

Antitrust 101: Best Practices for an Effective Antitrust Compliance Program

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There has recently been a heightened focus on antitrust enforcement as the Biden administration has signaled its intent to vigorously enforce the antitrust laws, including through its appointment of Lina Khan to the Federal Trade Commission and its proposed increases in the budgets of the FTC and Antitrust Division. Most recently, on July 9, 2021, President Biden signed a comprehensive Executive Order aimed at promoting economic competition across the U.S. economy, including through enhanced enforcement of antitrust laws. See [here](#) for prior blog posts on the Executive Order. In addition, the Department of Justice has published guidelines for compliance programs during the last few years, which provide factors the DOJ considers in evaluating the effectiveness of a company's program. See [here](#) for a prior blog post on this guidance.

As such, it is more important than ever for companies to devote resources to designing and maintaining effective antitrust compliance programs. This post focuses on best practices related to antitrust compliance programs, based on the DOJ's guidelines, for companies to keep in mind in an environment of increased antitrust enforcement and scrutiny.

Design and Tailor the Compliance Program to Address the Particular Antitrust Risk the Company Faces

To be effective, a company's antitrust compliance program must be crafted to address the potential antitrust risks that the company faces particular to how its business operates. When designing and tailoring a compliance program, a company should engage in both risk identification and risk assessment, with the company's specific circumstances in mind.

From a risk identification perspective, a program should be designed to detect the types of misconduct most likely to occur in the company's line of business.^[1]

- For example, if a company uses distributors to help sell and distribute its products, the compliance program should focus on ways to reduce risks associated with distributor relationships, including with respect to resale prices and resale restrictions.

In addition, when designing the program, a company should consider external factors relating to antitrust risk.

- External factors may include: (i) the locations of the company's operations; (ii) the industry sector and competitiveness of the relevant market; (iii) the regulatory landscape; (iv) the company's position, as well as the overall market concentration, in the product and geographic markets in which it sells its products and services; (v) the tender process in place in the relevant market; and (vi) whether employees participate in any trade associations or industry gatherings.

The compliance program should focus on any business units and functions within the company that are most at risk for anticompetitive behavior, such as sales personnel or those divisions with responsibility for pricing.

- To the extent that sales personnel or other employees participate in trade associations, for example, it is important that those employees receive antitrust training and are provided with specific guidance to follow for any trade association activities.

The compliance program should provide clear standards and policies specifically tailored to the business and potential risks the company faces. These standards and policies should include hypothetical situations specific to the risks that apply to the company's business, which will help employees identify potentially unlawful conduct.

An effective compliance program should also provide employees with resources to assess risk. For example, the compliance program should identify the legal personnel to contact or a hotline number to call should employees identify potentially unlawful conduct.

Foster a Culture of Compliance at All Levels

It is important that senior executives of the company promote antitrust compliance and encourage employees to report any potentially unlawful conduct.^[2] Even a well-crafted program on paper will be ineffective at preventing antitrust violations or limiting risk exposure if leadership fails to emphasize the importance of compliance.

- Company executives and leadership should clearly articulate the company's compliance program and policies to employees and agents.
- Company executives should actively encourage employees to report potentially unlawful conduct and adhere to the company's compliance program and policies.
- Company executives should remain engaged in the oversight and management of the compliance program. For example, company executives should remain involved in any audits of or revisions to the compliance program.

Devote Adequate Resources to Compliance

In addition, a company should dedicate sufficient resources to its antitrust compliance program.^[3] To be effective at detecting and preventing potential antitrust violations, a compliance program must be well-organized and well-resourced.

- Companies should devote sufficient resources to antitrust compliance and allocate those resources to areas and functions that are more likely to encounter antitrust risk.
- Companies should give responsibility for the program to specific individuals within the company—such as a chief compliance officer or an executive specifically charged with overseeing the program—and hold those individuals accountable for the effectiveness of the program.
- Those individuals charged with responsibility for a company's compliance program should have sufficient autonomy and authority within the company's organization.
- Company leaders should ensure that there are reliable means by which those in charge of compliance can inform leadership of compliance-related issues, including the effectiveness of the compliance program. This could

include regular meetings between company leaders and those responsible for the compliance program, or regular updates to company leadership regarding the compliance program's effectiveness.

Regularly Train Employees on Antitrust Compliance

Regular employee training is paramount to an effective compliance program. Compliance training, like the compliance program, should be tailored to the company's business and the employee audience.^[5] Though there is no single model for effective compliance training, companies should craft their trainings with the following factors in mind:

- A compliance program should include regular training and clear protocols for employees to follow. More regular training may be needed for those employees in business units and functions within the company that are most at risk for potentially anticompetitive behavior.
- Trainings should provide employees with an understanding of general purposes of the antitrust laws and antitrust risk. This should include a clear explanation of the types of conduct that will violate antitrust laws, as well as the potential risk for the company and the individual if a violation occurs.
- The compliance program and trainings should be tailored to the employee's duties and should provide examples of scenarios that could arise in the course of the employee's work. For example, an employee with authority to set prices should be educated on price-fixing. Similarly, an employee who participates in trade associations or attends industry events should be educated on how potential issues may arise in those contexts and provided with guidance and clear policies for conduct at such trade association or industry meetings.
- Interactive, in-person training sessions are ideal, but these may be supplemented with or followed by online tools.

Review and Revise the Compliance Program

Companies should regularly review and update their compliance program and policies.^[5] Like other aspects of antitrust compliance, the way a company reviews its compliance program must be tailored to the company and the nature of the antitrust risk the company faces.

- Audits should be regularly conducted, either through informal interviews, through screens, or through software tools designed to flag potential antitrust violations.
- Larger companies should consider conducting unannounced audits of the documents and communications of high-risk employees.
- The compliance program should be revised to account for any antitrust compliance incidents detected and should incorporate any lessons learned from the company's own experience as well as from other companies operating in the same industry.

It is important that a company's compliance policies prohibit not just conduct that violates the antitrust laws but also conduct that may give the appearance of a violation, even if not unlawful, and should clearly state as such. In this era of heightened government and private enforcement, it is vital that companies prohibit even conduct that may give the appearance of an antitrust violation so that companies can avoid costly investigations and litigation.

If you have any questions regarding your company's compliance program, we are happy discuss the specifics of your company's program and ways to improve your company's program based on the company's unique risk profile, size, resources, and culture.

^[5] See U.S. Department of Justice Criminal Division, Evaluation of Corporate Compliance Programs (updated June 2020) (hereinafter, "2020 Guidelines") at 3; U.S. Department of Justice Antitrust Division, Evaluation of Corporate Compliance Programs in Antitrust Investigations (July 2019) (hereinafter, "2019

Guidelines”) at 7.

▣ see 2020 Guidelines at 10; 2019 Guidelines at 5.

▣ 2020 Guidelines at 11.

▣ 2020 Guidelines at 5-6; 2019 Guidelines at 8-9.

▣ 2020 Guidelines at 15-16; 2019 Guidelines at 10-11.
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Authors

[Eva Cole](#)

[Lauren Duxstad](#)

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Lauren Duxstad

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