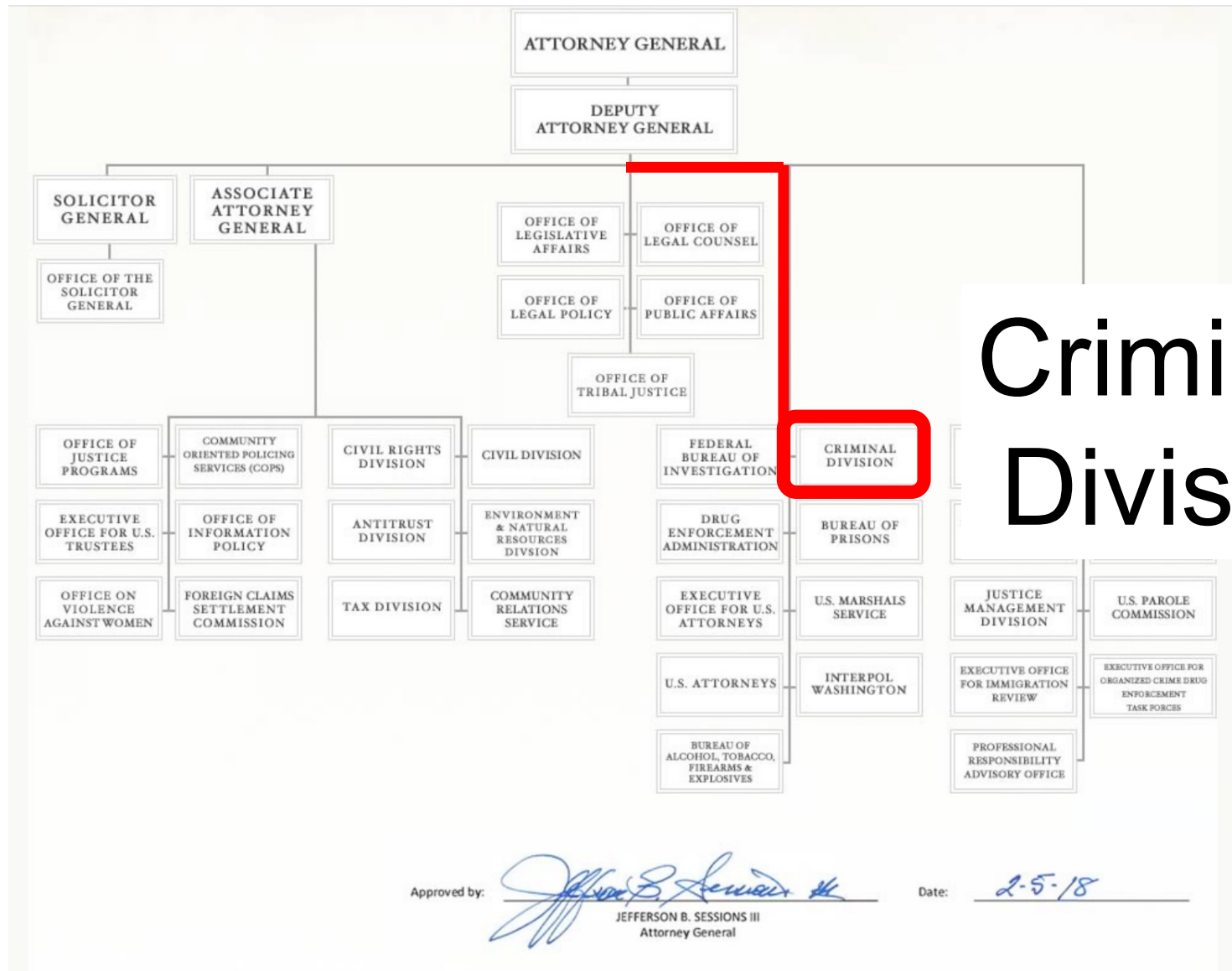
- *Respondeat superior*
 - The master is responsible for
 - The criminal acts of the agent
 - Within the scope of the agency
 - For the benefit of the master
 - In the corporate context

Org Chart



Antitrust Division

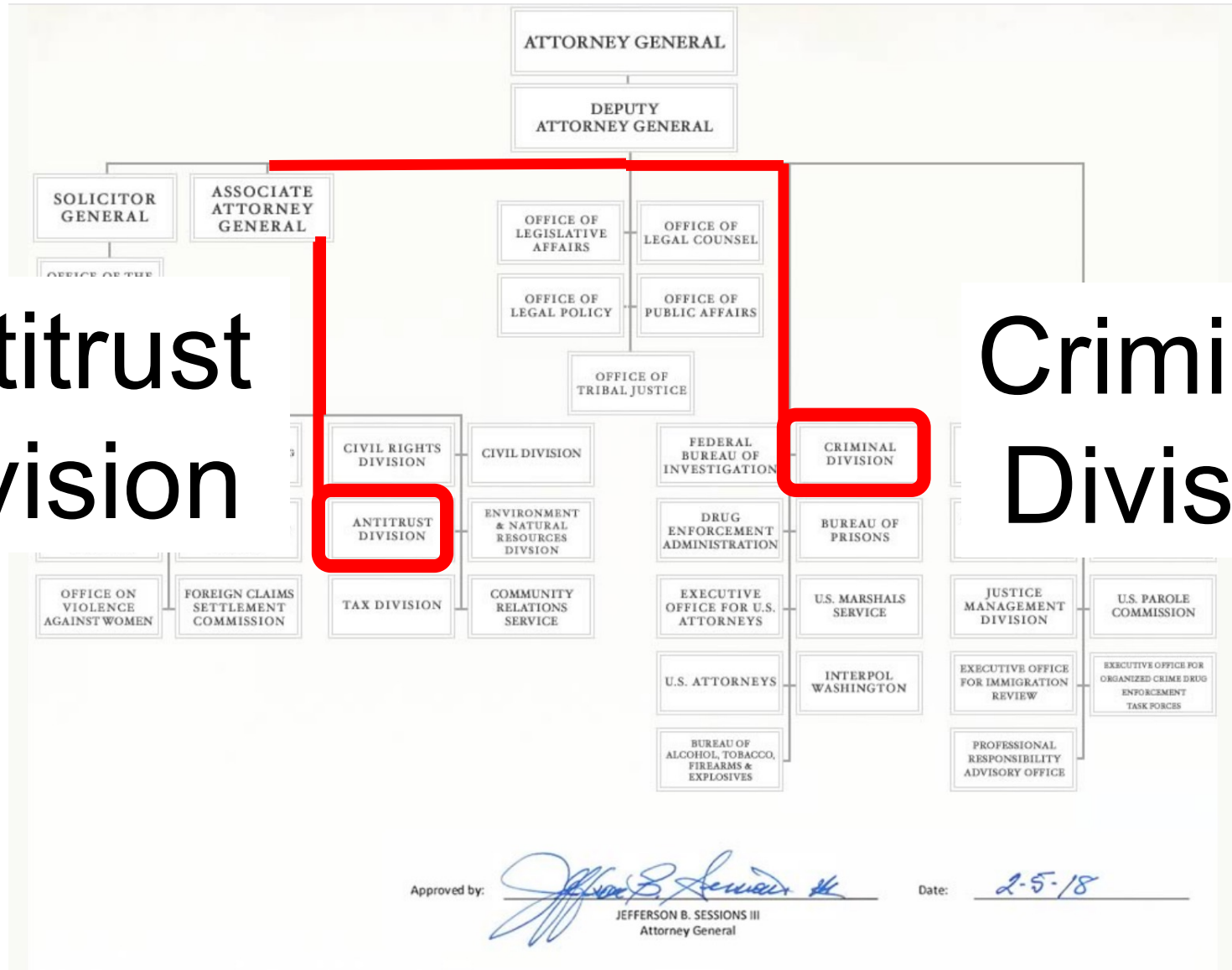




Criminal Division

Antitrust Division

Criminal Division



Courts v. Antitrust Division

- 1960 – having a compliance program no defense (Court)
- 1972 – guilty despite management instructions and policies (Court)
- 1979 – Compliance programs irrelevant (Antitrust Division)
- 1980 – if acted and implemented in good faith and diligently, undercuts imputing intent to corporation (Court)
- 1981 – might affect intent if in good faith (Court)
- 1983 – was violation to benefit company? (Court)
- 1991 – Sentencing Guidelines (doesn't apply to antitrust)
- 1993 – Leniency Program is alternative (Antitrust Division)

1991: Organizational Sentencing Guidelines


- Effective compliance program can reduce criminal punishment
- Antitrust Division position: doesn't apply to antitrust
 - “Well accepted” in the business community that antitrust is different
 - Only way to reduce penalty is to be first to confess

Why have a Compliance Program anyway?

- Reduce risk
- State law (Delaware)
 - Duty of directors
 - Have a system
 - Exercise oversight
- Criminal laws
 - SEC
 - FCPA
 - Etc.

Federal Sentencing Guidelines

- Risk assessment
- Due diligence to prevent/detect
- Culture of compliance
- Standards and procedures
- Board knowledgeable
- High level personnel responsible
- Adequate resources
- Regular communication
- Training appropriate for jobs
- Monitoring & auditing
- Periodic evaluation
- Reporting system
- Incentives & discipline
- Response to violations



Unlike the Antitrust Division, other countries and international organizations seemed to like the Sentencing Guidelines and created compliance guidelines that looked very similar . . .

- Australia
- Brazil
- Canada
- Chile
- EU
- France
- India
- ICC

- ISO
- Israel
- Japan
- Mexico
- OECD
- Singapore
- Turkey
- UK

	Management ownership and commitment	Structure & support	Risk assessment	Policy, standards, procedures & controls	Education	Communications	Monitoring & auditing	Reporting	Discipline & incentives	Periodic review & renewal	Culture of compliance	Integrated into workforce & operations
US	√	√	√	√	√	√	√	√	√	√	√	√
Australia	√		√	√	√		√	√		√	√	
Brazil	√			√	√		√	√				
Canada	√		√	√	√		√	√	√	√		
Chile	√		√	√	√		√	√	√			
EU	√		√	√	√		√	√		√		
France	√			√	√		√	√	√	√		
ICC	√		√	√			√	√	√			
India	√			√	√		√	√	√			
ISO	√		√	√	√	√	√	√		√		
Israel	√			√	√		√	√	√			
Japan	√		√	√	√		√	√	√	√		
Mexico	√		√	√	√		√	√	√	√		
OECD	√			√	√		√	√				
Singapore				√	√					√		
Turkey	√		√	√	√				√			
UK	√		√	√	√					√		



In 2019 the Antitrust Division
released “Evaluation of
Corporate Compliance
Programs”

U.S. Department of Justice



**U.S. Department of Justice
Antitrust Division**

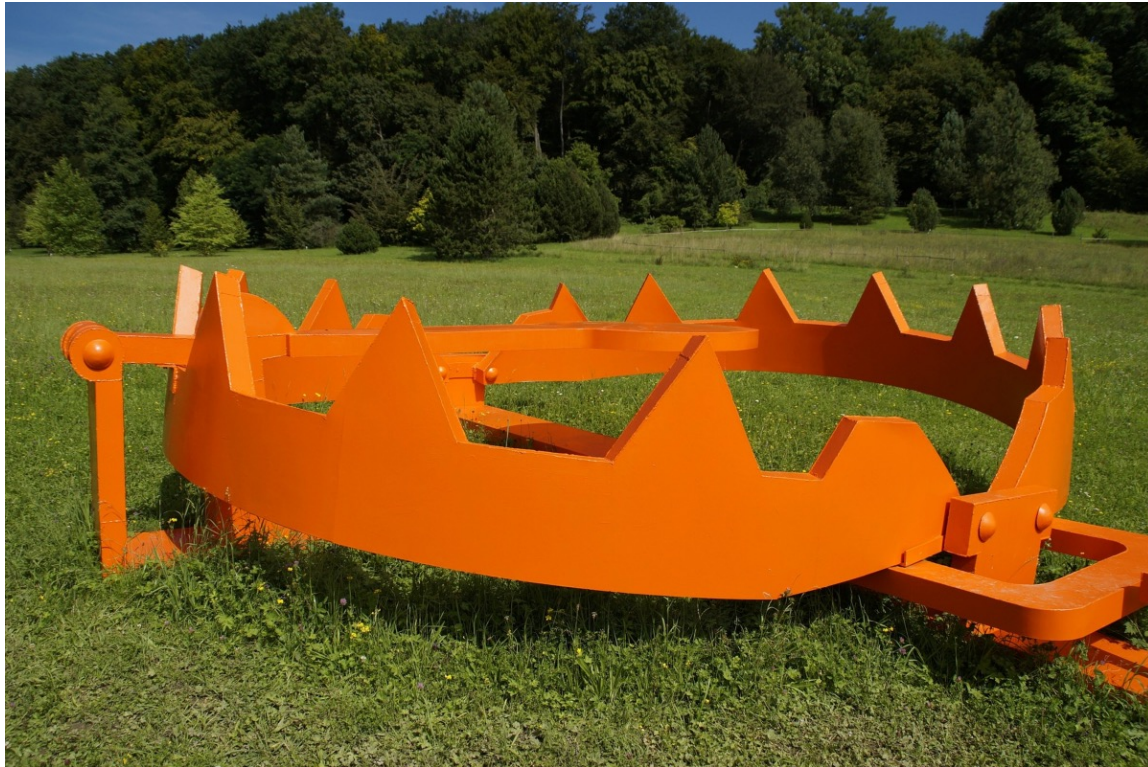
**Evaluation of Corporate Compliance Programs in
Criminal Antitrust Investigations**

July 2019

Nine Elements (Fairly Familiar)

1. the comprehensiveness and design of the program
2. the culture of compliance
3. responsibility for, and resources dedicated to, antitrust compliance
4. antitrust risk assessment
5. compliance training and communication
6. monitoring and auditing techniques, including continued review, evaluation, and revision of the antitrust compliance program
7. reporting mechanisms
8. compliance incentives and discipline, and
9. remediation methods

Hidden traps



Hidden traps

- Limited risk assessment?
- Code of Conduct infrastructure
 - Policy, Training, Monitoring, etc.
- Training isn't understood?
- Activities not documented?
- You haven't communicated enough?
- No updates based on Lessons Learned?
- No visible Board involvement/oversight?



Surprising
requirements!

Surprising requirements

- Risks posed by specific groups of employees
- Senior leadership not accountable for failures in antitrust compliance
- No people penalized for not taking reasonable steps to prevent or detect violations
- Board not trained
- Company doesn't accept responsibility
- Didn't report promptly

How will government/monitors respond?

- Are you serious?
 - Culture of compliance
 - Documented processes (not just policy)
 - Do you test? Audit? Monitor?
 - Is discipline consistent?
- Integration into workforce
- Can you be trusted?

What does the government want?



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What does the government want?

- No violations
- Culture of compliance
- Integrated
 - Board
 - Management (Senior, Middle, and Line)
 - Workforce
- Reporting
- Take responsibility

What techniques work?

- Explain why
- Tie to elements of Code of Conduct program
- Personalize training
- Controls on processes tied to risky activities
- Constant communications
- Keep it simple



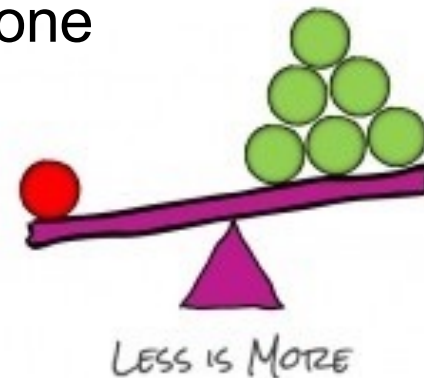
Put Yourself in Your Employee's
Shoes

Shoes

- Role/job
- Education
- Language
- Office/factory
- Age
- Background
- Culture
- Problems

Target the Training

- Provide principles, examples, stories relevant to the individual's role in the corporation
- Make access to information painless.
 - FAQs
 - Online access via computer or smart phone
- **KEEP IT SHORT!**
 - People will only remember 2 or 3 points
 - Test to verify they retain those points



Communication Key: Tell a Story





Strive for Zen Clarity

- Don't fix prices with competitors
- Don't talk to anyone outside the company about how we compete
- Call if you have questions

Thank you.



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