

8 Key Elements Of An Effective Antitrust Compliance Program

By **Herbert Allen and Alexa DiCunzolo** (July 18, 2019, 2:59 PM EDT)

Antitrust compliance should be top of mind for companies and trade associations across the country. Last week, the U.S. Department of Justice announced that organizations that “invest significantly” in “robust” and “effective” antitrust compliance programs may be able to minimize, or even avoid, criminal antitrust liability when faced with allegations that an employee has committed a criminal antitrust violation, like price fixing or bid rigging.[1]

Meanwhile, criminal antitrust enforcement has been a top priority of the DOJ over the last year. At the end of 2018, there were 91 open grand jury investigations into criminal antitrust matters across the United States, the most since 2010.[2] And DOJ has recently been urging an expansion of criminal antitrust liability in certain areas, such as employee no-poach agreements. All of this makes now an ideal time to rethink your organization’s antitrust compliance efforts.

But what is required for an antitrust compliance policy to be deemed “robust” and “effective” under the DOJ’s new guidance on antitrust compliance programs? The answer, it turns out, may be quite a lot.[3]

Based on our reading of the new guidance, there are eight key elements of a “robust” and “effective” antitrust compliance program that organizations should consider as they assess whether their current compliance program is up to snuff:



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1. Meaningfully Involve Senior Leadership in Antitrust Compliance

The DOJ wants CEOs and other senior leaders to take “concrete actions” to show that their organizations take antitrust compliance seriously. In a speech quoted in the new guidance, the DOJ’s former head of criminal enforcement explained, “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.”[4] Put another way: “If the bosses take compliance seriously, the employees are far more likely to take it seriously. If they don’t, the employees won’t. It’s as simple as that.”[5]

To meet this standard, antitrust compliance efforts include reinforcement from the top. Antitrust compliance should be the subject of a periodic communications from senior leadership. Onboarding materials for new employees could include antitrust compliance messaging from a senior executive. Leaders should consider

beginning internal meetings and presentations with discussion of legal compliance issues, including antitrust compliance. Finally, leaders should ensure that their actions foster a “culture of compliance.” Leaders should take antitrust concerns seriously when they arise and ensure that enough resources are allocated to compliance efforts.

Needless to say, the involvement of senior management in an antitrust violation will likely be fatal to an organization’s efforts to invoke the new guidance to avoid criminal liability. The DOJ has said that it will apply a rebuttable presumption that a compliance program is not effective when high-level leaders “participated in, condoned or [were] willfully ignorant of the offense.”[6]

2. “Tailor” Your Compliance Efforts to Your Organization’s Risk Profile

Every organization has a different antitrust risk profile. For example, a company that submits bids for government contracts will have very different antitrust risk concerns (such as bid rigging) than a restaurant chain (where recent enforcement has focused on employee no-poach agreements). Trade associations have different risks altogether, depending on the scope of their activities, as they inherently bring competitors together and have frequently been subject of antitrust investigations and litigation.

With this background in mind, the DOJ’s new guidance requires antitrust compliance programs to be “appropriately tailored” to each organization’s various industries/business lines. Using an “off the shelf” antitrust policy of another company or trade association is likely to be insufficient.

Tailoring begins with an assessment of antitrust risk created by all the activities of your organization in light of current antitrust enforcement and litigation activity. Generally, this assessment should be undertaken in consultation with an experienced antitrust lawyer knowledgeable about the current enforcement landscape. Engaging an attorney is also crucial to ensuring that the attorney-client privilege applies to findings and legal advice related to your risk assessment.

An appropriate risk assessment may include interviews with key company personnel, distribution of written questionnaires, analysis of key contracts and joint-venture agreements and review of preexisting compliance materials. Working with antitrust counsel, companies should also identify markets in which they may have “market power” or “pricing power” — a key indicator of antitrust risk of all kinds. Ultimately, this risk assessment should account for the full range of antitrust risks facing your organization, allowing you to allocate compliance dollars to the areas where the risk is greatest and potential consequences of a violation are most severe.

3. Ensure Sufficient Training of Key Employees

According to the DOJ, “an effective antitrust compliance program will include adequate training and communication so that employees understand their antitrust compliance obligations.”[7] What this means for each organization will be situation-specific.

At a minimum, companies and trade associations should implement training programs for senior executives and employees in antitrust-sensitive positions, such as human resources employees, employees with responsibility for setting prices or developing strategy for competitive bids, and employees who regularly interact with competitors. This training should help employees identify their own actions that may violate antitrust law and help them spot the problematic behavior of others. It should also give guidance on how to respond when potentially unlawful actions are identified.

Companies should carefully think through all aspects of antitrust training efforts: how often training should occur, whether it should be conducted in person versus online, how training activities are tracked, and who should lead the training. Finally, the guidelines suggest that companies should ensure that antitrust training materials and policy documents are easily accessible, such as “via a prominent location on the company’s intranet.”[8]

4. Create a Mechanism for Prompt Reporting of Violations

Under the new guidance, an “effective” compliance program includes a reporting mechanism that facilitates prompt reporting without fear of retribution. The new guidance suggests that employees should be able to report potential antitrust violations confidentially or anonymously. This could take a number of forms: reporting software installed on company-owned mobile devices, a secure website or an anonymous hotline. Organizations should also consider imposing positive duties to report on employees that are closest to sources of antitrust risk and consequences for failure to report. Finally, company policy should require immediately involving antitrust counsel to help investigate and address reports subject to the attorney-client privilege.

5. Institute Appropriate Incentives and Discipline to Deter Violations

To ensure that a compliance program is well integrated into a company’s operations and workforce, the DOJ wants companies to institute incentives to reward compliance, as well as discipline to deter violations. Companies should consider making antitrust compliance a consideration in performance reviews and compensation decisions, so that employees who support compliance efforts may be rewarded. When a violation has occurred, company policy should require taking disciplinary action commensurate with the violation. Companies should document these decisions, which may help demonstrate their compliance program is “effective” in the event of a criminal inquiry.

6. Consider Regular Audits and Monitoring to Detect Potential Violations

The new DOJ guide suggests that many companies should institute auditing or monitoring programs to detect potential antitrust violations. The guidance states: “An effective compliance program includes monitoring and auditing functions to ensure that employees follow the compliance program.”[9] According to the DOJ, audits could take the form of periodic review of documents/communications from specific employees, employee self-assessments and interviews of specific employees. Depending on the industry, monitoring technology may be available identify risk areas.

A history of recent enforcement activity — whether involving the organization or the industry — may provide a strong reason for instituting an audit/monitoring program. Companies with high market share in particular products or geographic markets may also have good reason to conduct regular audits or monitoring. Finally, the largest companies with significant exposure in the event of a violation should make regular audits and monitoring a part of their compliance efforts.

7. Give Your Organization’s Compliance Officer Sufficient Authority and Resources

For an antitrust compliance program to be effective, employees with operational responsibility for the program must have “sufficient autonomy, authority, and seniority within the company’s governance structure, as well as adequate resources for training, monitoring, auditing and periodic evaluation of the program.”[10] What this means for your organization will be fact specific. But you should avoid relegating antitrust compliance to a low level employee who infrequently meets with key decision-makers within the organization.

Your company may have a designated compliance officer that is well-positioned to spearhead the program with support from outside antitrust counsel. Very large companies with significant antitrust exposure may engage one or more in-house antitrust attorneys to set up and oversee compliance efforts in coordination with senior company leadership. Whatever route your company takes, your antitrust compliance officers should be given the authority and access to get the attention of senior leadership and resources commensurate with your antitrust risk.

8. Reevaluate Risk and Compliance Efforts on a Regular Basis

Change happens. Companies expand into new business lines, restructure their leadership and even merge with competitors. Trade associations may admit a new category of members or undertake new research or advocacy initiatives. Finally, the law applicable to antitrust compliance and enforcement changes regularly. The recent criminal enforcement focus on no-poach agreements is a great example.

To ensure that compliance efforts evolve with these changes, the DOJ wants organizations to periodically review and update their antitrust compliance programs. Such a review should take place anytime changes in your organization necessitate an immediate review. Otherwise, regular review every year or two makes good sense. Finally, the DOJ wants organizations to take a broad approach to identifying areas of antitrust risk. To take just one example cited in the guidelines, reevaluation of antitrust risk may be necessary “as employees utilize new methods of electronic communication.”^[1]

Conclusion

All of this may seem daunting. For the largest companies in industries with significant antitrust risks, the guidelines may require a significant new investment of resources for compliance program to be deemed “effective.”

On the other hand, small and midsize companies may find that they can implement many features of an “effective” program at a relatively modest cost over the course of several months. And some organizations will already have elements of an effective compliance program that can be modified and expanded upon to more fully align with the DOJ’s new guidelines.

Finally, it’s worth remembering why compliance matters. Good antitrust compliance can have the benefit of preventing an antitrust violation from happening in the first place. And preventing the violation means preventing all liability — not just criminal liability. It also means avoiding reputational harm and the drain on senior executives’ time and energy associated with an antitrust inquiry and litigation.

To quote the DOJ’s top antitrust enforcer, Makan Delrahim, who himself quoted Ben Franklin in his speech last week: “An ounce of prevention is worth a pound of cure.” And so it is with antitrust compliance.

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[1] Assistant Attorney General Makan Delrahim, U.S. Dep’t Justice, Antitrust Div., Remarks at the New York University School of Law Program on Corporate Compliance and Enforcement, July 11, 2019,

available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0> (announcing that “the time has now come to improve the Antitrust Division’s approach and recognize the efforts of companies that invest significantly in robust compliance programs”).

[2] Assistant Attorney General Makan Delrahim, U.S. Dep’t Justice, Antitrust Div., Remarks at Roundtable Discussing the Antitrust Criminal Penalty Enhancement & Reform Act, April 11, 2019, available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-opening-remarks-roundtable-discussing>.

[3] Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (hereinafter, “2019 DOJ Guidance on Antitrust Compliance”), U.S. Dep’t Justice, Antitrust Div., July 2019, available at <https://www.justice.gov/atr/page/file/1182001/download>.

[4] Deputy Assistant Attorney General Brent Snyder, U.S. Dep’t Justice, Antitrust Div., Compliance is a Culture, Not Just a Policy, Remarks as Prepared for the International Chamber of Commerce/United States Council of International Business Joint Antitrust Compliance Workshop, September 9, 2014, available at <https://www.justice.gov/atr/file/517796/download>.

[5] *Id.*

[6] 2019 DOJ Guidance on Antitrust Compliance, at 14-15 (quoting U.S.S.G. § 8C2.5(f)(3)(A)–(C)).

[7] *Id.* at 14.

[8] *Id.* at 9.

[9] *Id.* at 10.

[10] *Id.* at 6.

[11] *Id.* at 7.