

DOJ Antitrust Creates Guidance for Evaluating Antitrust Compliance Programs

November 20, 2024

On November 14, 2024, the U.S. Department of Justice (“DOJ”) Antitrust Division (the “Division”) released guidance for the Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (the “Guidance”). The Guidance will be used by the Division in assessing the adequacy and effectiveness of a company’s antitrust compliance program when making a charging or resolution decision.¹

The Antitrust Division’s Guidance generally aligns with other guidance issued by the DOJ, including the Fraud Section’s Evaluation of Corporate Compliance Programs (“ECCP”), most recently updated in September 2024.² The Division’s Guidance sets forth the elements of an effective antitrust compliance program and questions prosecutors may ask when assessing a company’s program. Companies should carefully consider the Guidance when reviewing their own antitrust compliance programs, both as a source for best practices to prevent violations and to mitigate the consequences if misconduct arises.³

This memorandum highlights the key takeaways from the Guidance.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors:

NEW YORK

Rahul Mukhi
+1 212 225 2319
rmukhi@cgsh.com

Joseph Kay
+1 212 225 2745
jkay@cgsh.com

Andres Felipe Saenz
+1 212 225 2804
asaenz@cgsh.com

WASHINGTON D.C.

Jeremy Calsyn
+1 202 974 1522
jcalsyn@cgsh.com

Lauren Aragon
+1 202 974 1624
laragon@cgsh.com

SAN FRANCISCO

Heather Nyong’o
+1 415 796 4480
hnyongo@cgsh.com

¹ U.S. Dep’t of Justice, Antitrust Div., Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations Nov. 2024, 5 available at <https://www.justice.gov/d9/2024-11/DOJ%20Antitrust%20Division%20ECCP%20-%20November%202024%20Updates%20-%20FINAL.pdf>.

² U.S. Dep’t of Justice, Criminal Div., Fraud Section, Evaluation of Corporate Compliance Programs Guidance Document Apr. 2019, 3 available at <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

³ Evaluation at 2.



The Guidance

The Guidance is framed along three main questions derived from the Justice Manual⁴:

1. Is the corporation's compliance program well designed?
2. Is the program being applied earnestly and in good faith? In other words, is the program adequately resourced and empowered to function effectively?
3. Does the corporation's compliance program work in practice?

While the Guidance is drafted from the perspective of criminal prosecutors, it also notes that these same questions are relevant to civil enforcement attorneys assessing the effectiveness of a compliance program.

Elements of an Effective Compliance Program

The Guidance states that the Division will evaluate the effectiveness of a compliance program using the following nine elements:

1. Design and Comprehensiveness
2. Culture of Compliance
3. Responsibility for the Compliance Program
4. Risk Assessment
5. Training and Communication
6. Periodic Review, Monitoring, and Auditing
7. Confidential Reporting Structure and Investigation Process

8. Incentives and Discipline

9. Remediation and Role of the Compliance Program in the Discovery of the Violation

1. Design and Comprehensiveness

With respect to design and comprehensiveness, prosecutors will evaluate how often the program is updated to address evolving risks, and whether guidance is provided to key employees who are in a position to identify potential antitrust violations.⁵ The Guidance specifically identifies using systems to monitor and track contacts with competitors, including business communications and at trade association meetings, as potentially important controls. The Guidance also emphasizes the importance of document preservation, including preservation of ephemeral messaging or non-company methods of communication, consistent with DOJ guidance in other contexts.⁶

2. Culture of Compliance

The Guidance expects a company's senior leadership—including the board of directors and executives—to set the tone for antitrust compliance among the company's workforce. This includes communicating the importance of antitrust compliance through words and actions. The goal is for employees to be “convinced of the corporation's commitment to [the compliance program].”⁷ Accountability is another theme throughout the Guidance, which asks, for example, whether there has been “personal accountability by senior leadership for failures in the company's antitrust compliance.”⁸

⁴ Justice Manual (“JM”), available at <https://www.justice.gov/jm/justice-manual>.

⁵ Guidance at 5.

⁶ *Id.* at 6. Please refer to our alert memorandum on U.S. antitrust and ephemeral messaging more generally at <https://www.clearygottlieb.com/news-and-insights/publication-listing/us-antitrust-regulators-threaten-ephemeral-messaging-users-and-their-counsel-with-obstruction-charges>.

⁷ JM § 9-28.800. This mirrors previous guidance from the Division, such as former Assistant Attorney General for the Division Brent Snyder's remarks that “If senior management does not actively support and cultivate a culture of compliance, a company will have a paper compliance program, not an effective one.”

⁸ Guidance at 7.

3. Responsibility for the Compliance Program

To ensure the effectiveness of a compliance program, the Guidance highlights the need for compliance personnel with “sufficient qualifications, autonomy, authority, and seniority,” as well as adequate resources for “training, monitoring, auditing and periodic evaluation of the program.”⁹ Some specific questions the Division will ask include whether the company has a chief compliance officer responsible for antitrust compliance, their familiarity with antitrust law, and whether the compliance officer splits their time with other commitments at the company. Prosecutors will also examine the compliance officer’s reporting lines, including whether they report directly to the board or a committee thereof. Additionally, the Division will consider the level of expertise among the board oversight bodies.¹⁰

4. Risk Assessment

The Guidance advises that compliance programs should be tailored “to detect the particular types of misconduct most likely to occur in a particular corporation’s line of business.”¹¹ This includes using metrics to inform training, gap analyses, and internal controls targeted to antitrust-specific risks, including bid-rigging, price-fixing, and employment decisions. In addition, and in line with the ECCP updates earlier this year, the Guidance reflects DOJ’s expectation that risk assessments will be performed and routinely updated, including to reflect “lessons learned” and the introduction of new technologies, such as artificial intelligence (“AI”).

5. Training and Communication

As with other DOJ compliance guidance, the Division’s Guidance highlights the importance of training, including periodic training of directors, officers, relevant employees, and, where appropriate, third parties. Prosecutors will assess accessibility and clarity of training materials. They will also evaluate whether a company has provided information specific to the industries in which the company operates.

Moreover, the Guidance suggests trainings should be adapted to the particular function and seniority of the employees being trained. A training program should also test how effectively the information is being conveyed to the participants. Consistent with the Guidance’s emphasis on incorporating “lessons learned,” prosecutors will consider whether the training adequately covers prior compliance incidents and whether updates to the compliance program are informed by any such incidents.

6. Periodic Review, Monitoring and Auditing

Throughout the Guidance, the Division underscores that compliance programs and policies must regularly assess the company’s specific antitrust risks. Periodic assessments, ideally under the guidance of an oversight body, signal a company’s commitment to antitrust compliance and help identify antitrust concerns. Regarding auditing, prosecutors will assess a company’s process for determining when and how to undertake an audit, including for antitrust issues. The Guidance also advises that prosecutors will ask how technology, such as AI or data analytics tools, are used in compliance and monitoring. The Guidance’s discussion on review and monitoring places additional emphasis on the need to amend the compliance programs to account for previous antitrust violations at a company, or more broadly within its industry.

7. Confidential Reporting Structure and Investigation Progress

The Guidance memorializes the DOJ’s expectation that companies will adopt reporting mechanisms, including in compliance with the anti-retaliation provisions under the Criminal Antitrust Anti-Retaliation Act.¹² Prosecutors are directed to determine if the company has such a mechanism in place, and if not, why not. Prosecutors will also consider the company’s use of non-disclosure agreements and other restrictions on current and former employees, in assessing whether potential antitrust violations can be reported without fear of retaliation.

⁹ *Id.* at 7; see U.S.S.G. § 8B2.1(b)(2)(C).

¹⁰ Guidance at 7.

¹¹ *Id.* at 8; JM § 9-28.800.

¹² Guidance at 14.

Prosecutors will evaluate whether supervisors and employees have a duty to report potential violations and whether there are disciplinary measures in place for those who fail to do so.

Consistent with the theme of “lessons learned” and risk-based analysis, the Guidance suggests that a company should periodically examine any reports and investigations of potential antitrust misconduct, which may reveal red flags for compliance weaknesses. If any such red flags are identified, the program should be adjusted to address them.

8. Incentives and Discipline

With respect to incentives and discipline, the Guidance advises that prosecutors will ask: (1) whether any employees has been disciplined for an antitrust violation; (2) if there has been a violation, whether that violation resulted in management turnover, and (3) whether antitrust violations are disciplined in a similar manner as other types of misconduct?¹³

9. Remediation and Role of the Compliance Program in the Discovery of the Violation

As reflected in the Guidance, compliance programs should be structured to detect, prevent, and remediate misconduct, and past experiences should influence how a company designs and implements its program to prevent recurring antitrust violations. Specifically, prosecutors should assess “whether and how the company conducted a comprehensive review of its compliance training, monitoring, auditing, and risk control functions following the antitrust violation.”¹⁴ At the charging stage of an investigation, prosecutors will verify whether the compliance program effectively identifies misconduct and allows for

remediation and self-reporting, by asking questions such, “What role did the antitrust compliance program play in uncovering the antitrust violation?” and “What is the company’s root cause analysis of the antitrust misconduct[]?”¹⁵

According to the Guidance, early-detection and self-assessment may support a company’s request to be a successful applicant for Type A under the Corporate Leniency Policy.¹⁶

Sentencing Considerations

The Guidance sets forth how the U.S. Sentencing Guidelines (“U.S.S.G.”) provide credit for effective compliance programs, which can result in significant corporate fine reductions.^{17, 18}

Among other factors, Antitrust Division prosecutors can consider whether a company’s “extraordinary post-violation compliance efforts” merit a fine reduction.¹⁹ The Guidance notes that prosecutors will consider, among other things, how senior company leadership has incentivized participation in the compliance program; whether there has been a comprehensive review of the program following the violation; and whether the company disciplined employees who engaged in the violation.²⁰

Takeaways from the Guidance

The Division’s Guidance on the Evaluation of Antitrust Compliance Programs, while largely mirroring previous compliance guidance from the DOJ, offers valuable information on how prosecutors will specifically evaluate antitrust compliance programs. Key takeaways from the Guidance include:

U.S.S.G. § 8C2.8 when determining their fine recommendations.

¹⁸ Prosecutors will first need to verify whether there was an unreasonable delay in reporting the illegal conduct prior to recommending sentence reductions. *See* U.S.S.G. § 8C2.5(f)(2). They will also consider the rebuttable presumption that compliance programs are not effective when high-level personnel participated in the offense. *See* U.S.S.G. § 8C2.5(f)(3)(A)–(C).

¹⁹ *See* 18 U.S.C. § 3572(a)(8).

²⁰ Guidance at 18-19.

¹³ *Id.* at 14-15.

¹⁴ *Id.* at 14.

¹⁵ *Id.* at 16.

¹⁶ Type A immunity is generally available to the first company that self-reports its involvement in a cartel and provides substantial cooperation in the investigation. *See* JM § 7-3.300-7-3.320.

¹⁷ For example, U.S.S.G. § 8C2.5(f) provides for a three-point reduction in a corporate defendant’s culpability score if the company has an effective compliance program.

Prosecutors may consider compliance programs under

- There are significant benefits to having an effective antitrust compliance program in place, including early detection to prevent violations. In the event misconduct is discovered, companies with effective antitrust compliance programs will be in a better position to consider whether to self-report and participate in the DOJ’s antitrust leniency program.
- The degree to which an antitrust compliance program is dynamic, tested, and self-evaluated at regular intervals will inform the Division’s assessment of the program’s effectiveness when making charging and resolution decisions.
- Individuals at all levels of the corporate structure should strive to demonstrate a commitment to antitrust compliance through their words and actions. This includes the board and senior management responsible for setting the “tone at the top.”
- Antitrust trainings should be tailored to the company’s risk profile and to its past experiences, incorporating any “lessons learned” by the company and/or the industry.
- Similarly, the level of ongoing monitoring and incorporation of “lessons learned,” including through data analytics, will distinguish “paper programs” from well-designed, effective, and functional compliance programs.
- The DOJ continues to emphasize in all contexts the importance of monitoring compliance risks created by new technologies, including AI in particular.

For any questions arising from this alert, you can consult with any member of the Antitrust Group.

...

CLEARY GOTTlieb