

Elements of Effective Antitrust Compliance Programs

The following list of factors for companies to consider when designing and implementing an antitrust compliance program is based on guidance published by the U.S. Department of Justice for evaluating the effectiveness of compliance programs in criminal antitrust investigations.* While this document is styled as a checklist, compliance programs should be specifically tailored to a company's unique risk profile, size, resources, geographic footprint, industry, and culture. Not all factors are therefore equally important or relevant to every company. Moreover, while this list of factors focuses on antitrust compliance, companies should consider compliance holistically, and compliance programs should address all areas of legal risk.

1 DESIGN AND COMPREHENSIVENESS

Written policy or code of conduct includes guidance on antitrust issues and prohibits criminal antitrust violations

Program is integrated into company's business (e.g., internal controls for tracking business contacts with competitors, trade association meetings, etc.)

Materials/resources are readily accessible to relevant and high-risk employees (e.g., with pricing authority or opportunities to meet with competitors)

Clear document retention guidelines; employees are educated about document destruction and obstruction of justice

2 CULTURE OF COMPLIANCE

Program is supported by senior executives and middle and top management (e.g., through statements in compliance materials and attendance and active participation in compliance training)

Accountability for leadership involved in conduct or for tolerating subordinates' conduct

3 OPERATIONAL RESPONSIBILITY AND RESOURCES

Program is run by independent, senior-level individual with direct access to Board of Directors or equivalent

Personnel responsible for antitrust compliance have adequate experience and familiarity with antitrust law

Sufficient resources and time are dedicated to administering program

Personnel responsible for compliance have access to relevant source of data to timely and effectively monitor or test policies, controls, or operations

Resources are allocated efficiently, focused on high antitrust risk areas

4 RISK ASSESSMENTS

Program is tailored to monitor and address antitrust risks specific to company's lines of business and markets in which it operates

Larger companies with significant resources periodically benchmark and collect data and metrics to enhance program's efficacy

* U.S. Department of Justice Antitrust Division, *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations* (July 2019), available at <https://www.justice.gov/atr/page/file/1182001/download>. See also U.S. Department of Justice Criminal Division, *Evaluation of Corporate Compliance Programs* (June 2020), available at <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

5 TRAINING AND COMMUNICATION

Clear and accessible trainings and associated materials cover dos and don'ts and how to report conduct or seek guidance

Training is tailored to employee audiences, including at foreign subsidiaries, and includes realistic examples of antitrust issues that could arise in their jobs

Training tests level of employees understanding and allows employees to ask questions

Employees are trained during onboarding and regularly thereafter

6 PERIODIC REVIEW, MONITORING AND AUDITING

Regular audits and reviews of program to evaluate effectiveness (e.g., audits of high-risk employees' emails and documents; interviews; use of targeted screening tools)

Program is periodically assessed and revised to ensure it reflects evolving laws and risks and incorporates lessons learned from company's own misconduct or that of its peers

7 REPORTING MECHANISMS

Anonymous and confidential mechanism (e.g., publicized hotline) available for employees and other third parties to report potential violations without fear of reprisal

Reports or investigation findings are periodically analyzed for patterns or red flags

8 INCENTIVES AND DISCIPLINE

Incentives (e.g., promotions, bonuses) provided to individuals who support culture of compliance

Discipline for individuals who violate antitrust compliance policy or tolerate violations by others

9 DISCOVERY AND REMEDIATION METHODS

Comprehensive review of compliance training, monitoring, auditing, and risk control functions following discovery of antitrust violation

Modifications to program after violation to prevent recurrence

Winston's Antitrust / Competition Practice Group

An ounce of antitrust prevention is worth millions in litigation costs. With antitrust agencies worldwide focusing on compliance programming and training, our extensive experience enables us to provide customized on-site antitrust training, CLE antitrust seminars, compliance programs, audits, antitrust manuals and guidelines, and computer training materials. We can also provide compliance program review and advice on restructuring to comport with the most recent enforcer guidelines and expectations.