

The Complete Compliance and Ethics Manual 2023 Antitrust Compliance Programs as Evaluated by the Antitrust Division of the U.S. Department of Justice

By Theodore Banks^[1]

The prior policy of the Antitrust Division of the United States Department of Justice was not to follow the United States Sentencing Guidelines that recognized that an effective compliance program could serve to mitigate the impact of an antitrust prosecution. The Antitrust Division instead pointed to its leniency program, which gave a pass to the first member of a cartel that confessed its wrongdoing to the Division. Official policy was that “antitrust was different” and should not be treated like all the other crimes enforced by the other divisions of the Justice Department, which followed the Sentencing Guidelines and would give credit for compliance programs.

That policy changed in July 2019, when the Antitrust Division released its *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations*.^[2] This policy statement, along with contemporaneous revisions to the *Justice Manual*, brought the Antitrust Division’s approach to corporate compliance in line with the rest of the Justice Department. Reassuringly, nothing in it should come as a surprise. In addition to following the Sentencing Guidelines and the *Justice Manual*, the policy generally follows the similar *Evaluation of Corporate Compliance Programs*, released by the Criminal Division of the Department of Justice in April 2019.^[3] The guidance also quotes from the 2012 paper on antitrust compliance published by the OECD and the International Chamber of Commerce Antitrust Compliance Toolkit.^[4]

While there is no strict formula that all compliance programs must follow, the division would start its analysis of an antitrust compliance program by asking the following questions during the charging stage:

1. Does the company’s compliance program address and prohibit criminal antitrust violations?
2. Did the antitrust compliance program detect and facilitate prompt reporting of the violation?
3. To what extent was a company’s senior management involved in the violation?

The division provides greater detail under each of the nine elements of an effective compliance program. A company reviewing its antitrust compliance program, even in the absence of any government investigation pending, should consider how it would answer these questions. There is a two-fold purpose to this exercise: (1) the questions represent a summary of the state of current compliance learning, and satisfying these questions would reduce the likelihood that a violation will occur, and (2) being able to show how the company went about addressing all of the issues raised would go a long way toward convincing a prosecutor that a company’s commitment to comply with the law was sincere. The questions are reviewed below.

Element 1: Design and Comprehensiveness

A company is expected to have more than just a code of conduct or an antitrust policy on paper; it should have a program that was integrated into the company’s business and accessible to employees and agents. How would you answer the following questions?

- Before becoming aware of any investigation, did the company have an antitrust compliance program
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establishing standards and procedures to prevent and detect criminal conduct?

- When was the company's antitrust compliance program first implemented?
- How often is it updated? Is it periodically reviewed and does it seek feedback from employees? Are compliance materials updated with recent developments and periodically refreshed so they do not become stale?
- What is the format of the antitrust compliance program? Is it in writing?
- Who is responsible for integrating antitrust policies and procedures into the company's business practices?
- In what specific ways are antitrust compliance policies and procedures reinforced through the company's internal controls? For example, does the company have a way of tracking business contacts with competitors or attendance at trade association meetings, trade shows, and other meetings attended by competitors? Is that tracking system regularly monitored?
- What guidance has been provided to employees who could flag potential antitrust violations (e.g., those with approval authority for pricing changes and participation in industry meetings, certification responsibilities for bidding activity, or human resources/hiring authority)? Do they know what antitrust risks the company faces, and what conduct potentially indicates an antitrust violation?
- What guidance has been provided to employees about document destruction and obstruction of justice? Does the company have clear document retention guidelines, and does it educate employees on the ramifications of document destruction and obstruction of justice?^[5]

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