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Compliance Update

DOJ's Antitrust Division Updates Guidance on Corporate Compliance Programs

By [Craig Lee](#), [Nathaniel Edmonds](#), [Nisa Gosselink-Ulep](#), [Emma Hutchison](#), and Margot Kelley

On November 12, 2024, the Department of Justice (DOJ) Antitrust Division (Division) updated its [guidance](#) on how prosecutors will evaluate corporate antitrust compliance programs for the first time since 2019. The Division's "Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations" stresses a company's ongoing responsibility to monitor and minimize risks of criminal antitrust violations, as prosecutors are instructed to assess a compliance program as it "existed the time of the offense, as well as the company's subsequent improvements to the program." Updates to the guidance, which largely mirror those [issued by the Criminal Division this September](#), reflect the DOJ's rising expectations for antitrust compliance programs, as they introduce several new areas of focus that may not be addressed in companies' current antitrust compliance programs.

In particular, companies should be aware of the following focus areas and additions to the Antitrust Division's 2024 guidance:

Civil Antitrust Risks

While the Division's guidance on the Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations applies only to criminal investigations, the guidance notes that "a well-designed antitrust compliance program should also minimize risk of civil antitrust violations." Although the updated guidance does not reference the risk of civil antitrust violations as a consideration for prosecutors, the guidance does state that companies "seeking to resolve investigations into civil antitrust violations and asking the Antitrust Division to take notice of existing or improved compliance efforts. . . should expect the civil team to consider many of the same factors when assessing the effectiveness of their compliance program."

Emerging Technology and Ephemeral Messaging

The updates to the Division's guidance focus heavily on the role of technology and, specifically, a compliance program's ability to monitor and mitigate antitrust risks associated with a company's use of emerging technology. In particular, prosecutors will assess how a company's compliance program measures and responds to antitrust risks presented by artificial intelligence (AI) and algorithmic revenue management (e.g., algorithmic pricing). Prosecutors will also evaluate how the company trains employees on the "permissible and nonpermissible uses" of new technology, such as AI.

Another update calls out the use of ephemeral messaging. Prosecutors will consider whether and to what extent a company has clear guidelines regarding employees' use of ephemeral messaging and other non-company communication methods. For example, a prosecutor will evaluate a company's preservation policy for messages sent on ephemeral messaging platforms, considering when, if at all, the company requires messages on the platform to be preserved.

The Importance of Compliance Culture

The Division's updates emphasize the significance of building a "culture of compliance" and self-reporting through the administration of an effective antitrust corporate compliance program. Prosecutors will assess how a company measures and incentivizes a "compliance culture," looking in part at the company's deployment and maintenance of anti-retaliatory reporting mechanisms. For example, prosecutors will now consider whether employees are trained regarding any anti-retaliation policy and informed of their protections under the Criminal Antitrust Anti-Retaliation Act (CAARA). They will also evaluate whether non-disclosure agreements (NDAs) leveraged by the company are used or enforced to effectively deter employees from reporting antitrust violations.

Relatedly, changes to the guidance highlight that a culture of compliance relies on engagement from all levels of the organization, beyond "senior leadership and managers" referenced in the Division's 2019 guidance, to include middle management. The changes also specifically note that prosecutors will evaluate how middle and senior managers have demonstrated their commitment to compliance in the face of competing business interests and how the company's hiring and incentive structures reinforce ethical conduct.

Lessons Learned

According to the updated guidance, prosecutors will now evaluate a company's consideration and implementation of lessons learned, not only to account for previous antitrust violations at the company itself, but in "the industry in which it participates."

Updates to the Antitrust Division's guidance on corporate compliance programs largely track the DOJ's broader push for stronger corporate compliance programs. Moreover, while recent guidance across the DOJ has similarly focused on managing AI, encouraging a culture of reporting, and applying lessons learned, the Antitrust Division's updates introduce new considerations unlikely to be already integrated in many current corporate compliance programs. The updated guidance also specifically asks how the antitrust compliance program fits within a company's broader compliance program and whether it is given appropriate emphasis in light of the company's actual antitrust risks. Thus, companies should take specific note of managing risks of civil as well as criminal antitrust violations; the use of emerging technologies, ephemeral messaging, and NDAs; and measuring effectiveness and ongoing monitoring in building out and updating their antitrust corporate compliance programs.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings Washington, D.C. lawyers:

Craig Lee
1(202) 551-1752
craiglee@paulhastings.com

Nathaniel Edmonds
1(202) 551-1774
nathanieledmonds@paulhastings.com

Nisa Gosselink-Ulep
1(202) 551-1746
nisagosselinkulep@paulhastings.com

Emma Hutchison
1(202) 551-1754
emmahutchison@paulhastings.com