

Key Areas to Consider Under the Updated Antitrust Division Corporate Compliance Guidelines

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TAKEAWAYS

- ⑩ The revised Antitrust Compliance Guidelines expand their scope and provide critical insight into how the Department of Justice (DOJ) evaluates compliance programs—not only as tools to address criminal antitrust violations but also as mechanisms relevant to civil antitrust investigations and litigation.
- ⑩ The updated Guidelines also underscore several key focus areas, reflecting the DOJ’s priorities in an evolving regulatory landscape.
- ⑩ Implementing a robust antitrust compliance program aligning with the DOJ’s guidelines offers benefits of mitigating antitrust risk, detecting potential violations and mitigating potential consequences should an investigation arise.

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For the first time since its introduction in 2019, the U.S. Department of Justice Antitrust Division (DOJ) has updated its Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (the “Antitrust Compliance Guidelines” or “Guidelines”). The Antitrust Compliance Guidelines assist prosecutors in evaluating the effectiveness of corporate compliance programs aimed at preventing and detecting violations of the Sherman Act. These guidelines serve a critical role in prosecutorial decisions, shaping the DOJ’s approach on whether to bring antitrust charges, structuring resolutions and determining sentencing guidelines recommendations. For this reason, it is important for corporations to design their antitrust compliance programs with the Antitrust Compliance Guidelines in mind.

Updated on November 12, 2024, the revised Guidelines expand their scope and provide critical insight into how the DOJ evaluates compliance programs—not only as tools to address criminal antitrust violations but also as mechanisms relevant to civil antitrust investigations and litigation. Additionally, the updated Guidelines underscore several key focus areas, reflecting the DOJ’s priorities in an evolving regulatory landscape.

Corporations should take this opportunity to reevaluate their antitrust compliance policies to mitigate antitrust risk, particularly in advance of any potential antitrust issues. Adopting these practices can underscore a proactive commitment to fostering a robust culture of compliance that would be well-served should the DOJ commence or consider an antitrust investigation.

The updated Antitrust Compliance Guidelines build on the foundation of the original Guidelines in a number of key respects, as highlighted below.

Expanded Applicability to Civil Antitrust Enforcement

The DOJ’s revised Guidelines acknowledge, for the first time, their applicability to civil antitrust investigations and litigation. While the 2019 Antitrust Compliance Guidelines focused exclusively on criminal violations of the Sherman Act, the updated version broadens their scope to emphasize the role of compliance programs in mitigating civil antitrust risks. The update notes “a well-designed antitrust compliance program should also minimize risk of civil antitrust violations,” and that companies “asking the Antitrust Division to take notice of existing or improved compliance efforts ... should expect the civil team to consider many of the same factors when assessing the effectiveness of their compliance program as criminal prosecutors do.”^[1]

The DOJ further suggests that companies demonstrating a proactive culture of compliance may avoid burdensome remedies, such as court-mandated oversight or external monitors. These updates underscore the DOJ’s broader emphasis on compliance practices across both criminal and civil enforcement, highlighting the benefits for companies that align their policies with these expectations.

Key Priorities in the DOJ’s Updated Guidance

The key area of focus for the DOJ remains on whether a compliance program is effective in deterring and detecting Sherman Act violations, even if a violation ultimately occurs. While the DOJ emphasizes that it will evaluate programs holistically, considering a company’s line of business and risk profile, the updated Antitrust Compliance Guidelines highlight several new priorities that the DOJ will consider in its evaluation. These priorities shape the DOJ’s approach and warrant close attention:

- **Electronic Communications.** The Guidelines highlight policies governing electronic communication channels, including ephemeral messaging and non-company methods of communication. The DOJ will assess whether companies have clear guidelines on usage, preservation and deletion protocols, as well as employee training on document retention and obstruction of justice. Companies should ensure their

policies address antitrust risks associated with new communication tools and demonstrate a proactive approach to compliance. Companies should also carefully evaluate the risks and use of ephemeral messaging.

- **Artificial Intelligence and Evolving Technologies.** The DOJ emphasizes the role of artificial intelligence (AI) and evolving technologies in antitrust compliance. Companies must evaluate how these tools, including algorithmic revenue management software, may pose antitrust and other risks, such as raising questions about price-fixing or other violations. The DOJ will assess whether compliance programs address these risks through tailored training, risk assessments, and mechanisms to detect and correct improper decisions made by AI. Integrating compliance personnel into the deployment of AI tools is recommended to mitigate risks and align with the DOJ's evolving expectations, as is using AI tools to detect and eliminate potential antitrust risks.
- **Comprehensive Compliance Culture.** The Guidelines expand on their previous focus on top management's role in supporting antitrust compliance by emphasizing the importance of engagement at all levels of management. Prosecutors are now directed to evaluate whether corporate leaders—both senior executives and middle managers—actively articulate and demonstrate a commitment to compliance. This shift highlights the DOJ's focus on whether a “culture of compliance” permeates the entire organization, not just at the top.
- **Sufficient Resources.** The DOJ delves into the infrastructure necessary to support this culture. Companies are encouraged to assess whether their antitrust training incorporates lessons learned internally and from industry peers, whether they perform regular gap analyses to address risks in policies and controls, and whether their boards of directors possess the expertise and commitment to oversee compliance efforts. It emphasizes the importance of measuring the effectiveness of compliance programs, allocating sufficient resources, and integrating compliance priorities into hiring practices and incentive structures.
- **Reporting Mechanisms and Whistleblower Protections.** The Guidelines emphasize the importance of mechanisms for internally reporting antitrust violations and protecting whistleblowers. Prosecutors are directed to assess whether a company has established confidential and anonymous channels for reporting concerns and whether employees feel encouraged—or deterred—by company policies from coming forward. The DOJ will consider whether anti-retaliation policies are simple, clearly articulated, effectively implemented and reinforced through training for all employees, including managers and supervisors.
- **Non-Disclosure Agreements.** The Guidelines now scrutinize the use of non-disclosure agreements and other restrictions on current and former employees to ensure they do not act as barriers to reporting violations.
- **Objective Review.** Companies must also assess whether their investigative processes for antitrust complaints are independent, objective and thoroughly documented, including how they determine which “red flags” warrant further investigation and who oversees such inquiries. These expectations underscore the DOJ's focus on fostering a reporting environment that encourages transparency and accountability while safeguarding employees from retaliation.

Conclusion

Implementing a robust antitrust compliance program that aligns with the DOJ's Antitrust Compliance Guidelines offers benefits of reducing antitrust risk, detecting and addressing potential violations and mitigating potential consequences should an investigation arise. To maximize these advantages, companies should proactively review and update their antitrust policies and procedures to ensure compliance with the DOJ's updated guidance and to address the priorities outlined in the Antitrust Division's new framework.

[1] U.S. Department of Justice Antitrust Division, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (November 12, 2024), at 2-3.

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