

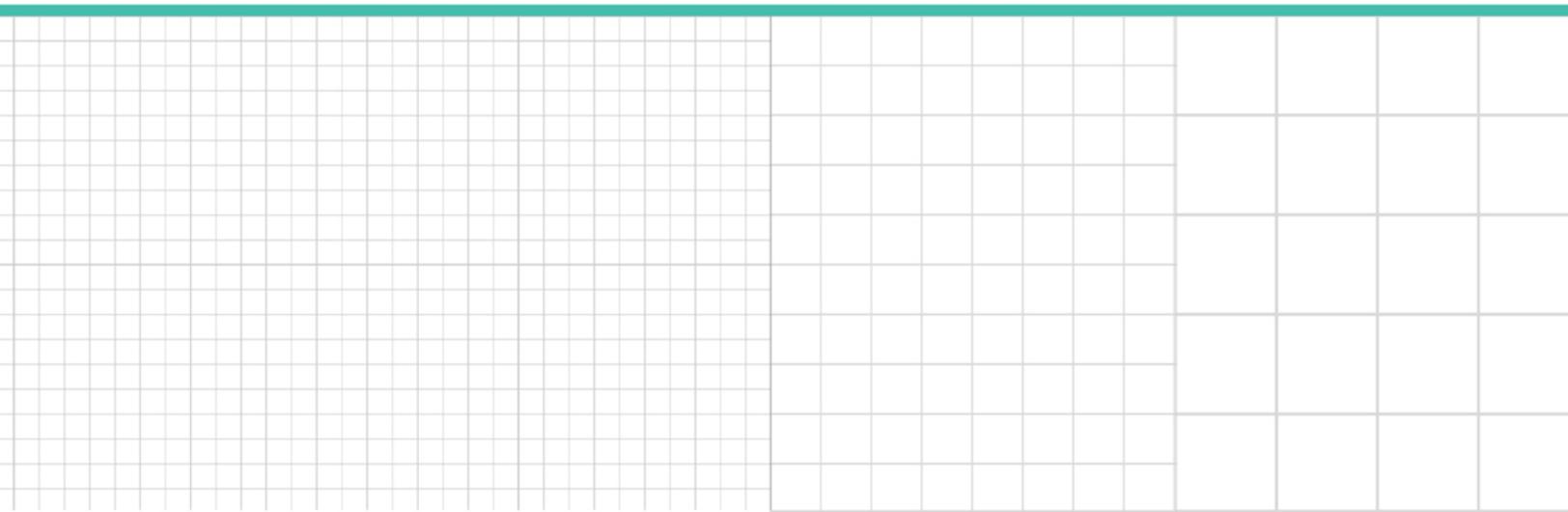


Professional Perspective

Landmark Antitrust Division Policy to Incentivize Corporate Compliance and Mitigate Antitrust Risk

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Contributed by [Mark Krotoski](#), Morgan, Lewis & Bockius

The Antitrust Division announced a landmark [policy](#) to incentivize corporate compliance. It marks a major turning point and opportunity as it changes Antitrust Division policies and practices that have been in place since the early 1990s.

The policy is designed to encourage and reward robust antitrust compliance programs that consider specific elements that are tailored to the company and industry. This article reviews key changes under the new policy, provides an overview of the new evaluation framework for antitrust compliance programs, notes the essential leadership role of the board of directors and management, identifies benefits and risks under the policy, and identifies next steps for companies.

Key Changes

For nearly three decades, the Antitrust Division took the position that any occurrence of an antitrust violation meant that the company's compliance program failed to prevent and detect the conduct and therefore was not "effective." In fact, the U.S. Department of Justice's [Justice Manual](#) expressly provided that in antitrust cases, credit was not "given at the charging stage for a compliance program" as "national law enforcement policies mandate[d] prosecutions of corporations notwithstanding the existence of a compliance program."

Sentencing credit was rarely given. The policy against providing credit for compliance programs at the charging and sentencing stages was [reinforced in speeches](#) by senior Antitrust Division officials and in practice.

The new policy represents a major change in several key respects:

- For the first time, the Antitrust Division will consider credit for compliance programs at the charging stage. For example, this could result in fewer charges, lesser charges, a narrower period for the charged conduct, among other options.
- The Antitrust Division has also expressly acknowledged the possibility of a deferred prosecution agreement when "[relevant Factors](#), including the adequacy and effectiveness of the corporation's compliance program, weigh in favor of doing so."
- At the sentencing stage, the Antitrust Division has clarified that an "effective" compliance program may result in a three-point reduction in a corporate defendant's culpability score under the Sentencing Guidelines, result in a recommendation for a lower criminal fine, and affect the recommendation on whether probation should be imposed.
- Also for the first time, the Antitrust Division published guidance, "[Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations](#)," which identifies specific questions and elements prosecutors will use in assessing compliance programs at both the charging and sentencing stages.

Overview of New Framework

The Antitrust Division has found, over time, that existing antitrust compliance programs, even for large companies with significant resources, may be either a mere "[paper](#)" program, "[sloppy](#)," or otherwise ineffective. The new policy identifies the specific questions and elements that the Antitrust Division will use to evaluate antitrust compliance programs.

As an overview, these elements now include:

Three "Fundamental" Questions: "Is the corporation's compliance program well designed?" "Is the program being applied earnestly and in good faith?" and "Does the corporation's compliance program work?"

Preliminary Questions about Compliance Efforts: “Does the company's compliance program address and prohibit criminal antitrust violations?” “Did the antitrust compliance program detect and facilitate prompt reporting of the violation?” and “To what extent was a company's senior management involved in the violation?”

Factors to Evaluate the ‘Effectiveness’ of the 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

Source: [U.S. Department of Justice](#), Antitrust Division

Careful consideration and application of these questions and elements is required to ensure that the company's antitrust compliance program may favorably withstand review and evaluation by the Antitrust Division, if an investigation commenced. The guidelines are not formulaic requirements and must be tailored to the company, industry and circumstances.

Leadership Role of the Board and Management

As a general matter, leadership and support, including by the board of directors and senior management, is universally recognized as essential for a successful antitrust compliance program. The leadership role is also required as a legal obligation and under the new policy.

In managing and directing the corporation, the board of directors has a general duty of oversight to manage risk including antitrust risk. This role is often referred to as the *Caremark* duty of oversight. See *In Re Caremark International Inc. Derivative Litigation Consolidated Civil Action No. 13670, 698 A.2d 959* (Del. Sept. 25, 1996), and progeny. Given new and significant DOJ guidance, the board will want to ensure that the compliance standards are carefully considered and applied to the company's policies and circumstances.

Independent of this duty, the new policy expects that the board will exercise leadership on antitrust compliance issues. The evaluation factors specifically consider the role of the board and management in the compliance program.

Benefits from Robust Programs Under the New Policy

An effective, updated program advances the primary objectives of a strong compliance program: prevention, detection, and mitigation. In the best circumstances, the compliance program will prevent antitrust risk, avoiding potentially significant penalties and costs. Upon detection of antitrust risk, the program can be used to mitigate steps implemented including participation in the [Leniency Program](#) if available.

As an overview, some of the benefits from an effective compliance program include:

- Preventing antitrust risk
- Detection of antitrust risk with a chance to assess options including self-reporting
- Participating in the Leniency Program, if available, and avoiding any criminal penalties
- Mitigating the antitrust risk by obtaining credit at charging
- Considering a deferred prosecution agreement with the Antitrust Division
- Mitigating the potential sentence
- Avoiding court-imposed probation for up to five years.

Primary Risks from Corporate Exposure to Criminal Antitrust Conduct

The criminal investigation and prosecution of companies and executives engaged in antitrust conduct (such as price fixing, bid rigging, and market allocation) can take several years to resolve, including follow-on civil litigation. As an overview, substantial penalties resulting from antitrust risk may include:

- Substantial criminal corporate fines up to the [statutory maximum of \\$100 million](#), or even more
 - Criminal fines exceeding \$100 million have been imposed based on twice the gross pecuniary gain or twice the gross pecuniary loss caused by the antitrust offense
 - Higher criminal penalties may also result if there is a prior history of antitrust violations)
- The risk of detection by various global leniency and whistleblowing programs in different jurisdictions and risk of multiple fines in other jurisdictions for antitrust conduct that violates the laws of multiple jurisdictions
- A probation term under the continuing jurisdiction of the court up to five years with specific conditions to be satisfied as part of a corporate sentence
- A corporate monitor for up to five years at company expense
- A court order of criminal restitution
- Debarment or suspension by federal or state agencies
- A continuing corporate obligation to cooperate with the Antitrust Division after resolving the criminal case including by a corporate plea agreement
- Separate prosecution and prison terms of company executives involved in the antitrust conduct up to 10 years
- Extradition of executives outside the U.S.
- Parallel or follow-on civil cases including class actions seeking treble damages

Next Company Steps

Given the landmark policy change to incentivize robust antitrust compliance programs, companies should take the following steps now to take advantage of the new benefits:

Board Oversight: As noted, the board's active role is essential to the success of any compliance program. The board of directors, or equivalent body managing risk, should direct and oversee a review of the company's antitrust compliance program to ensure it is "designed, implemented, reviewed, and revised, as appropriate, in an effective manner," and would withstand scrutiny and evaluation under the new policy.

Management Leadership: Management needs to be proactive in the development and enforcement of the compliance program. Management demonstrates its leadership and commitment, sets the tone for the company, reinforces the policies, and promotes a “culture of compliance” for all employees.

Responsibility: Designate an appropriate executive “responsible for integrating antitrust policies and procedures into the company’s business practices” with sufficient independence, autonomy and support.

Role of Privilege and Counsel: Carefully consider the role of the attorney client privilege in the design and review of the antitrust compliance program and to obtain legal guidance on applicable options and features for the compliance program. This includes consideration of the risk assessment of antitrust risk factors. Experienced counsel can also provide legal analysis and advice on whether antitrust compliance program is “effective” to withstand an evaluation by the Antitrust Division.

Tailoring and Risk Assessment: Identify areas of antitrust risk for the business, conduct a risk assessment, and develop risk mitigation policies and procedures tailored to the business. For example, this will include a review of sales practices, bidding processes, participation in trade association meetings, among other unique aspects of the business that may result in antitrust risk. This will ensure that the antitrust compliance program is tailored to the company and industry as there is no “one size fits all.”

Recent Developments: Ensure that the antitrust compliance program covers recent antitrust developments. For example, since [Oct. 2016](#), the Antitrust Division, the Federal Trade Commission, and several states have been active in bringing enforcement actions for no-poaching and wage fixing agreements. This enforcement is focused largely on human resource professionals or executives who are not accustomed to antitrust laws.

Training and Education: Training creates an awareness for employees to prevent antitrust risk, recognize it and report it and is a key factor that is evaluated by the Antitrust Division. Relevant considerations will include who is involved in the training including company leadership, the frequency and manner of training, whether employees certify that they have read the compliance policies, what records are maintained to confirm training, among other factors.

History: The history of the antitrust compliance program is another important factor. Specifically, the new policy asks: “Before becoming aware of any investigation, did the company have an antitrust compliance program establishing standards and procedures to prevent and detect criminal conduct?” “When was the company’s antitrust compliance program first implemented?” and “Is it periodically reviewed and does it seek feedback from employees?”

Detection: If antitrust conduct or risk is detected, contact experienced antitrust counsel to evaluate the options including consideration of the Leniency Program. Conduct an investigation under attorney client privilege to assess legal options.

Under the landmark new policy, companies with “effective” antitrust compliance programs are eligible to receive significant new benefits. Companies that fail to do so may suffer significant penalties in the event of antitrust risk and will be asked to explain why the new guidelines were not adopted before the conduct was uncovered.

The new policy provides an opportunity for companies. Companies can act now to take advantage of this significant new development to receive the benefits and avoid the penalties and costs resulting from a robust antitrust compliance program.