

## DOJ Antitrust Division updates its corporate compliance guidance

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The Antitrust Division of the Department of Justice has updated its 2019 Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations. The changes bring the guidance in line with recent changes to the DOJ Criminal Division's compliance guidance, but also offer new guidance for civil antitrust cases.

On November 12, 2024, the Antitrust Division of the Department of Justice (DOJ) released an update to its 2019 Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (the Guidance). The Guidance provides insight into how prosecutors will assess antitrust compliance programs at the charging and sentencing stage. The Guidance is intended to be consistent with the DOJ Criminal Division's Evaluation of Corporate Compliance Programs (ECCP), and reflects similar updates made to the ECCP in [September 2024](#). For the first time, the Guidance notes that companies should expect DOJ to consider many of the same factors when evaluating a company's compliance program in civil antitrust investigations.

### Notable areas of focus

**Culture of compliance.** The Guidance emphasizes the importance of companies fostering internal dynamics that promote antitrust compliance and incentivize reporting and self-policing of antitrust concerns.

- The Guidance continues to emphasize the importance of senior leadership in contributing to antitrust compliance and now extends that focus to mid-level managers. The Guidance asks about specific, concrete actions that those in authority have taken to encourage, or discourage, antitrust compliance. DOJ has added new questions related to what management “at all levels” and “across the organization” have done to promote antitrust compliance.
- The Guidance emphasizes the importance of anonymous or confidential reporting mechanisms for the detection of potential antitrust violations. DOJ has added questions related to how companies determine which antitrust reports to investigate further and how they ensure that these investigations are independently and appropriately conducted. DOJ will analyze whether companies have enacted policies that encourage or chill internal reporting of potential violations.

**Non-disclosure agreements.** DOJ has added questions that flag the potential negative effects of non-disclosure agreements (NDAs) on antitrust compliance.

- The Guidance asks whether NDAs and other restrictions on current and former employees hamper employees' ability to report antitrust violations without fear of retaliation. In addition, DOJ will consider whether companies are using NDAs in ways that potentially violate the Criminal Antitrust Anti-Retaliation Act.

**Technological risks.** As companies implement new technology, the Guidance asks how companies are assessing the antitrust risks presented by these tools.

- Like the Criminal Division’s update to the ECCP in [September 2024](#), the Guidance now specifically flags the use of artificial intelligence, as well as algorithmic revenue management software. The Guidance asks to what degree antitrust compliance personnel are involved in the adoption of these new technologies.
- Mirroring the Criminal Division’s [March 2023](#) update to the ECCP, the Guidance now also looks at what electronic communication channels companies use and what mechanisms they have employed to manage and preserve information stored on these channels. In particular, the Guidance asks what guidelines companies have instituted for ephemeral messaging and employee use of non-company communication methods.

**Periodic refinement and improvement.** The Antitrust Division re-emphasizes that internal review and assessment of antitrust compliance is a critical part of an effective program.

- The Guidance now stresses the need for antitrust compliance programs to receive adequate resources, authority, and autonomy within companies to meaningfully prevent antitrust violations. The Guidance also asks how compliance personnel utilize company data and whether they receive sufficient data for proper monitoring.
- The Guidance asks how companies revise their compliance programs in response to antitrust incidents. DOJ will inquire whether employee training programs reflect lessons learned from prior antitrust compliance incidents and whether training programs are tailored to particular industries. DOJ will also evaluate whether training programs focused on antitrust “hot” words are designed to detect and deter antitrust violations, or to make them harder to detect.
- The DOJ will take into account how companies detect antitrust violations. In the updated Guidance, prosecutors are instructed to consider whether companies use communications monitoring tools or statistical testing to flag potential violations.

**Connection to civil enforcement.** While the Guidance relates to criminal antitrust violations, DOJ notes that a well-designed antitrust compliance program will also minimize the risk of civil violations.

- The Guidance flags that companies facing investigations into civil antitrust violations should expect many of the same questions and areas of focus.

## Key takeaways

- The Antitrust Division’s Guidance offers insight into what factors prosecutors will consider when evaluating corporate antitrust compliance programs and provides insight into DOJ’s current areas of focus and experiences.
- The Antitrust Division believes that an effective compliance program depends on companies creating a culture of compliance that includes involvement from not just senior leadership, but also middle management.
- Mirroring recent updates to the Criminal Division’s ECCP, the Antitrust Division’s Guidance features discussions of technological tools, including artificial intelligence and ephemeral messaging platforms, reflecting the current administration’s priorities over the last few years.
- Companies should carefully evaluate their antitrust compliance programs with these new updates in mind.

Linked [here](#) is a redline of the new Guidance against the prior version from 2019.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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