

# CREATE YOUR OWN: BESPOKE ANTITRUST COMPLIANCE PROGRAMS FOR EFFECTIVE COMPLIANCE



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Corporate antitrust compliance programs, much like our preferred morning beverages, come in all shapes and sizes – there is no one size or flavor that fits all. And yet, just like one person's large matcha green tea oat milk latte wakes him up as effectively as the next person's small foamy cold brew with half-and-half does her, the compliance programs best suited to promote genuine antitrust compliance may vary greatly based on the particular companies they serve. The Department of Justice Antitrust Division (Division) astutely recognizes this. Announcing their new approach to corporate compliance on July 11, 2019, the Division noted in public statements and subsequent public commentary<sup>2</sup> that there is no standard or singular approach to effective corporate antitrust compliance programs. In fact, companies rely on their corporate compliance programs, including antitrust compliance, in different ways. And various factors may affect and shape what best promotes competition and antitrust compliance for any given company.

This article raises some of the many differences between companies that may lead to different flavors of compliance. It provides a sample, non-exhaustive menu of options from which different companies may choose to create the type of robust, dynamic, and current program that may warrant credit from the Division.

<sup>2</sup> See, e.g. Department of Justice, Antitrust Division, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations, p. 2 (July 2019) ("This document addresses these questions in the criminal antitrust context by identifying elements of an effective antitrust compliance program. Although Division prosecutors should consider these factors when evaluating antitrust compliance programs, the factors are not a checklist or formula. Indeed, not all factors will be relevant in every case, and some factors in the Division's analysis are relevant to more than one question.").

# I. ANTITRUST COMPLIANCE GETS ITS DUE

Historically, antitrust compliance programs received little credit from the Division. The Division did not take pre-existing antitrust compliance programs meaningfully into account when assessing and investigating potential criminal matters.

Prior to July 2019, a party facing allegations of criminal antitrust behavior had limited recourse, especially a party that was not the “first one in,” in terms of eligibility for leniency. For second- and later-comers unable to pursue leniency, the best hope of avoiding liability was to convince the Division to decline to prosecute given lack of evidence. One way to do so was through Deferred Prosecution Agreements (“DPAs”), which “occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation,”<sup>3</sup> and are probation-like arrangements under which the Division files criminal charges but agrees not to pursue prosecution against the company subject to the company abiding by certain compliance conditions. Division use of DPAs was exceedingly rare, at best.<sup>4</sup>

The Division set a high bar for corporate antitrust compliance programs seeking credit during the sentencing phase of a criminal investigation. Under the U.S. Sentencing Guidelines (“Sentencing Guidelines”), companies with corporate compliance programs are eligible for a three-point reduction in their culpability score.<sup>5</sup> Unlike other branches of the Department of Justice, the Division, as Assistant Attorney General (“AAG”) Makan Delrahim acknowledged, “has yet to recommend credit for a defendant’s ‘pre-existing’ antitrust compliance program under the Guidelines’ three-point reduction provision.”<sup>6</sup> In rare instances, the Division credited “forward-looking” compliance programs that demonstrated “extraordinary efforts” that began at the time the violation was uncovered.<sup>7</sup> For example, in November 2015, Kayaba Industry Co. Ltd., pled guilty to its role in a conspiracy to fix prices, rig bids, and allocate markets in the shock absorbers industry.<sup>8</sup> The Division recommended a reduced fine for Kayaba’s cooperation with the government and for “the substantial improvements” to its “compliance and remediation program to prevent recurrence of the charged offense.”<sup>9</sup>

Between the expense and burden of implementing a comprehensive antitrust compliance program and the relatively non-existent payoff of having an existing antitrust compliance program in the event of a potential antitrust criminal investigation, proponents faced an uphill struggle convincing companies to invest significantly in antitrust compliance. Forward-thinking companies with antitrust compliance programs nonetheless risked a determination that all their hard work was insufficient. After all, the Division’s historical position has been that even if you had a program, it didn’t work because wrongdoing allegedly occurred. In the summer of 2019, the landscape shifted.

On July 11, 2019, AAG Delrahim made history when he announced that the Division would: (1) begin giving companies accused of antitrust crimes credit for existing antitrust compliance at the charging stage; (2) provide more clarity on how the effectiveness of an antitrust compliance program is assessed at the sentencing stage; and (3) for the first time in the Division’s history, publish guidance for Division prosecutors to use in their evaluation of antitrust compliance programs.

The Division’s announcement further underscored what compliance-credit proponents have been saying for years – a robust and dynamic antitrust compliance program is critical to a company’s culture of good corporate citizenship. Further, compliance programs could point to additional value for these efforts, while outside counsel quickly penned client alerts touting their services. Before long attorneys were explaining their compliance programs to internal governing bodies and boards and assessing whether updates and additional investments in those pro-

3 Department of Justice, Division Manual at § 9-28.200, available at <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations>.

4 Examples include a 2013 agreement with the Royal Bank of Scotland (<https://www.justice.gov/atr/case-document/file/509081/download>), a 2015 agreement with Deutsche Bank. (<https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/05/22/2014-04-23-deutsche-bank-deferred-prosecution-agreement.pdf>), and most recently, an agreement with Heritage Pharmaceuticals in June 2019, <https://www.justice.gov/opa/press-release/file/1174111/download>.

5 United States Sentencing Commission, Sentencing Guidelines at §8C2.5(f)(1).

6 Assistant Attorney General Makan Delrahim, Department of Justice – Antitrust Division, “Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs,” available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-i-0>.

7 Brent Snyder, Dep. Ass’t Att’y Gen., Antitrust Div., Remarks at the Sixth Annual Chicago Forum on International Antitrust (June 8, 2015), <https://www.justice.gov/opa/speech/deputy-attorney-general-brent-snyder-delivers-remarks-sixth-annual-chicago>.

8 Sentencing Memorandum, *United States v. Kayaba Industry Co., Ltd.*, (S.D. Oh. Oct. 5, 2015).

9 *Id.* at 9. See also Plea Agreement, *United States v. Barclays PLC.*, (D.C. Ct. May 19, 2015) at 16, <https://www.justice.gov/file/440481/download> (Division cited the “substantial improvements” Barclays had made to its “compliance and remediation program to prevent recurrence of the charged offence” as a factor in its sentence recommendation).

grams were warranted. On the former, counsel could now point to not only the cost savings of avoiding antitrust litigation by preventing antitrust violations in the first place through robust compliance, but also the upside of being able to get relief in case of a crack in antitrust: being able to demonstrate to DOJ a robust, dynamic and continuously evolving antitrust program sincerely supported by leadership could translate into millions of dollars in savings in case an antitrust violation takes place – likely far outweighing the cost of any such program.

And the change is likely to stick. The Division announced that it is not merely changing its practices; the change is to be incorporated into the Department of Justice Manual, which formerly had a specific carve out for antitrust in the provisions giving credit for compliance programs.<sup>10</sup> Unlikely to be a change that is taken lightly, what does this mean for companies, and in-house antitrust counsel in particular, going forward?

## II. HOW TO IMPLEMENT A SUCCESSFUL COMPLIANCE PROGRAM



A deep dive into specific compliance programs is beyond the scope of this short article, but, as you'll see, one message rings loud and clear. Different companies have different needs, and there is no "one-size-fits-all" approach to antitrust compliance. That matcha green tea oat milk latte might be just what works for some companies, but others might need something different. In the interest of providing examples of how antitrust compliance may vary, much like our morning beverages, we provide a brief overview of factors that companies may take into consideration when designing an antitrust compliance program, including size, scope and industry, as well as some ideas on how to structure compliance programs.

The Sentencing Guidelines provide a useful framework for the development of a successful compliance program.<sup>11</sup> The elements of a successful compliance program are policies and procedures, oversight by a governing authority or tone from the top, exclusion of anyone from substantial authority who the company knew (or should have known) engaged in illegal activities, training programs and communications, monitoring and auditing and reporting mechanisms, enforcement of policies and procedures, and periodic risk assessments.

While these elements provide a useful framework for the design of a program, each company should take the time to assess its business and risk in order to create a program that's the right fit for the company. There are a number of factors a company should consider as part of its assessment, including the size of the company, geographic scope, and the business and legal model. For example, some companies may put their products into the market through distribution channels and/or direct through hundreds of employees all over the world, so a robust training program with on line options may be appropriate. Whether to translate antitrust policies and trainings into a variety of languages is another consideration for a company with a significant global presence, taking into account factors such as that country's relative antitrust risk and any guidance from the local antitrust agencies on effective compliance programs. The size of the in-house legal team should also inform the design of the program. A company with a large in-house legal team that includes country-specific lawyers, sales lawyers, and business lawyers can extend the reach of its compliance program by training the legal team to identify and report red flags to the compliance team, provide in person training, and contribute to risk assessments.

Regular risk assessments ensure the program is successfully preventing and detecting violations of antitrust laws. Risk assessments may be accomplished through audits, outside counsel reviews, teams of in-house lawyers, or a combination of lawyers and business people. External and business changes that are not obvious to the compliance team may be captured through these assessments, and should result in enhancements to policies and training programs.

A company's past experience with enforcement agencies and private litigation may also inform the design of a compliance program. Companies that are part of a settlement agreement or order should incorporate the obligations of those instruments into their program.

The level of regulation a company faces in its ordinary course of business may also be an important consideration in designing an antitrust compliance program. Companies in regulated industries, or industries subject to control by governmental rules, face unique challenges with regard to corporate compliance, and risk assessment and management. Such challenges can include evolving regulatory landscapes,

<sup>10</sup> Department of Justice, Division Manual at §§ 9-28.400 & 9-28.800, available at <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations>.

<sup>11</sup> U.S. Sentencing Guidelines. An antitrust compliance program should also be in line with the DOJ's new guidance, which draws from the Sentencing Guidelines.

significant data and reporting obligations and strict compliance requirements. Creating and maintaining a culture of compliance is thus rarely an afterthought, but something that, to be most effective should be built into the ethos and organization fundamentals. Having a dedicated in-house legal team involved in developing a robust and dynamic compliance program is one way to build this in, though outside counsel or cognizant generalists can also have the necessary impact. Whatever the mode, the need is particularly acute with regard to antitrust, where the risks of non-compliance are substantial and extensive.

### **III. IDEAS TO STRUCTURE AN “EFFECTIVE” COMPLIANCE PROGRAM**

An “effective” antitrust compliance program can look one of a number of ways, but below we outline some components to consider including in a program/policy:

#### ***A. Create a Culture of Compliance***

As the well-known adage goes, “culture eats strategy for lunch.” So what does it mean to have a “culture of compliance” and how can in-house counsel help instill compliance values within an organization? Again, there is no one-size-fits-all approach, but there are some common characteristics of robust compliance programs.

A culture of compliance starts at the top with buy-in from senior management. Senior management can set a strong “tone from the top” about the importance of antitrust compliance to the company and ensure that the compliance program is given the necessary budget and other resources. Onboarding training for new hires and newly acquired businesses is another key component of instilling a culture of compliance. As new hires are being introduced to a company and learning the corporate culture, onboarding training provides an effective and efficient way to emphasize the importance of an antitrust compliance program. Compliance training can be embedded in any orientation and training programs new hires are given. For new senior managers the training may include a conversation about the value of “tone from the top” and how to role model a culture of compliance. As part of that tone from the top there should also be oversight from high level personnel, whether the CEO, the GC, the Board of Directors, or an appropriate Board committee. That oversight is important because it gives a sense of value and importance to the compliance program.

#### ***B. Documented Policies and Procedures***

A documented antitrust policy is a critical element of a successful antitrust compliance program. A policy facilitates enforcement of expectations regarding antitrust laws by informing employees about those expectations and putting them on notice about the consequences of a violation. It is also an important step towards program documentation, in case it becomes necessary to demonstrate the program features to an enforcer. Similar to an antitrust compliance program, the policy should reflect the unique aspects of the company. Multinational companies may benefit from a global antitrust policy that sets coherent expectations around antitrust compliance. For some companies, however, it may be more important to tailor the policy to address the expectations of certain local enforcers.

The policy should be simple, and easy to understand, primarily focused on standards of conduct rather than antitrust principles. Certain companies may also benefit from supplemental procedures or subject matter guidelines to ensure compliance, such as guidance on hiring or automated procedures that track certain sales activities. For companies with a significant mobile workforce or global presence, translations may be useful as well as placing the policy on a variety of platforms, including cell phone apps. Once the policy is finalized, companies should develop a training and communications plan to ensure effective roll out of the policy. The policy and supporting guidelines are not static, they should be periodically reviewed and refreshed to reflect changes to the antitrust laws and the business. The need for modifications may be identified through periodic program effectiveness reviews.

The importance of compliance, including antitrust compliance, can also be emphasized through a company’s code of conduct, or best practices guide/handbook. These foundational materials often set the very groundwork from which all employees proceed. It is often one of the first documents new hires are shown. It is one of the few documents that is available to every single person in an organization. And having an antitrust policy referenced in such key materials helps demonstrate just how important such a policy is to senior leadership.

### ***C. Detailed Training Programs***

Antitrust can be complex and, as many antitrust practitioners know, intensely fact-driven. Introducing employees to antitrust and sensitizing employees to potential issues is therefore critical. No one expects any individual employee to become an antitrust expert; that is why companies have in-house counsel. They are there to advise on questions that may arise.

However, you don't know what you don't know. Counsel can only address questions that are brought to them. If employees are given broad, substantive and high-level training on a variety of topics, they are better equipped to spot potential issues in their day-to-day business and come to counsel with questions, thus protecting themselves and the company. One way to accomplish this broad reach is through a series of online training programs. A company can create a high-level "Antitrust 101" program that can be made available to all employees and new hires. An online training suite also allows for targeted training programs on particular topics that might be of relevance or import to a business.

### ***D. Reporting System***

Employee reporting of suspicious conduct is central to a culture of compliance and is one of the most important ways of detecting wrongful conduct. An effective compliance program empowers employees to serve as the compliance team's eyes and ears on the ground who can flag anticompetitive conduct early on. To help create a strong reporting culture, in-house attorneys should make themselves visible to employees by attending management meetings and visiting their company's facilities to educate employees on how to report a problem and who to ask questions about compliance. It is also critical that employees feel confident that information they report will remain confidential and that they will not be retaliated against for raising complaints in good faith.

To facilitate honest and open reporting, it is also important to establish easily accessible reporting channels that allow employees to remain anonymous if they so choose. Toll-free hotlines and online reporting tools are two of the more common solutions companies use. When using these tools, it is imperative that a member of the compliance team be assigned ownership of monitoring the hotline and/or online submissions and keeping them operational. In evaluating compliance programs, the DOJ has been known to call reporting hotlines. On more than one occasion, it found the hotline disconnected. Employees should also be made to feel comfortable reporting concerns to a member of the in-house legal team.

### ***E. Auditing and Monitoring***

In addition to employee reporting, companies can establish an audit program to monitor and detect anticompetitive conduct. While all audit programs should include some degree of employee interviewing and document review, the scope of an audit program can vary based on company size, compliance team resources, industry, a company's antitrust history, and risks facing the company. For some companies, it may be prudent to have an audit program that includes multiple formal audits per year examining emails and other communications, as well as a regular cadence of interviews with key employees in sales and marketing and other competitive decision-making roles. For other companies, less formal, but regular, check-ins with key employees combined with a targeted review of communications may be appropriate. With today's mobile workforce, companies should also consider auditing texts and messaging programs if these tools are regularly used for work-related communications. Whatever form a company's audit program takes, it is important that it be directed by counsel in a manner that will preserve the attorney-client privilege.

### ***F. Enforcement and Remediation***

An effective compliance program also requires counsel to enforce the antitrust policy when violations occur and apply learnings from audits and investigations through appropriate remedial action. Enforcement of an antitrust policy against employees who have engaged in inappropriate conduct can include remedial actions such as rigorous training, employee counseling or discipline for more egregious conduct.

In addition, learnings from audits and investigations can be applied more broadly. For example, learnings can be used to identify areas where additional employee training is needed or policies require clarification. There is no limit to the types of remedial actions a compliance team can take; what is important is that the compliance team implement and espouse a culture of continuous learning and program improvement.

## ***G. Routine Risk Assessment***

The U.S. Sentencing Guidelines provide that “an organization shall take reasonable steps . . . to evaluate periodically the effectiveness of the organization’s compliance and ethics program.”<sup>12</sup> What constitutes “reasonable steps” can vary from company to company. Some companies may want to employ a formal review process with reporting to senior management that takes place on a regular (perhaps annual) basis. Other companies may find a less formal assessment works better.

Regardless of the formality of the process, the risk assessment should examine changes to both the legal and business landscape. An assessment of changes in the legal landscape includes staying abreast of enforcement priorities of the antitrust agencies in the jurisdictions where a company operates and changes in statutory and case law. On the business side, counsel should assess whether changes in company strategy, new business initiatives, or the addition of new lines of business (either organically or through acquisition) warrant updates to the anti-trust compliance program.

The compliance team may also want to conduct a self-assessment to ensure it is effectively promoting a culture of compliance. Items to assess include the effectiveness of training programs and whether the material has become stale or outdated, as well as the clarity of antitrust policies and guidelines. Finally, all assessment activities should be documented in a non-privileged document that can be shared with DOJ or other enforcement agencies if needed to demonstrate the effectiveness of the company’s antitrust compliance program.

## **IV. CONCLUSION**

As we note, different things work for different companies, and may work differently for the same company at different points in time. The key is that an antitrust compliance program should be a living, dynamic part of any company’s culture. As a company evolves, it should evolve; as it moves in a different direction, an antitrust compliance program should be reassessed to see if any changes are required. This requires antitrust counsel that is engaged and present. Pick up your beverage of choice, and stay vigilant.

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<sup>12</sup> U.S. Sentencing Guideline Manual § 8B2.1(b)(5) (2018), available at <https://www.uscourts.gov/guidelines/2018-guidelines-manual/annotated-2018-chapter-8#NaN>.

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