



507 How to Conduct an Efficient & Beneficial Antitrust Audit

Howard Feller
Partner
McGuireWoods LLP

Lori Kaczynski
Vice President - Compliance Audit
Georgia-Pacific LLP

Daniel Renbarger
Principal Counsel-Bleached Paper & Kraft/Antitrust
Georgia-Pacific Corporation

Faculty Biographies

Howard Feller

Howard Feller is a partner in the Richmond, Virginia office of McGuireWoods LLP where he concentrates his practice on antitrust litigation, antitrust counseling, antitrust merger investigations, and commercial litigation. His practice also includes representation before government enforcement agencies, advertising issues, and franchising and distribution matters. He has worked extensively on antitrust issues in many diverse industries, and has substantial experience in conducting antitrust audits and antitrust compliance programs.

Mr. Feller currently serves as a member of the governing council of ABA's antitrust section. He previously served as the chair of the program committee, the co-chair of Sherman Act Section 1 committee, and the chair of the health care committee of the ABA antitrust section. Mr. Feller is also a past editor of both the *Section 1 Newsletter* and the *Antitrust Health Care Chronicle* published by the ABA antitrust section, as well as a past chair of the antitrust section of the Virginia State Bar. In addition, he has made many speeches and written a number of articles on various antitrust issues.

He received a B.A. from the University of Virginia and a J.D. from Georgetown University Law Center.

Lori Kaczynski

Lori Kaczynski is vice president - compliance audit at Georgia-Pacific LLC (GP) in Atlanta. In this role she created and currently manages the compliance audit group. Her audit group is responsible for audits in the environmental, health and safety, and commercial law subject areas. They plan to perform over 230 audits in a variety of subject matter areas across a global manufacturing and consumer products company.

Ms. Kaczynski joined GP as an audit leader in the internal audit financial audit group. Previously she worked for a healthcare company as the director of financial reporting and treasury, and as a financial auditor for PricewaterhouseCoopers (PwC). At the healthcare company she was responsible for the company's treasury department, SEC filings, and various other reporting requirements. At PwC she was responsible for large scope financial audits through the assessment of engagement risk and the performance of analytical reviews of clients' quarterly and annual financial statements.

Ms. Kaczynski currently serves on the Kennesaw State University accounting advisory board. She is a certified public accountant.

Ms. Kaczynski graduated summa cum laude with a B.A. from Kennesaw State University.

Daniel Renbarger

Daniel Renbarger is chief counsel - antitrust for Georgia-Pacific LLC in Atlanta. His responsibilities include managing competition law issues for Georgia-Pacific operations worldwide, with particular emphasis on compliance and mergers and acquisitions activities. He is a member of the company's compliance leadership team.

Prior to assuming his current role, Mr. Renbarger was a business attorney for Georgia-Pacific. He was the chief counsel for several business divisions and provided advice in a variety of commercial law areas.

Mr. Renbarger received a B.B.A. from the University of Michigan School of Business Administration and a J.D. from the University of Michigan School of Law.

HOW TO CONDUCT AN EFFICIENT AND BENEFICIAL ANTITRUST AUDIT

Howard Feller, Esq.
Partner
McGuireWoods LLP

Lori P. Kaczynski
Vice President – Compliance
Georgia-Pacific LLC
Compliance & Ethics Dept.

Daniel Renbarger, Esq.
Chief Counsel – Antitrust
Georgia-Pacific LLC
Law Department

Association of Corporate Counsel
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I. REASONS FOR CONDUCTING AN ANTITRUST AUDIT

A. Overview

An “antitrust audit” is an examination of the actual operations and practices of a company to determine the extent of its compliance with the antitrust laws, identify potential antitrust risks and liabilities, and assess the adherence to and effectiveness of the company’s antitrust compliance policy and training program. Typically, the primary components of an antitrust audit are: (1) an examination of selected company documents, and (2) interviews with selected company personnel, both of which are designed to identify specific business activities that potentially could create antitrust exposure for the company. The results of the audit will provide the company with an opportunity to change business practices that may create potential antitrust liability and to identify the areas where additional antitrust counseling is needed. The results of the audit also can be used either to structure a compliance program initially or to determine where an existing program needs modification, with particular emphasis on avoiding high-risk practices. At times, an antitrust audit may be undertaken in order to assess the scope of a known antitrust issue across an organization. However, it can also be a very effective tool for assessing compliance without knowledge of a specific preexisting issue.

B. Benefits of an Antitrust Audit

1. Effective Way to Identify Potential Antitrust Risks

An antitrust audit provides companies with an effective way to identify antitrust issues and legal risks before they result in actual liability and litigation. By identifying and correcting potential antitrust risks early, companies can avoid enormous litigation expenses and exposure to liability, both corporate and personal, criminal and civil.

Antitrust is a high risk area for companies because of the potential for substantial damage claims, government fines, and litigation expenses. The federal and state antitrust enforcement agencies are very active and aggressive in enforcing the antitrust laws, and the potential for treble damages provides a strong incentive for private plaintiffs to bring antitrust cases. There has also been more vigorous enforcement in recent years in other countries, particularly European Union countries. Antitrust audits can be an effective way to assist companies in responding to this more intensive regulatory environment. Antitrust also is a high risk area for many companies because of the pressures on business people to generate significant profits in the face of an increasing amount of

competition in virtually every industry, from both domestic and foreign sources.

Moreover, antitrust is an appropriate area for specialized treatment because, unlike other areas of regulatory law where there are objective standards and methods to measure results, the focus in antitrust cases is directly on the practices, conduct, and communications of business people. For example, in some cases, seemingly ordinary and innocuous business behavior and discussions may become evidence of an unlawful conspiracy.

In addition, companies that have merged with or acquired other companies or businesses should be particularly interested in an antitrust audit program because they may have inherited files, personnel, and business practices that pose significant antitrust law risks.

2. Avoid Negative Consequences

An antitrust defendant can expect substantial notoriety from the filing of an antitrust case. The filing of a civil or criminal antitrust action by the government virtually guarantees a deluge of private treble damage suits by plaintiffs seeking to capitalize on the government case. Furthermore, once challenged (or convicted) by the government for antitrust violations, a company is likely to become the subject of close governmental scrutiny in the future. In addition, antitrust law violations can cause great harm to a company's reputation and standing in the market, particularly with customers, because such violations cast doubt about the company's integrity and ethics.

3. Help Instill a Culture of Compliance in the Company

By conducting an antitrust audit, the company sends a strong message to its employees about the importance of antitrust compliance and reinforces the company's efforts to instill a culture of compliance. This benefit of an antitrust audit was specifically acknowledged and described by Deputy Attorney General Larry Thompson, in the now-famous "Thompson Memo," issued by the U.S. Department of Justice:

While the department recognizes that no compliance program can ever prevent all criminal activity by a corporation's employees, the critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in

misconduct to achieve business objectives. The fundamental questions any prosecutor should ask are: "Is the corporation's compliance program well designed?" and "Does the corporation's compliance program work?"

In evaluating compliance programs, prosecutors may consider whether the corporation has established corporate governance mechanisms that can effectively detect and prevent misconduct. For example ... are internal audit functions conducted at a level sufficient to ensure their independence and accuracy and have the directors established an information and reporting system in the organization reasonable [sic] designed to provide management and the board of directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law.

Prosecutors should therefore attempt to determine whether a corporation's compliance program is merely a "paper program" or whether it was designed and implemented in an effective manner. In addition, prosecutors should determine whether the corporation's employees are adequately informed about the compliance program and are convinced of the corporation's commitment to it. This will enable the prosecutor to make an informed decision as to whether the corporation has adopted and implemented a truly effective compliance program that, when consistent with other federal enforcement policies, may result in a decision to charge only the corporation's employees and agents.

"Principles of Federal Prosecution of Business Organizations," Larry D. Thompson, Deputy Attorney General, to Head of Department Components, United States Attorneys, dated January 20, 2003.¹

¹ The Thompson Memorandum was subsequently amended by U.S. Deputy Attorney General Paul J. McNulty with respect to the attorney-client privilege. "Principles of Federal Prosecution of Business Organizations," Paul J. McNulty, Deputy Attorney General, to Head of Department Components, United States Attorneys, dated December 12, 2006 (the "McNulty Memorandum"). According to the McNulty Memorandum, "Prosecutors may only request waiver of attorney-client or work product protections when there is a legitimate need for the privileged information to fulfill their law enforcement obligations. A legitimate need for the information is not established by concluding it is merely desirable or convenient to obtain privileged information." The McNulty Memorandum then lays out four factors to be considered in determining if there is a legitimate need:

"(1) the likelihood and degree to which the privileged information will benefit the government's investigation; (2) whether the information sought can be obtained in a

The individuals participating in the audit are those who are making decisions daily that may place their company at antitrust compliance risk. The interview process and document review provide an opportunity to solidify their antitrust personal knowledge by converting abstract concepts, rules, facts, and terminology into a more meaningful understanding of behaviors that may place them and their company at risk. This improves their ability to perceive and prevent antitrust risks.

4. Insulate Company Officers

If a company conducts antitrust audits as part of an effective antitrust compliance program, it may help protect senior management of the company from personal liability for the actions of employees who are found to have engaged in serious antitrust violations. See, e.g., *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125 (Del. 1963) (the court concluded that the company directors did not have actual knowledge of the illegal antitrust activities of employees; thus, the directors were not liable as a matter of law).

Otherwise, the Federal Sentencing Guidelines require individuals who are convicted of participating in an antitrust violation to pay a fine from 1% to 5% of the volume of commerce at issue, but not less than \$20,000. 18 U.S.C.S. Appx § 2R1.1(c)(1). In setting fines for individuals, the court will consider the extent of the defendant's participation in the offense, the defendant's role, and the degree to which the defendant personally profited from the offense (including salary, bonuses, and career enhancement). If the court concludes, however, that the defendant lacks the ability to pay the guideline fine, it will impose community service that is "as burdensome" as the fine would have been.

In addition, as indicated above, an antitrust audit can help a company avoid expensive and burdensome private treble damage suits.

C. **Goals and Objectives of an Antitrust Audit**

1. Assess

- a. Provide an independent and objective evaluation through a systematic and disciplined risk-based approach in order to ensure that the company's affairs are conducted lawfully and with integrity

timely and complete fashion by using alternative means that do not require waiver; (3) the completeness of the voluntary disclosure already provided; and (4) the collateral consequences to a corporation of a waiver."

- b. Evaluate compliance with the antitrust laws
- c. Evaluate the company's policies and practices for weaknesses (what antitrust exposure it has), strengths (what it does right), and opportunities (what it can do better)
- d. Determine the effectiveness of the company's compliance program
- e. Discover opportunities for improvement

2. Remediate weaknesses

- a. Provide concrete recommendations to eliminate or reduce the company's antitrust risks
- b. Provide recommendations to increase the company's competitiveness due to misunderstandings of the antitrust laws or unnecessarily conservative practices.
- c. Ensure that the audit recommendations are prioritized based upon the magnitude of the problem and the needs of the business, and set a reasonable timetable with the company for implementation of the suggested corrective actions. This should be a collaborative effort between audit counsel and the company.
- d. Implement the corrective actions based upon the timetable agreed upon.
- e. Monitor appropriate and timely audit finding corrective actions to remediate antitrust risks

3. Educate

- a. Ensure that the company's antitrust compliance training program not only sufficiently educates employees about antitrust prohibitions and risks, but also assists the company in competing within the bounds of the law.
- b. An antitrust audit is designed to keep the company out of antitrust difficulty which may arise through acts of employees who either do not know the prohibitions of the antitrust laws or are not fully aware of their seriousness. Educating company employees, not only as to the importance and parameters of the antitrust laws, but also as to the purpose and benefits of an audit, are the best weapons a company has to limit, if not prevent, antitrust liability.

4. Monitor

Create a follow-up mechanism to ensure that the changes agreed upon during the audit have been made. Continually assess the level of compliance and legal risk, as well as the effectiveness of policies, procedures, and systems

II. ELEMENTS OF AN ANTITRUST AUDIT

1. Best Practices

1. Confirm Audit Objectives and Scope with Law and Compliance Departments

At an initial meeting among the Law Department, the Compliance Department and the outside audit counsel, the specific objectives and scope of the audit should be established and agreed upon. The audit will be more efficient and productive if the scope of the audit is defined and established at the outset and is based on a consensus among the Law Department, the Compliance Department and outside counsel.

2. Obtain Support and Commitment from Management

Audit programs need clear and sufficient authority from the company's senior management to promote the importance of the auditing function and to ensure broad audit coverage, adequate consideration of the audit report, and appropriate action on the audit recommendations. Business people are inherently forward-looking; consequently, there may be a reluctance for managers to disrupt their own operations, which are generating revenues and profits for the company, to take a retrospective look at prior events, particularly in the absence of pending litigation. This tendency is inherent in the nature of business thinking and can be overcome only if the audit carries the authority and sanction of the highest levels of management.

At an initial meeting with the senior officer of the company or business unit being audited discuss and understand the company's decision-making procedures and business practices.

3. Issue Communication from Senior Officer

The senior officer of the company or business unit involved should send a message announcing the antitrust audit to the relevant employees. This message should indicate that the antitrust audit is an important compliance activity of the company and will be beneficial to the company's business. Specifically, the message should indicate that the audit is intended not only to detect and remedy potential antitrust issues, but also to identify areas where the company can compete more effectively and aggressively and improve its performance.

4. Maximize Ability to Assert and Preserve Attorney-Client Privilege

The following steps should be taken to improve the company's ability to assert and preserve the attorney-client privilege for the work product and results of the antitrust audit:

- The company should issue an engagement letter requesting audit counsel to conduct the antitrust audit and to provide legal advice
- The interviewees should be directed to maintain the confidentiality of the information collected, reviewed, and discussed in the audit
- All attorney notes, memoranda, and communications should be clearly marked "Privileged Attorney-Client Communication and Work Product"
- All attorney notes, memoranda, and reports should clearly record and reflect the attorney's mental impressions and opinions
- The audit report should be kept confidential and its distribution should be carefully controlled

5. Dedicate an Internal Resource in the Company

The company should dedicate at least one employee to the audit project who is assigned the responsibility to assist audit counsel with scheduling interviews, obtaining needed information, and gathering relevant documents. By centralizing this responsibility with one company employee, it makes the entire team and process more efficient and less disruptive.

6. Weekly Telephone Calls

It is imperative to have frequent communications between audit counsel and the company. Weekly telephone calls are recommended to ensure full communication, provide progress updates, and create a regular forum to resolve any issues.

7. Weekly Team Meetings

To manage and organize the audit properly, it is beneficial for outside counsel to have an internal team meeting each week. During this team meeting, the status of the project activities is reviewed, and any needs or plans for the upcoming activities are addressed.

8. Selecting an Appropriate Audit Team

The company will have to decide whether to use its own in-house lawyers, its regular outside lawyers, or lawyers specially retained for the audit. The most important considerations here are that the lawyers be experts in antitrust law and practice, and have experience performing audits.

Specialized knowledge of the substantive principles of antitrust and the evidentiary basis for proving a plaintiff's case are essential, and general business lawyers and litigators frequently lack the necessary substantive expertise. The lawyers should have substantial experience in conducting an antitrust audit because the skills involved in managing and carrying out an effective and efficient audit, evaluating business practices, and developing practical and productive guidance for corrective actions are different from those utilized in litigation or government investigations.

It is also important to ensure the auditor can be objective and has no potential and/or actual conflicts of interest or bias as well as ensuring continuity of audit team members through out the audit.

9. Close Involvement of In-House Attorneys at Every Phase

It is important to keep in-house lawyers involved and informed at all stages of the project to help assess the potential antitrust risks and to protect confidentiality, work product, and the attorney-client privilege.

2. Audit Process

1. Conduct Kick-Off Meeting

- a. Meet with the Law and Compliance Departments to finalize the audit objectives and scope

2. Obtain Background Information for Audit

- a. It is extremely important that the lawyers conducting the audit become completely familiar with the company's decision-making procedures and business practices. Normally, this familiarity can be obtained by conducting preliminary interviews with senior management as to the company's overall organization, the identity of key positions and personnel, the markets in which the company operates, and the company's business practices.
- b. The background interview of senior management about the company's business and practices should include the following topics:
 - (i) Identification of competitors
 - (ii) Interactions with competitors
 - (iii) Market share estimates
 - (iv) Identification of geographic markets
 - (v) Pricing practices, policies, and strategies
 - (vi) Sales and distribution practices
 - (vii) Market trends and developments
 - (viii) Joint ventures or collaborations with competitors
 - (ix) Primary trade associations and company involvement

- (x) Customer issues
- (xi) Supplier issues
- (xii) Historical antitrust problems
- (xiii) Market problems or issues
- (xiv) Product lines
- (xv) Business/strategic plans
- (xvi) Organization structure and key decision makers
- c. Review publicly available information about the company's performance and competitive conditions
- d. Collect information regarding antitrust compliance program
 - (i) Evaluate the extent of conformance with the current antitrust compliance program
 - (ii) Assess the comprehensiveness and effectiveness of the current antitrust compliance program
- e. Interview Law and Compliance Departments regarding the company's litigation history and any problems or issues of concern

2. Identify Departments to be Audited

- a. Consult with the Law and Compliance Departments to identify the relevant departments to include in the audit, which often consist of:
 - (i) Sales department
 - (ii) Marketing department
 - (iii) Pricing department or persons responsible for pricing
 - (iv) Persons involved in trade associations
 - (v) Persons involved in joint ventures or collaborations with competitors
 - (vi) Senior management who interact with competitors
 - (vii) Strategic planning/business development department (*i.e.*, mergers and acquisitions)
 - (viii) Credit department
 - (ix) Production department management
 - (x) Other departments and/or individuals recommended by Law and/or Compliance departments based upon a risk-based analysis
- b. Work with the Law and Compliance departments to identify the relevant persons within each department or group to be included in the audit
 - (i) For example, determine the relevant levels within the sales department that should be included

3. Identify Types of Activities that will be Examined

- a. A priority of the audit should be to investigate the possibility of horizontal collusive activities, such as price fixing, bid rigging, or market division (by customer, territory, product, or volume) activities

b. Other possible activities to examine during the audit include:

- (i) Contacts and communications with competitors
- (ii) Pricing policies and practices
- (iii) Bidding activities
- (iv) Joint ventures and collaborations with competitors
- (v) Trade association activities
- (vi) Sales and distribution practices
- (vii) Discount, allowance, and promotional activities
- (viii) Near cost or below cost pricing
- (ix) Resale price maintenance
- (x) Exclusive dealing arrangements
- (xi) Customer and supplier selection and termination
- (xii) Group purchasing activities
- (xiii) Tying arrangements
- (xiv) Reciprocal dealing arrangements
- (xv) Requirements contracts
- (xvi) Benchmarking practices
- (xvii) Adherence to and effectiveness of current antitrust compliance program
 - (1) Assess the comprehensiveness and effectiveness of the current antitrust compliance program
 - (2) Existence of internal mechanisms for confidential reporting of antitrust compliance concerns

c. Audit counsel should work with the Law and Compliance departments to review the above recommendations and finalize the list of activities to be audited.

5. Specific Steps Involved in Conducting the Audit

- a. Determine the scope of and process for the collection and review of hard copy documents and emails
 - (i) Consult with Law Department and Compliance Department
 - (ii) Review retention policy and practice for emails and electronic information
 - (iii) When applicable consider data privacy or privacy laws applicable to document review and the need for custodian consent
- b. Identify the specific types of documents to be collected
 - (i) Consult with Law and Compliance Departments to determine the types of documents to be reviewed
 - (ii) Carefully consider the efficiency and cost-effectiveness of this activity when determining its scope
- c. Examples of relevant types of documents to be reviewed
 - (i) Existing antitrust compliance materials
 - (ii) Strategic business plans – sales, marketing, and general business plans

- (iii) Periodic sales management reports (*i.e.*, monthly, quarterly, and/or annual reports)
- (iv) Sales call reports for larger customers
- (v) Competitor files
- (vi) Meeting competition files
- (vii) Trade association files
- (viii) Communications with competitors
- (ix) Emails for selected employees – consult with Law and Compliance Departments as to scope of the search and use keyword searches to review emails
- (x) Chronological files of senior management

- d. After completing background interviews, conduct training session for internal team
 - (i) Prepare interview outline for use by attorneys
 - (ii) Consult with Law Department regarding attendance of company employee or in-house attorney in some or all of interviews
- e. Prepare a timeline for steps involved in audit
- f. Schedule interviews
- g. Conduct review of documents and emails
- h. Conduct interviews
 - (i) After each interview is completed, prepare summary memo of each interview with attorney's opinions and mental impressions included
- i. Analysis of results
 - (i) Identify any activities that need to be discontinued or modified
 - a. Identify areas of existing civil and/or criminal liability because of clear violations
 - (ii) Identify any potential risks and liability areas that need to be analyzed with business people and Law Department
 - a. Identify high, moderate, and low risk activities
 - b. Identify methods for managing and/or reducing these risks
 - (iii) Identify areas where the company can compete more effectively and aggressively
 - (iv) Assess effectiveness of existing antitrust compliance program
 - a. Identify any areas for improvement
- j. Prepare written report of results of audit and recommendations
 - (i) Consult in advance with the Law and Compliance Departments as to the desired scope and contents of the report
 - (ii) The report should contain a comprehensive record of all of the work that was performed in the audit (*i.e.*, the persons interviewed, the files reviewed, etc.)

- (iii) The audit report should contain a detailed description of the activities that potentially could create antitrust liability and proposed corrective actions to eliminate or reduce the antitrust risks from those activities
- (iv) The audit report should identify the specific antitrust issues and risks that either require the company's immediate attention or should be addressed systematically.

III. IMPLEMENTING AUDIT RECOMMENDATIONS

A. Prepare a Corrective Action Plan for Each Issue

A detailed corrective action plan for each antitrust issue should be developed and included as part of the audit report. The plan shall include assigning the actions to owners, the establishment of target closure dates and status reviews to promote prompt and appropriate resolution. The corrective actions should be as specific as possible and may include recommended changes in business practices, suggested antitrust counseling for relevant employees, and/or supplemental employee antitrust training.

B. Assign an "Action Owner" and Due Date to Each Corrective Action

Each corrective action should be assigned to one individual or "action owner" who will be responsible for implementing the specific corrective action and reporting to management the results thereof in a timely manner.

The timely implementation of the corrective actions is crucial to achieving the objectives of the antitrust audit and to establishing an effective antitrust compliance program. Each corrective action should have a due date for completion and the date shall be "Prompt" to avoid any allegation of knowingly continuing a violation or risky business practices. They should not, however, be unreasonably short in light of the actual circumstances of the audit Finding and required actions.

C. Monitor Deadlines and Appropriate Corrective Actions

The company shall monitor to completion the corrective actions and their due dates including the review of the actual corrective actions for their appropriateness.