

## Updates

February 11, 2025

### Antitrust Compliance Programs: Worth Their Weight in Gold Under Any Administration



Corporate compliance programs are essential tools for mitigating antitrust risk.

With the transition to the new administration, organizations should consider developing and empowering their corporate compliance programs to address potential weaknesses. The costs of deploying an effective compliance program are greatly overshadowed by their potential to prevent or mitigate devastating civil or criminal penalties. Regulators consider the design and effectiveness of compliance programs when investigating potential antitrust violations. Especially during times of change, proactive and effective antitrust compliance strategies are well positioned to tackle uncertainty and ambiguity.

In November 2024, the U.S. Department of Justice Antitrust Division (DOJ) updated its guidance for evaluating an antitrust compliance program during an investigation into alleged antitrust violations.<sup>[1]</sup> The revised guidance distinguishes effective programs from compliance programs that exist only on paper but fail to deter antitrust violations. *Id.* at 5. DOJ elaborated on key concepts previously in the guidance and developed several factors for effective and appropriately customized compliance programs. Compliance programs are often an afterthought, but DOJ's updated guidance makes clear that the greatest value of these programs is in how well they function in advance. Below are six points DOJ emphasized for effective compliance programs, which is golden advice under any administration.

#### **1. New Technology, New Antitrust Strategies**

The revised guidance emphasized that compliance programs should address the use of emerging technologies, including communication tools, artificial intelligence (AI), and algorithmic revenue management software. *Id.* at 5-6, 9-10. Organizations should have an accessible policy that clearly outlines permissible communication platforms and addresses the use of ephemeral messaging services, such as WhatsApp and Signal. The policy should discuss the organization's approach to preserving communications and employee measures required for

compliance with the policy. Similarly, organizations that use AI or algorithmic revenue management software should accurately assess whether these technologies or their usage might constitute an antitrust violation. The revised guidance places the responsibility on compliance personnel for understanding how their organizations use technology and for assessing the level of risk associated with that usage. One area of particular emphasis is using AI or algorithmic revenue management tools to set prices. In those cases, compliance programs should assess whether inputs to the algorithm or AI system are shared with competitors and whether the organization is required to accept price recommendations generated by the software. An effective antitrust compliance program will critically examine usage and provide guidelines for these types of tools so that employees are empowered to avoid antitrust violations when deploying emerging technologies.

## **2. Invest in Trust, Avoid Antitrust**

DOJ emphasized the significance of allocating sufficient resources to ensure a compliance program is effective and not just paying lip service. *Id.* at 8. DOJ will compare the resources reserved for an antitrust compliance program with the resources reserved for similar programs within the organization. *Id.* Compliance personnel should have appropriate qualifications, competitive compensation, and genuine authority to serve an integral role in the organization. The size of the organization and the volume of technology relied upon in business operations will dictate whether a compliance person or compliance team is proper.

## **3. Anticipate Scrutiny—DOJ Will Look at Compliance Programs Early**

Under the revised guidance, DOJ emphasized that it would evaluate the effectiveness of an organization's compliance program early in an investigation to determine the appropriate charges and sentences to seek if DOJ brings charges. *Id.* at 15. An effective compliance program may mitigate consequences for an antitrust violation and can avert prosecution for organizations that qualify for the Corporate Leniency Policy. To assess effectiveness, DOJ investigators analyze whether the program was designed to detect the violation early on. *Id.* An organization under investigation for price-fixing should demonstrate that their compliance program provides relevant antitrust training and guidelines designed to monitor for and detect price-fixing. Likewise, an organization accused of engaging in monopolistic conduct should show that compliance personnel analyzed the organization's business practices for monopolistic risk.

## **4. From the Top Down, Compliance Starts With Genuine Commitment From Leadership**

The guidance also emphasized how the role of the senior leadership team, identified as the board of directors and executives, are essential components of an effective compliance program. *Id.* at 6. Establishing a culture of compliance throughout the organization begins with the senior leadership team vocally supporting and enforcing compliance goals. The senior leadership team can demonstrate their commitment to antitrust compliance by regularly meeting with compliance personnel, investigating reports of misconduct, and disciplining employees who violate the organization's antitrust policy. If the senior leadership team does not commit to and enforce the organization's compliance efforts, the program will likely be considered ineffective.

## **5. Avoid Generic; Train for Industry-Specific Risk**

DOJ emphasized that employees should be prepared for industry-specific antitrust risks. *Id.* at 10-11. An effective compliance program should train employees with examples of previous antitrust violations that occurred within the organization or the industry. For example, an organization that sends employees to events where competitors are present should educate employees on the risks of information sharing and provide consistent training for communications with competitors.

## 6. The Effective Compliance Trio: Empower, Investigate, Monitor

DOJ also emphasized that to confirm the effectiveness of their compliance programs, organizations should include practical steps that address how personnel can detect and remedy violations. *Id.* at 12. The program should encourage employees to report potential misconduct without fear of retaliation. DOJ noted that the integrity of internal investigations should be objective and well documented. *Id.* at 14. While the senior leadership team should be involved in the enforcement of the program, compliance personnel should have independence to conduct investigations. Compliance personnel should have access to data analytics tools to aid in monitoring the program. If an investigation reveals an antitrust violation, organizations should engage in a root-cause analysis that informs senior leadership and compliance personnel of how to improve the existing compliance program.

### Conclusion

DOJ's revised guidance provides insight into the components of a successful antitrust compliance program. Organizations should take heed of the key concepts highlighted by the DOJ in the revised guidance and ensure their compliance program is effective, is appropriately tailored to antitrust risks prevalent in their industry, and adequately addresses the risks associated with their technology tools. As antitrust enforcement undergoes continued uncertainty with the transition to a new administration, a proactive and effective compliance program is more valuable than ever. Organizations should speak with experienced antitrust counsel to design an effective compliance program that aligns with the objectives emphasized by the DOJ.

### Endnote

[1] U.S. Department of Justice Antitrust Division, [Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations](#) (Nov. 13, 2024).

### Authors

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