

Antitrust & Trade Regulation White Collar Criminal Defense

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New Guidelines on Antitrust Compliance Programs Offer Chance to Avoid Criminal Charges

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What You Need To Know:

- For the first time in its history, the DOJ has stated that it will take account of a company's compliance program in determining whether to bring criminal antitrust charges—and not simply at the penalty stage.
- This offers an unprecedented chance for companies to avoid criminal charges by adopting robust antitrust compliance programs, as defined by DOJ in its new policy.
- Now is the time to design or modify antitrust compliance programs to comply with the DOJ's guidance.

The Antitrust Division of the U.S. Department of Justice has announced, for the first time in its history, that it will take account of a company's compliance program in deciding whether to bring criminal charges. This offers an unprecedented opportunity for companies not merely to get a reduced sentence on the basis of a strong compliance program, but to avoid charges completely.

The new policy affords prosecutors broad latitude to determine whether a compliance program is significant enough to allow the company to avoid criminal charges even if the investigation shows the company is involved in criminal antitrust activity.

The Antitrust Division has made clear, however, that the program will have to be an integral part of the firm's culture, with demonstrated participation throughout the company from the most junior salespeople to the HR department, senior executives, and the board of directors.

For any company that does not yet have a robust antitrust compliance program, the possibility of avoiding criminal charges entirely if it is caught in a criminal antitrust investigation should be a strong reason to adopt one now.

Creating and administering a program that will have a realistic chance of shielding the company from criminal prosecution for an antitrust offense will require deep understanding not merely of antitrust law and how the Department of Justice evaluates existing compliance programs, but also of the criminal process particularly as it relates to charging decisions and the exercise of prosecutorial discretion.

The Division's 17-page [guide](#) to prosecutors, titled "Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations," lists nine "factors that Division prosecutors should consider when evaluating the effectiveness of an antitrust compliance program":

- The design and comprehensiveness of the program
- The culture of compliance within the company
- Responsibility for, and resources dedicated to, antitrust compliance
- Antitrust risk assessment techniques
- Compliance training and communication to employees
- Monitoring and auditing techniques, including continued review, evaluation, and revision of the antitrust compliance program
- Reporting mechanisms
- Compliance incentives and discipline
- Remediation methods
- Is there a chief compliance officer or executive within the company responsible for antitrust compliance? If so, to whom does the individual report, e.g., the board of directors, audit committee, or other governing body?
- What disciplinary measures does the company have for supervisors or employees who become aware of a potential antitrust violation but fail to report such conduct?
- Does the compliance program provide specialized antitrust compliance training for human resources personnel and executives responsible for overseeing recruitment and hiring?
- What information or metrics has the company collected and used to help detect antitrust violations?
- What mechanisms does the company have in place to ensure that employees follow its compliance program?
- Does training include senior management/supervisors and the board of directors?

To help evaluate against those factors, the guide sets out in the form of questions nearly 150 issues prosecutors will explore throughout the antitrust investigation in order to judge a compliance program; it also warns that these are not the only points that will matter in evaluating the specifics of each program.

Some examples will show that a nicely bound “paper program” will not be enough:

- What concrete actions have senior leaders taken to demonstrate leadership in the company’s antitrust compliance or remediation efforts if relevant? Does the compliance program provide specialized antitrust compliance training for human resources personnel and executives responsible for overseeing recruitment and hiring?

Designing an effective program, putting it into practice, and establishing the track record needed to prove it works will take time and experienced prosecutors and antitrust counsel. The new policy makes clear that the best time to start is now.

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