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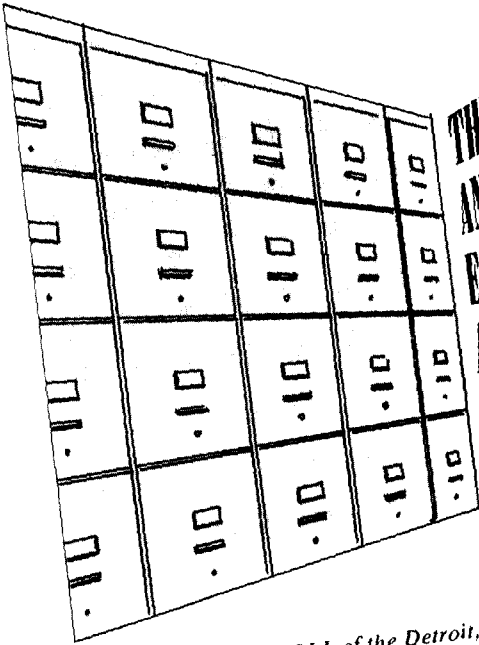
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THE CORPORATE ANTITRUST AUDIT - ESTABLISHING A DOCUMENT RETENTION PROGRAM

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Preventive maintenance is a doctrine with which lawyers are becoming—or should become—increasingly familiar. Since the field of antitrust law is potentially fraught with dire consequences for corporate clients, it is an area in which the doctrine of preventive maintenance should be liberally applied.

Witness the following examples in the area of private treble-damage litigation:

- The default judgment in excess of \$145 million approved in *Trans World Airlines, Inc. v. Hughes* [449 F.2d 51 (2d Cir. 1971), *rev'd on other grounds*, sub nom. *Hughes Tool Co. v. Trans World Airlines, Inc.*, 41 U.S.L.W. 4131 (Jan. 10, 1973)];
- The compromise of \$100 million approved in *West Virginia v. Chas. Pfizer & Co.* [314 F.Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440

F.2d 1079 (2d Cir. 1971)];

- The compromise of \$32.5 million approved in *Hartford Hospital v. Chas. Pfizer & Co.* [52 F.R.D. 131 (S.D.N.Y. 1971)]; and
- The jury award, after trebling, of nearly \$29 million in *Philadelphia Electric Co. v. Westinghouse Electric Corp.*, 1964 Trade Cas. ¶71, 123 (E.D. Pa.).

PREVENTIVE MAINTENANCE AGAINST ANTITRUST EXPOSURE

The "antitrust audit" is a procedure that is particularly adapted to meeting the need for preventive maintenance in the area of corporate antitrust exposure. One commentator has very aptly and concisely expressed the purposes of an antitrust audit:

"[I]ts purpose should be regarded as being somewhat like that of the financial audits performed by certified public accountants. Frequently such financial audits disclose nothing not previously known to top management. They constitute, however, a form of insurance against unsuspected losses." Hale, *Antitrust Audits*, 1 CORP. PRAC. COM. 17, 18 (1959) [hereafter cited as "Hale"].

Frequency and Scope of Audit

There is no uniform practice as to the frequency of antitrust audits. Although annual audits may be too frequent, a 10-year interval be-

tween audits is certainly too long. *Id.* In addition, the costs of an exhaustive survey may be high. Therefore, caution should be taken not to overdo the audit.

It has been suggested that the audit should initially consist of a more or less superficial review of the company's activities together with a series of "penetrating spot checks." *Id.* at 25. If this examination does not reveal any antitrust problems or potential problems, the audit may be terminated. If, on the other hand, the opposite situation is revealed, an exhaustive audit should be undertaken.

Audit Procedure

It has been observed that, although corporate antitrust review was formerly concentrated on specific business practices, it must now cover a wide range of intracorporate reports regarding competition, acquisition, new products, business development and planning, press releases, annual reports and other communications to shareholders, and even releases to securities analysts. Loughlin, *The Naughty Words of Antitrust*, 54 A.B.A.J. 246, 247 (1968) [hereafter cited as "Loughlin"].

Outside counsel should be employed to perform the audit in order to provide the necessary objectivity and to "avoid the negatives inherent in policing." See Anderson, *Effective Antitrust Compliance Programs and Procedures (An Out-*

line), 18 BUS. LAW. 739, 745 (1963) [hereafter cited as "Anderson"].

Facts about Company and Industry

The first step of the antitrust audit procedure is to obtain company and industry facts. See Hale, above, at 18. Outside counsel should interview corporate officers and review the files at the client's principal offices. Indeed, it is advisable that files be kept in central locations accessible to periodic spot checks by counsel. VAN CISE & DUNN, HOW TO COMPLY WITH THE ANTITRUST LAWS 341 (Commerce Clearing House, Inc., Chicago, 1954) [hereafter cited, VAN CISE & DUNN].

Attention should be given to all phases of the business. Of course, the audit should be performed in cooperation with the corporate secretary and house counsel, because they are usually extremely knowledgeable about the company's day-to-day operations, and their suggestions will invariably prove of value to outside counsel. See Hale, above, at 25.

DOCUMENTS TO BE EXAMINED

In an exhaustive audit, counsel should examine the following documents and files:

- Minutes of the meetings of the board of directors and key man-

agement committees.

- Files of policy-making executives.

- Previously issued company directives on antitrust subjects.

- Sales Department files, including:

- Reports from the field organization.

- Agreements and correspondence with distributors and dealers.

- Agreements and correspondence with customers, actual and potential.

- Sales literature and advertising. In addition to other potential antitrust problems in the wording of advertising (referred to below), heavy advertising expenditures have been the subject of judicial scrutiny. See *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946).

- Terms of sales "promotions" (such as offers, for a limited time, of two items for the price of one). See *National Dairy Prods. Corp. v. FTC*, 412 F.2d 605 (7th Cir. 1969); discussion of Robinson-Patman Act [15 U.S.C. §§13, 13a, 13b, 21a] in the section on "Price Discrimination," below.

[Antitrust considerations concerning these documents are discussed in the section on "Illegal Sales Practices," below.]

- Files of departments dealing with suppliers and competitors, such as accounting and purchasing departments, including correspondence and agreements.

- Patent files, patent licenses, know-how agreements. Outside counsel and patent counsel should make a general survey of the company's patent position. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969). Accumulating large numbers of patents may be a problem in and of itself. See *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

→ Licenses should be examined for provisions affecting prices, production [see *United States v. Line Material Co.*, 333 U.S. 287 (1948)], and "grant backs" [see REPORT OF ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 227 (1955)].

Trade Association Membership

- Files relating to membership in trade associations, including:

→ Reports of those who attended trade association meetings;

→ The agenda and minutes of trade association meetings; and

→ Trade association publications.

→ Other matters that should be examined thoroughly with reference to trade associations are:

- ¶ Price reporting systems. Compare *United States v. Container Corp. of America*, 393 U.S. 333 (1969); *FTC v. Cement Institute*, 333 U.S. 683 (1948); *Sugar Institute, Inc. v. United States*, 297 U.S. 553 (1936); and *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921) with *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925) and *Cement Mfrs. Protective Ass'n v. United States*, 268 U.S. 588 (1925).

- ¶ Collection of statistical information. See *Tag Mfrs. Institute v. FTC*, 174 F.2d 452 (1st Cir. 1949); LAMB & SHIELDS, TRADE ASSOCIATION LAW AND PRACTICE 34 *et seq.* (Little, Brown & Co., Boston, rev. ed. 1971) [hereafter cited, LAMB & SHIELDS].

- ¶ Joint activity with respect to the extension of credit to customers. *United States v. First National Pictures, Inc.*, 282 U.S. 44 (1930).

- ¶ Group lobbying. Compare

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) with *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). See also *United Mine Workers v. Pennington*, 381 U.S. 657, 669-72 (1965).

¶ Attempts to control competitive practices. See *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941); LAMB & SHIELDS, above, at 20 *et seq.*; product simplification and standardization is dealt with at 74 *et seq.* As to a combination to block technological improvements, see *Hartford-Empire Co. v. United States*, 323 U.S. 386 (1945), *clarified* in 324 U.S. 570 (1945).

Pricing Practices

- Price lists and pricing files. Outside counsel may wish to compare price lists with those of competitors to determine extent of identical pricing.

Although *counsel* may wish to look at competitors' price lists, the authors strongly recommend against *company personnel* looking at these price lists. Counsel should be aware of the tension between the Robinson-Patman Act [15 U.S.C. §§13, 13a, 13b, 21], which allows a seller to take into account its competitor's prices to the extent of "meeting, but not beating," those prices, and the Sherman Act

[15 U.S.C. §§1-7], which strives towards differentiated pricing, and in which conscious parallelism—one form of which may be basing prices on the prices of one's competitors—may be evidence, although not proof, of price-fixing. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954). But see *United States v. Container Corp. of America*, 393 U.S. 333 (1969); *Pittsburgh Plate Glass Co. v. United States*, 260 F.2d 397 (4th Cir. 1958), *aff'd*, 360 U.S. 395 (1959); and *Morton Salt Co. v. United States*, 235 F.2d 573 (10th Cir. 1956).

Even if it could be shown that price-list examination by company personnel was done to *prevent* identity of prices, independent pricing decisions, without any knowledge of competitors' prices, are much more likely, in the long run, to lead to the differentiated pricing structure that is the desired goal of the antitrust laws.

On the other hand, it is desirable for the seller's salesmen to keep records of instances in which they have attempted to verify the allegedly lower prices of their competitors. Such a practice, which should be the result of written company policy, will evidence that this examination of competitors' prices was not done pursuant to a general price-fixing scheme, but rather was done to satisfy the requirements of the proviso to sec-

tion 2(b) of the Robinson-Patman Act. 15 U.S.C. §13(b). Furthermore, such records will be extremely useful if the company is ever charged with a Robinson-Patman violation.

→ Counsel should examine fair trade contracts, if any. The various provisions of the laws of those states having fair trade statutes are set forth in TRADE REG. REP. ¶¶6041-47. See also, *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956).

→ With reference to potential Robinson-Patman Act violations, counsel should make a careful examination in the problem areas listed in the section on "Price Discrimination," below.

Other Documents

- Threats of antitrust action that have been received, if any, and letters of complaint from customers or competitors. See Hale, above, at 19.
- Acquisition and merger files.
- Files relating to joint ventures. See *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964).
- Files relating to standardization. Problems in this area are frequently encountered in connection with trade associations. See the section

on "Trade Association Membership," above.

- Restrictive labor agreements. See *South-East Coal Co. v. Consolidated Coal Co.*, 434 F.2d 767 (6th Cir. 1970), cert. denied, 402 U.S. 983 (1971); *United States v. Cigarette Merchandisers Ass'n*, 1957 Trade Cas. ¶68,599 (S. D. N. Y.); *United States v. Tobacco & Candy Jobbers Ass'n*, 1954 Trade Cas. ¶67,798 (D. Ohio).
- Annual reports and stock prospectuses. See Loughlin, above, at 247.

SPECIFIC PROBLEM AREAS

In checking these documents, counsel should pay particular attention to the problem areas discussed below. The authors make no pretense that this outline constitutes anything but the barest skeleton of antitrust information. This discussion is intended merely to give the practitioner an indication of the types of conduct that should be examined more closely and of some of the leading cases in which these practices are discussed and in which standards of legality are indicated.

Illegal Sales Practices

Among the sales practices that may be illegal under the antitrust laws—indications of which may be contained in certain of the above corporate documents—are the following:

● *Tie-in Sales*—A requirement by the seller that the purchaser buy a second product (the tied product) as a condition to being allowed to buy the tying product. *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495 (1969); *Northern Pacific Ry. v. United States*, 356 U.S. 1 (1958); *International Salt Co. v. United States*, 332 U.S. 392 (1947). Under Sherman Act §1 [15 U.S.C. §1] neither the tying nor the tied product need be a tangible good; it may also be land, a service agreement, credit, and the like.

● *Marketing New Products*—A course of conduct by a manufacturer of introducing additional lines in advance of any clear consumer demand, with an intent to preclude competitors from entering the market.

In *United States v. Aluminum Co. of America* [148 F.2d 416, 430-31 (2d Cir. 1945)] the Second Circuit (per L. Hand, J.), observed: "There were at least one or two abortive attempts to enter the industry, but 'Alcoa' effectively anticipated and forestalled all competition, and succeeded in holding the field alone. True, it stimulated demand and opened new uses for the metal, but not without making sure that it could supply what it had evoked. . . . It was not inevitable that it should always anticipate increases in the demand for ingot and be prepared to supply

them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face very newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel."

The FTC complaint against Xerox Corporation, announced Dec. 12, 1972, charges Xerox with "announcing new copier models and taking orders thereon before availability of such copiers in response to introduction of competing copiers by actual or potential competitors." TRADE REG. REP. ¶¶20,164, 20,207. See also the complaint in *United States v. International Business Machines Corp.*, Civil No. 69-200 (filed Jan. 17, 1969), TRADE REG. REP. Transfer Binder, U.S. Antitrust Cases, Summaries, Complaints, Indictments, Developments, 1961-1970, ¶45,069 (Case 2039).

● *Boycotts and Refusals To Deal*—Concerted action by a group of competitors to refuse to buy from, or sell to, another person or persons unless certain conditions are met. *United States v. General Motors Corp.*, 384 U.S. 127, 145-47 (1966); *Klor's Inc. v. Broad-*

way-Hale Stores, Inc., 359 U.S. 207, 211-12 (1959); *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457, 465 (1941).

- **Reciprocity**—An agreement, either explicit or implicit, or a course of conduct of purchasing from another company because the company is purchasing other products from the concerned company or its affiliates, or has the market potential to do so. *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965); *United States v. General Dynamics Corp.*, 258 F. Supp. 36 (S.D.N.Y. 1966).

- **Restrictive Customer and Territorial Agreements**—Restrictions on the customers to whom, or the area in which, distributors or dealers may sell. Such restrictions may either be imposed by a manufacturer on its distributors, in which case they are designated "vertical"; or they may result from an agreement among competing manufacturers or competing dealers, in which case they are designated "horizontal." *United States v. Topco Associates*, 405 U.S. 596 (1972); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *White Motor Co. v. United States*, 372 U.S. 253 (1963).

- **Requirements Contracts**—A restriction on a distributor or dealer that, as a condition of being allowed to buy the manufacturer's

product, the distributor or dealer will not buy the products of the manufacturer's competitors. Such agreements are usually coupled with an agreement by the manufacturer to meet all the distributor's needs. *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966); *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961); *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293 (1949).

- **Leasing**—Situations in which a manufacturer will not offer its product for sale, but will only lease it. *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 319-25 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954); *Mid-America ICEE, Inc. v. John E. Mitchell Co.*, 1972 Trade Cas. ¶73,833, at pp. 91, 501-02 (D. Ore. 1971). See also FTC complaint against Xerox Corp., TRADE REG. REP. ¶¶20,164, 20,207 (announced Dec. 12, 1972).

Price Discrimination

The following is a list of problem areas that counsel should investigate with regard to potential violations of the Robinson-Patman Act. For this purpose, it has been suggested that certified public accountants make sample audits of the company's books. For example, the giving of rebates is a practice that certified public accountants are trained to detect and that may have an important

bearing on the legality of the client's pricing practices. See *Hale*, above, at 19-20.

- The existence of price differences on the same or similar commodities, either with respect to different territories or different customers on the same functional level in the same territory. See *Perkins v. Standard Oil Co. of Cal.*, 395 U.S. 642 (1969); *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967); *FTC v. Borden Co.*, 383 U.S. 637 (1966).
- The extension of, and the underlying calculation of, quantity discounts. See *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948). Here too, the services of accountants may be necessary.
- Any attempts at "cost justification." See *United States v. Borden Co.*, 370 U.S. 460 (1962).
- Price concessions made to meet competition. Such concessions are valid only within narrow limits and should be studied carefully. See *FTC v. Sun Oil Co.*, 371 U.S. 505 (1963); *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951).
- Payment of "brokerage" to customers. See *FTC v. Henry Broch & Co.*, 363 U.S. 166 (1960).
- Conditions for the granting of advertising allowances. Counsel

should insure that the client has instituted a practice of bringing to the attention of all of its customers the availability of advertising allowances, special offers, and so forth. See *FTC Guides for Advertising Allowances and Other Merchandising Payments and Services*, 3 TRADE REG. REP. ¶139,035 (1969), amended, ¶150,140 (1972).

- Rendition of services only to selected customers, or selective payment therefor. See *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968); *FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959).
- Policy with respect to return of goods, and supporting credit memos.
- Shipments of extra merchandise for which no charge is made, or at a reduced price.

Telltale Words in Documents

The prospect of rummaging through innumerable file drawers of papers looking for indications of possible antitrust violations must seem to most counsel a Herculean task. However, discovering evidence of possible antitrust violations need not be like looking for a needle in a haystack. Counsel should bear in mind that telltale words in documents are often indicative of corporate activities that may have adverse antitrust significance.

One commentator has pointed out that there is a wide variety of telltale words indicating that a document is considered a “hot” antitrust document by its author [see Loughlin, above, at 247]:

- “Please destroy after reading”;
- “Original—no copies”;
- “Personal and confidential”; and
- “For your eyes only.”

Other Examples

Here are some other examples of such telltale words [for many of which the authors are indebted to Loughlin, above]:

- “Aggressive” or “unethical” competition, and the use of the word “legitimate” in similar contexts.
- Objections to customer’s purchases of competitor’s products.
- “Beating” a smaller competitor’s price.
- “Matching” a competitor’s quotation.
- “Aim to destroy all competition.”
- Competitors will have “no objections” or will “go along.”
- Sales of more than one product in a “package deal.”

- “Exploiting” weaknesses of competitors. Competitive weaknesses should never be conceded to exist. See Loughlin, above, at 248.

- “Willingness” or “promise” to adhere to seller’s suggested prices.

- Expressions of plan to capture a specific market share.

- “Margins were low due to competition, which we expect to be remedied next year.”

- “To you, and to you alone, the price is (a below cost) \$2.00 a dozen.”

- Advertisement in which corporate sales manager is pictured and quoted to the effect that the telephone assisted him a great deal, particularly when he wanted to communicate special offers to his largest customers.

- Advertisement describing a company’s strength and importance in various fields and its plans to establish positions of comparable strength in new fields.

- Investment house reports referring to a corporation’s opportunities for expanding sales by effective “trade relations,” to its “captive” customers, to its “virtual monopoly” as to a specific product, or to its “inherent advantages” over smaller competitors. Any company that

knows it is to be the subject of such a write-up should insist upon an antitrust evaluation of the proposed report. See Loughlin, above, at 248.

A DOCUMENT RETENTION PROGRAM

In the course of reviewing a client's files for documents evidencing policies or acts that may give rise to antitrust liability, counsel should bear in mind the desirability of instituting a document retention program. Such programs have an accepted place today in corporate administrations. Whiting, *Antitrust and the Corporate Executive II*, 48 VA. L. REV. 11, 14 (1962). One reason for such programs is the economy resulting from savings of record storage costs. See Beckstrom, *Destruction of Documents with Federal Antitrust Significance*, 61 NW. U. L. REV. 687, 688 (1966) [hereafter cited as "Beckstrom"].

More important, since a company's internal thought processes when reduced to writing are subject to discovery by compulsory process in antitrust cases [FED. R. CIV. P. 34], any documents no longer required—either because of their nature or their age—should be discarded.

As of March 1972, with respect to the federal government alone, there were more than 1,000 statutes and regulations requiring document retention for periods

ranging from 30 days to "permanent." [These requirements are summarized in *Guide to Record Retention Requirements*, 37 Fed. Reg. 4602 (1972).]

For example, the Internal Revenue Service regulations, while not aimed at a large variety of documents, specify retention rules that apply to all businesses. Documents covered by the IRS regulations must be retained "so long as the contents thereof may become material in the administration of any internal revenue law." *Id.* at 4635.

Establishing a Program

In establishing a document retention program for a corporate client, the document retention policy must have some specific guidelines. The actual number of years of retention should be governed by a "rule of reason." This may require detailed discussion with management of the frequency with which the documents in question are examined, and the harm to the company from early destruction.

Although it is obviously necessary to conform to statutory requirements, it is usually desirable not to retain documents any longer than necessary. The number of times that documents will be useful in defending an allegation of an antitrust violation will probably be outweighed many-fold by the times that such documents will be damaging.

Legal Implications of Document Destruction

In counseling the client on the subject of destruction of corporate documents that may contain incriminating evidence, the attorney may have to act as a moderating influence, and should even err on the side of caution, since both common sense and the Canons of Professional Ethics compel the conclusion that the client, not the lawyer, go to jail. ABA CANON 15 provides in pertinent part that "the office of attorney does not permit, much less demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience, not that of his client."

To be sure, there is little likelihood that destruction of documents pursuant to an established document retention program prior to knowledge of any investigation in which the documents might be relevant would lead to prosecution on any theory of criminal liability. See Beckstrom, above, at 702-03. However, it is or may be illegal to destroy documents in the following circumstances:

- After service of process requiring their production [*id.* at 691-97];
- In the course of voluntary cooperation with authorities [*id.* at 697-700]; or
- After learning of a relevant inquiry but before being contacted by the authorities [*id.* at 700-02].

Preservation of Relevant Documents

Furthermore, since it is or may be illegal to select certain documents and destroy them under the circumstances just described, it would be illegal knowingly to permit documents to be destroyed by others pursuant to a previously arranged destruction program; a direction to interrupt the program would be called for. *Id.* at 704. See also *Grand Jury Investigation (General Motors Corp.)*, 1962 Trade Cas. ¶70,426 (S.D.N.Y.), where the Justice Department wrote General Motors that it was aware of its "document retention policy" and that "the law precludes the destruction by General Motors of any documents which General Motors has reason to believe may be sought by the grand jury at a later date."

When documents are destroyed under circumstances where it is unlikely that criminal sanctions for destruction will follow, it is, of course, possible that adverse inferences might be drawn from the fact that the documents had been destroyed. See Beckstrom, above, at 687. Further, given the widespread use of modern duplicating machines, it may be impossible to locate and destroy all copies of a

document in larger corporations. These eventualities should be inputs into the balancing process in arriving at a determination to destroy a given document or documents.

In addition, whatever document retention program is adopted, it must be impartial. One commentator has aptly stated: "A company may not pick and choose between so-called good and bad documents; insofar as it elects to submit to trial by files, those files should represent an accurate picture of the transactions involved, for better or for worse." VAN CISE & DUNN, above, at 341.

RECOMMENDATIONS FOLLOWING AN AUDIT

If the audit reveals substantive antitrust violations or potential violations, counsel will, of course, advise the client to take appropriate steps to remedy the situation. Hale [above, at 24-25] discusses the dilemma of whether to make these recommendations orally or in writing:

"Careful lawyers always prefer that the opinions which they prepare for their client's guidance be in written form, rather than expressed orally. Yet, it is often considered inadvisable to have in the client's files a catalog of potential antitrust violations. Although an attorney's opinion letter or memorandum may be a privileged communication, there is always a

hazard that some employee, unfamiliar with the risks involved, will permit an investigator to have access to it. In these circumstances counsel frequently has found it advisable to have a client's copy of a written opinion returned to counsel for destruction after it has been circulated among the client's officers."

In addition, counsel should advise the client to embark on a comprehensive antitrust compliance program. A full discussion of antitrust compliance programs is beyond the scope of this article. For good discussions of antitrust compliance programs, see e.g., Lipson, *How To Implement an Antitrust Compliance Program*, THE PRACTICAL LAWYER, Dec. 1971, p. 39. See also Anderson, above, and VAN CISE & DUNN, above.

Educating Management

In many instances, the audit will reveal to counsel the really appalling ignorance of some high-level management in even large companies of the nature and scope of the antitrust laws. In such cases, counsel should, at the very least, give some instruction to management—perhaps in the form of a series of short seminars—concerning the general nature of the antitrust laws and the potential liability thereunder. Such instruction to management can then be followed

up by policy directives to lower-level employees.

However, counsel should be aware that even express instructions to corporate employees concerning obedience to the antitrust laws will not exculpate either the corporate entity or high managerial agents if the instructions are "general" and no steps have been taken to enforce the instructions "by means commensurate with the obvious risks." *United States v. Hilton Hotels Corp.*, 1972 Trade Cas. ¶74,190 at 92,925 (9th Cir. 1972), cert. denied, 41 U.S.L.W. 3389 (U.S. S. Ct., Jan. 16, 1973).

CONCLUSION

It is an old maxim that an ounce of prevention is worth a pound of cure. This aphorism is nowhere more applicable than to the field of antitrust, where wise counsel are daily reminded of the potential disasters of governmental actions, possibly criminal in nature, and treble-damage litigation. Balanced against these considerations, the antitrust audit is well worth the costs for professional services rendered and the possible temporary slight disruption to the client's business operations.

Every responsible corporate program for compliance at least commences with some review of some areas in which the antitrust laws apply to the individual corporation. The breadth, depth, and accuracy of this survey will depend upon the extent to which the client wishes to insure that counsel has a sound foundation of fact upon which to build, with his legal tools, an effective compliance structure. . . .

Finally, counsel will, if he is wise, check his findings against his company's files. In this connection the attorney must remember at all times that the most authoritative advice of compliance, dutifully followed, may avail little, should a court find that the recommended lawful acts were undertaken pursuant to some written unlawful intent.

This legal inventory of antitrust issues will necessarily proceed item by item. Needless to say, however, at the completion of the inventory the component corporate items must be carefully fitted together to form the composite corporate picture, because inoffensive individual parts may collectively disclose a very different antitrust totality.

JERROLD G. VAN CISE, THE FEDERAL ANTITRUST LAWS 49, 51 (American Enterprise Institute for Public Policy Research, Washington, D.C., rev. ed. 1965).