

# Client Alert

Special Matters & Government Investigations | Antitrust

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## DOJ Releases Updated Antitrust Compliance Program Guidance

Last week DOJ published an updated version of its guidance on the Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (“Guidance”). These updates refresh the guidance originally issued in 2019, under the Trump administration. This Guidance, which assists prosecutors when making charging decisions and sentencing recommendations, describes how the DOJ assesses a compliance program’s effectiveness in preventing criminal violations of the Sherman Act. In its updated Guidance, the DOJ has expanded the guidance to include civil matters and added guidance focusing on persuading antitrust whistleblowers to speak out, ensuring that artificial intelligence and the increasing reliance on technology tools is adequately monitored and checked, and generally the need to have a robust antitrust compliance infrastructure. Many of these updates also align with recent updates to the DOJ Criminal Division’s related guidance, which was updated in September 2024.

Of course, DOJ has issued this Guidance in the waning days of the Biden administration, and it may be rescinded or amended by new leadership in the coming months. While time will tell, we anticipate that robust antitrust enforcement will continue during the next administration, based on actions taken during President Trump’s first term and positions taken by him and his advisors during his recent campaign.

### EXPANDS SCOPE TO CIVIL ANTITRUST MATTERS

A key update to the Guidance is that it now extends to civil antitrust matters, in addition to criminal violations of the Sherman Act such as price fixing, bid rigging, and market allocation. It makes clear that a well-designed antitrust compliance program should also minimize risk of civil violations and that the DOJ’s civil teams will consider many of the same factors as criminal prosecutors when assessing the effectiveness of a company’s compliance program. The Guidance also alerts companies that “a strong culture of compliance can allow a company to

steer clear of civil antitrust violations and if violations do occur, to promptly self-disclose and remedy them and cooperate with a civil antitrust investigation.”

### ANTI-RETALIATION, WHISTLEBLOWERS, AND USE OF NDAS

The Guidance makes clear that the government is focused on ensuring that the company is not providing any roadblocks to employees who may be whistleblowers. This is consistent with recent efforts by the DOJ’s Criminal Division to create incentives for whistleblowers to come forward, including introducing a new [Whistleblower Rewards Program](#) in August 2024. For more information on the Whistleblower Rewards Program, see our previous [Client Alert](#). The Guidance asks the following questions that DOJ will consider when assessing a company’s compliance program:

- In practice, are the company’s policies encouraging reporting of antitrust violations or are the policies chilling reporting?
- How does the company assess whether employees are willing to report violations?
- Does the company have an anti-retaliation policy, and are employees, including managers and supervisors, trained on it and the protections under the Criminal Antitrust Anti-Retaliation Act (CAARA)?
- Is the company’s use of non-disclosure agreements (NDAs) and other restrictions on current and former employees consistent with ensuring that employees can report potential antitrust violations without fear of retaliation?
- Are NDAs utilized or enforced in such a way that they act to deter whistleblowers or violate CAARA?

Companies should take a close look at any NDAs in use for current and former employees to ensure that nothing could be construed as an impediment to reporting misconduct. Companies should also ensure that their NDAs and policies make clear that employees can report antitrust violations internally and to government authorities, without fear of retaliation. The Guidelines note that a best practice is for companies to allow anonymous reporting and to train employees on their protections under CAARA.

### CLOSER LOOK AT TECHNOLOGY AND AI

For the first time, the Guidance now addresses the use of artificial intelligence (AI) and other evolving technologies, which is consistent with recent changes to the DOJ Criminal Division’s related guidance. These updates underscore the importance of compliance professionals keeping apprised of how technology developments impact the business’s day to day and overall compliance. According to the Guidance, the DOJ will consider which AI technologies are used, whether a company assesses the antitrust risk associated with new technology tools as they are deployed, what steps a company is taking to mitigate the risk associated with the use of the technology, whether compliance personnel are involved in the deployment of AI and other technologies to assess risks, and the extent to which compliance programs (e.g., employee training) recognizes AI and technology tools and the risks they may pose.

As an example of such technologies, the Guidance references algorithmic revenue management software technology, which is the subject of a recent [DOJ Antitrust Division enforcement action](#).

### FOCUS ON EPHEMERAL MESSAGING

The Guidance focuses on company policies governing the use of electronic communication channels, as well as companies’ document retention practices, noting that the DOJ will look to the following factors when assessing a company’s corporate compliance program:

- The types of electronic communication channels used by a company and its employees;
- Company policies regarding the use of ephemeral messaging and non-company methods of communication (if permitted), along with employee obligations to preserve such messages;
- Preservation or deletion settings employed by the company, including the basis for using such protocols;
- Training provided to company employees regarding document preservation and obstruction of justice; and
- Company processes to evaluate and manage antitrust risks associated with new manners of electronic messaging that employees are permitted to use.

#### “TONE AT THE MIDDLE”

The new updates emphasize the importance of the “tone at the middle” – making it clear that companies need to ensure a compliance culture is not only coming from senior leadership but that leadership implements “a culture of compliance at all levels of the organization.” The Guidance looks to how managers at all levels are demonstrating the importance of compliance and setting the tone from the middle.

#### EMPHASIS ON MORE ROBUST EFFORTS ALL AROUND

The changes go into more detail about the robust compliance infrastructure the government is looking for, including having a board of directors with compliance expertise, appropriate resource allocation for antitrust compliance, and compliance gap analysis and trend monitoring. The Guidance asks:

- Does antitrust training address lessons learned at the company but also companies operating in the same industry?
- Has the company undertaken a gap analysis to determine if particular areas of risk are not sufficiently addressed in its policies, controls, or training?
- Does the board of directors have compliance expertise?
- Have the board of directors and/or external auditors held executive or private sessions with compliance and control functions?
- How and how often does the company measure the effectiveness of its compliance program and its culture of compliance?
- How does the company’s hiring and incentive structure reinforce its commitment to ethical culture?
- Has the Company evaluated the appropriate level of resources to devote to the compliance function? Have compliance requests for resources ever been denied?
- Is the level of technology devoted to compliance at the company similar to that devoted to other functions?
- Is there a process to identify emerging risks as the company’s business environment changes?

As a best practice, companies should ensure that adequate attention is allocated to its compliance infrastructure, including but not limited to resources, technology, and hiring—and retaining—the right expertise. Incorporating these factors into preexisting compliance programs will help mitigate against antitrust misconduct. Further, DOJ’s inclusion of factors such as how a company’s incentive structure reinforces its commitment to an ethical culture is consistent with DOJ’s increased effort to encourage companies to implement compensation policies that incentivize compliance-driven behavior.

## KEY TAKEAWAYS

Companies should take a closer look at their antitrust compliance processes given the updated guidance from the DOJ. In particular, the updated Guidance emphasizes several features that should be in every company's corporate compliance program, including document retention and preservations policies, restrictions on the use of ephemeral messaging and the use of new types of messaging platforms and technologies, including AI, and policies designed to ensure that employees can report potential antitrust misconduct without fear of retaliation or violating an NDA. Often, the best policies are those that are clear and concise. As noted in the updated Guidance, "companies should seek to have clear, simple, and concise rules; to tailor guidelines to the needs of different business units and situations; to present the guidance in ways that make sense from a business perspective; and think about how to achieve maximum reach."

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