



# How to tailor an effective antitrust compliance program in light of recent DOJ guidance

## Companies should examine their compliance programs and update them on a regular basis

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In recent years, the Department of Justice’s Antitrust Division has ramped up antitrust enforcement and, in doing so, has brought renewed focus to corporate compliance programs. In light of this increased scrutiny from governmental agencies, companies should examine their compliance programs and update them on a regular basis to prevent and detect any antitrust violations.

It is particularly important for a company to identify any potential antitrust issues early on so the company can have the option of self-reporting and applying for leniency under the DOJ’s leniency program. In several recent public speeches, DOJ officials have emphasized that the department expects companies to implement robust compliance and to self-report any antitrust violations, and indicated that leniency would not be afforded in the absence of these proactive measures.

In a speech in September 2014, William Baer, the assistant attorney general for the Antitrust Division, emphasized that it is essential that companies develop *effective* compliance programs to uncover and prevent antitrust violations. Baer further noted the department requires companies seeking leniency to have made investments in developing effective compliance programs, “including conducting a thorough

internal investigation, providing detailed proffers of the reported conduct, producing foreign-located documents, preparing translations, and making witnesses available for interviews. Companies unwilling or unable to make the investments necessary ... will lose their opportunity to qualify for leniency.”

What are some of the benefits to a company for self-reporting and/or applying for leniency with DOJ’s Antitrust Division? While a company may not get a free pass for its antitrust violations, the existence of an antitrust compliance program may lead to a reduced fine at sentencing. Also, the Antitrust Division has imposed and will continue to impose a monitor on companies that violate the antitrust laws, have no effective compliance program, or allow culpable employees to remain in positions where they can commit further violations. The imposition of a monitor can be disruptive to a company’s business, so cooperating with DOJ early on after detecting a potential violation may allow a company to avoid this penalty.

With this guidance in mind, there are several key points that corporate counsel should focus on in developing an effective antitrust compliance program.

First, the compliance program should be tailored to the individual company. There is no “one-size-fits-all” antitrust compliance program. Corporate counsel must account for the specific nature of the business, and markets in which the

business operates, and establish specific standards and procedures to address the unique operational realities of the business. In the remarks of Assistant Attorney General Leslie Caldwell of DOJ’s Criminal Division at Compliance Week’s conference earlier this month, she advised that, in designing compliance programs, companies “would be wise to examine all of their lines of business — including those not subject to regulation — and determine where specific risks are and how best to control or mitigate them.” This includes advising third-party vendors and consultants with which the company does business about the company’s expectation that its agents and partners comply with its policies.

Second, the company should make compliance a priority and make sure employees know that the message comes from the top. Senior executives should support and oversee compliance efforts, and the company should establish and promote an effective system for employees to make confidential, internal reports of violations. The company should have assigned executives with the ability to report any potential violations directly to independent monitoring bodies, such as the board of directors or internal auditors. Moreover, the company should make clear that employees are required to report actions of both the company and any employee that raise potential antitrust concerns, as well as any misconduct that potentially violates antitrust laws.

Relatedly, the company must clearly communicate these compliance procedures to its workforce and educate its employees to ensure that the procedures are effectively implemented. The company should distribute written policies to employees, provide training and guidance to explain the importance of compliance, and offer case studies and relevant examples particular to the business to assist employees in identifying potential antitrust problems. These training efforts should include all executives, managers and especially employees with pricing responsibilities. The training also should involve senior personnel to demonstrate senior management's "buy-in" to the company's compliance programs. Additionally, the company also should solicit anonymous feedback to improve the training and compliance program itself.

Fourth, the company must be vigorous about enforcing existing policies, investigating reports of violations, and responding to potential violations. The company should incentivize cooperation with the compliance procedures, and violations should be disciplined. It is essential that enforcement be even-handed: Both senior managers and low-level employees should be held responsible for improper conduct.

Finally, all antitrust compliance policies and procedures must be revised periodically, even if there is no evidence that the current program is not working. The law is constantly evolving, and periodic revision of compliance procedures is necessary to ensure that up-to-date advice is conveyed to employees and management. Compliance policies also must be updated to reflect developments in a company's business

practices, as well as changes to data security and technology.

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