

# Important New Guidance – How an Effective Antitrust Compliance Program Could Prevent Criminal Charges Against Your Company

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On July 11, 2019, the Antitrust Division of the U.S. Department of Justice published an advisory concerning corporate compliance programs and announced a new approach to criminal charging decisions against companies.<sup>[i]</sup> Specifically, the advisory states that consideration of a company's antitrust compliance program can serve as a critical factor in deciding whether to pursue criminal charges against a company. In other words, the existence of a robust, functioning antitrust compliance program can, potentially, shield a company from criminal charges. The advisory underscores the importance of antitrust compliance and heralds the government renewed emphasis on ensuring robust antitrust compliance.

The DOJ's general principles of prosecution have long established that a company's robust compliance program can be a factor at the charging stage.<sup>[ii]</sup> The Antitrust Division however has had a long-standing policy *against* giving weight to this factor. Instead, it historically based decisions to offer credit to violating companies on whether a company "wins the race" for leniency for being the first to blow the whistle on cartel behavior.<sup>[iii]</sup> If a company was not eligible for leniency for being the first in the door, the fact that it had a robust compliance program was irrelevant to the charging decision and would be considered, if at all, only at the sentencing stage. Now, even if a company does not win the race of the swift, it still can potentially avoid criminal charges by demonstrating that it has a robust and operating compliance program in place.

What this means in practical terms is that if a company has, for example, a rogue employee that engages in criminal antitrust behavior (price fixing, bid rigging, etc.), it is not inevitable that the company itself will be charged with a felony under the Sherman Antitrust Act. A company's robust compliance program can make the difference in whether or not it is criminally charged. It is therefore imperative for every company to undertake an evaluation of its existing antitrust compliance program, or, if none exists, to create such a program. It is also imperative for every company to review its participation in trade associations and industry groups to ensure that its conduct in connection with those activities are governed by a robust compliance program.

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The Antitrust Division's advisory sets forth several factors that companies should consider in reviewing the sufficiency of their programs or adopting new ones:

1. **Design and Comprehensiveness.** This factor distinguishes between “paper programs” and genuine, robust ones. In other words, simply enacting a policy is not enough. The key, as the Antitrust Division has highlighted, is bona fide “integration into the company’s business and the accessibility of antitrust compliance resources to employees.”
2. **Culture of Compliance.** Effective compliance programs must promote and support compliance, starting at the top. To that end, senior leaders are encouraged to actively promote compliance and establish personal accountability for failures.
3. **Responsibility for the Compliance Program.** An effective policy requires the devotion of adequate resources and providing compliance personnel access to the organization’s leadership.
4. **Risk Assessment.** A “well-designed corporate compliance program is ‘designed to detect particular types of misconduct most likely to occur in a particular corporation’s line of business.’” Accordingly, a program should be tailored to account for industry and company specific factors. For example, if a company participates in trade association meetings or other trade group discussions, the company should prioritize enacting policies and procedures that apply specifically to potentially violative conduct that can occur in that setting.
5. **Training and Communication.** Effective compliance programs include adequate communication and training. Training requires instruction on the potential violations and what to do when the employee believes a violation has occurred. Training and other written materials should be documented and maintained.
6. **Periodic Review, Monitoring and Auditing.** A program should be periodically reviewed to ensure it is effective and current.
7. **Reporting.** An effective compliance program includes effective reporting mechanisms, such that employees are able to promptly report potential antitrust violations without fear of retaliation.
8. **Incentives and Discipline.** A company should undertake actions to incentivize compliance with its programs, including appropriate measures relating to compensation and discipline for violations.
9. **Remediation and Role of the Compliance Program in the Discovery of the Violation.** Part of a robust compliance program is making necessary improvements and undertaking appropriate remedial efforts in the event that an antitrust violation is reported.

In summary, the Antitrust Division's advisory represents a welcomed change and conforms to the DOJ's principles of prosecution which gives weight and consideration to effective compliance programs. Companies would be well advised to consult with counsel to assist in creating or reviewing existing compliance programs.

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[i] U.S. Dep’t of Justice, Antitrust Division, “Evaluation of Corporate Compliance Programs in

Criminal Antitrust Investigations” (July 2019),  
<https://www.justice.gov/atr/page/file/1182001/download>.

[ii] U.S. Dep’t of Justice, Principles of Federal Prosecution §§ 9-28.800; 9-28.1000 (2019).

[iii] Makan Delrahim, Asst. Att’y Gen., U.S. Dep’t Justice, Antitrust Div., Remarks at New York University School of Law Program on Corporate Compliance and Enforcement (July 11, 2019),  
<https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarksnew-york-university-school-l-0>.

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