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Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations

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Introduction[1]

Antitrust compliance programs promote vigorous competition in a free market economy by creating a culture of good corporate citizenship. Although even an effective antitrust compliance program may not deter every violation, it should prevent many of the most egregious violations—particularly the pervasive, long-running forms of corporate misconduct that can subject executives and their companies to significant prison sentences, criminal fines, and treble damages actions. And when potential antitrust issues arise, an effective compliance program should enable a company to swiftly detect and address them, including giving the company the best chance to self-report and qualify for the Antitrust Division's Corporate Leniency policy, which confers nonprosecution protection on the company and eligible personnel in exchange for cooperation against individual and corporate co-conspirators. Effective antitrust compliance programs thereby promote individual accountability and corporate enforcement.[2]

This guidance focuses on assessing a compliance program's effectiveness in the context of criminal violations of the Sherman Act, 15 U.S.C. § 1 *et seq.*, such as price fixing (including wage fixing and conspiracies to suppress other terms of price competition), bid rigging, market allocation, and monopolization, as well as obstructive acts that imperil the integrity of antitrust investigations. The guidance aids Antitrust Division prosecutors in evaluating corporate compliance programs at two points in time: 1) making charging decisions; and 2) making sentencing recommendations (including obligations such as reporting or an independent compliance monitor). In making this evaluation, prosecutors assess a compliance program as it existed the time of the offense, as well as the company's subsequent improvements to the program. This assessment requires prosecutors to obtain information necessary to evaluate compliance programs throughout the course of their investigation, including asking relevant compliance-related questions of witnesses. Accordingly, prosecutors should not wait for companies to offer a presentation before beginning their evaluation of a program.

While this guidance is focused on criminal risk, a well-designed antitrust compliance program should also minimize risk of civil antitrust violations. If allowed to occur, civil antitrust violations expose companies to substantial risk: civil actions resulting in equitable relief to restore competition to affected markets, treble damages actions—including federal enforcement actions on behalf of victim agencies—and monetary penalties for violations of the Hart-Scott-Rodino Act. 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

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[1] This guidance document offers the views of the Antitrust Division of the Department of Justice and has no force or effect of law. It is not intended to be, and may not be, relied upon to create any rights, substantive or procedural, enforceable at law by any party. Nothing in this document should be construed as mandating a particular outcome in any specific case, and nothing in this document limits the discretion of the U.S. Department of Justice or any U.S. government agency to take any action, or not to take action, with respect to matters under its jurisdiction.

[2] *See Leniency Policy*, U.S. DEP'T JUSTICE, ANTITRUST DIV., https://www.justice.gov/atr/leniency-policy.

antitrust investigation. In seeking to resolve investigations into civil antitrust violations, companies asking the Antitrust Division to take notice of existing or improved compliance efforts, including to avoid court-mandated further compliance and reporting requirements or retention of and supervision by external monitors, should expect the civil team to consider many of the same factors when assessing the effectiveness of their compliance program as criminal prosecutors do.

This document is based on the Antitrust Division's experience and expertise evaluating antitrust compliance programs, along with Department of Justice guidance on evaluating corporate compliance programs, *see* JM § 9-28.800. It is designed to be consistent with that guidance and the Criminal Division's guidance on the Evaluation of Corporate Compliance Programs, which allows companies to craft a coherent, holistic compliance program taking into account the company's lines of business and risk profile.[3]

I. Evaluating a Corporate Antitrust Compliance Program at the Charging Stage

When deciding whether and to what extent to bring criminal charges against a corporation, prosecutors consider the Principles of Federal Prosecution and the Principles of Federal Prosecution of Business Organizations and the Antitrust Division's Leniency Policy. *See* JM 9-27.001 *et seq.*, 9-28.300–28.400, 7-3.300. Prosecutors consider factors including "the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of the charging decision" and the corporation's remedial efforts "to implement an adequate and effective corporate compliance program or to improve an existing one." JM 9-28.300; *see* JM 9-28.800, 9-28.1000.

Although the Department has no formulaic requirements for evaluating corporate compliance programs, the Justice Manual asks prosecutors to consider three "fundamental" questions in their evaluation:

1. "Is the corporation's compliance program well designed?"
2. "Is the program being applied earnestly and in good faith? In other words, is the program adequately resourced and empowered to function effectively?"
3. "Does the corporation's compliance program work in practice?"

JM 9-28.800.

This document addresses these questions in the criminal antitrust context by identifying elements of an effective antitrust compliance program. Although prosecutors should consider these factors when evaluating antitrust compliance programs, the factors are not a checklist or a formula. Not all factors will be relevant in every case, and some factors are relevant to more than one question. The Antitrust Division recognizes that a company's size affects the resources

[3] U.S. DEP'T JUSTICE, CRIMINAL DIV., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS (Sept. 2024), https://www.justice.gov/criminal-fraud/page/file/937501/download [hereinafter CRIMINAL DIVISION ECCP]. It also draws on the United States Sentencing Guidelines' evaluation of effective compliance programs. *See* U.S.S.G. § 8B2.1.

allocated to antitrust compliance and the breadth of the compliance program.[4] In evaluating the design of the compliance program, prosecutors should be aware that the program may reflect efforts to meet standards across a number of areas of law and jurisdictions.

A. Preliminary Questions

At the outset of any inquiry into the efficacy of an antitrust compliance program, prosecutors should ask three preliminary questions:

1) Does the compliance program address and prohibit criminal antitrust violations?
2) Did the compliance program detect and facilitate prompt reporting of the violation?
3) To what extent was a company's senior management involved in the violation?

These questions help prosecutors focus the analysis discussed below on the factors most relevant to the specific circumstances under review.

B. Elements of an Effective Compliance Program

The goal of an effective antitrust compliance program is to prevent and detect violations. While the best outcome is to prevent antitrust violations from occurring, the Antitrust Division recognizes that "no compliance program can ever prevent all criminal activity by a corporation's employees." JM § 9-28.800. According to the Justice Manual, the "critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct." *Id*. Indeed, "[t]he keys for successful [antitrust] compliance [programs] in general are efficiency, leadership, training, education, information and due diligence."[5]

The factors that prosecutors should consider when evaluating the effectiveness of an antitrust compliance program include: (1) the design and comprehensiveness of the program; (2) the culture of compliance within the company; (3) responsibility for, and resources dedicated to, antitrust compliance; (4) antitrust risk assessment techniques; (5) compliance training and communication to employees; (6) monitoring and auditing techniques, including continued

[4] *See* U.S.S.G. § 8B2.1 note 2(C) ("The formality and scope of actions that an organization shall take to [implement an effective compliance program] . . . including the necessary features of the organization's standards and procedures, depend on the size of the organization. . . . A large organization generally shall devote more formal operations and greater resources . . . than shall a small organization. . . . [A] small organization may [rely on] . . . less formality and fewer resources.")

[5] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS, COMPETITION COMMITTEE, PROMOTING COMPLIANCE WITH COMPETITION LAW 12 (2012), http://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf [hereinafter OECD COMPLIANCE PAPER].

review, evaluation, and revision of the antitrust compliance program; (7) reporting mechanisms; (8) compliance incentives and discipline; and (9) remediation methods.[6] Questions relevant to each of these considerations are set forth below.

1. Design and Comprehensiveness

Although a Code of Conduct can be an effective tool for communicating a company's antitrust-related policies and procedures, the Justice Manual also requires prosecutors to evaluate whether a compliance program "is merely a 'paper program' or whether it was designed, implemented, reviewed, and revised, as appropriate, in an effective manner." JM § 9-28.800. Prosecutors should consider the design, format, and comprehensiveness of the antitrust compliance program. Key considerations are the adequacy of the program's integration into the company's business and the accessibility of antitrust compliance resources to employees and agents (hereinafter "employees and agents" will be collectively referred to as "employees").

- □ Before becoming aware of any investigation, did the company have an antitrust compliance program establishing standards and procedures to prevent and detect criminal conduct? When was the company's antitrust compliance program first implemented? How often is it updated? Is it periodically reviewed and does it seek feedback from employees? Are compliance materials updated with recent developments and periodically refreshed so they do not become stale? Are the compliance program and compliance materials updated to account for newly developed technology and emerging risks?

- □ What is the format of the antitrust compliance program? Is it in writing? How does the antitrust compliance program fit into the company's broader compliance program? Is antitrust compliance given appropriate emphasis in light of the antitrust risks the company faces?

- □ Who is responsible for integrating antitrust policies and procedures into the company's business practices? In what specific ways are antitrust compliance policies and procedures reinforced through the company's internal controls? For example, does the company have a way of tracking business contacts with competitors or attendance at trade association meetings, trade shows, and other meetings attended by competitors? Is that tracking system regularly monitored?

- □ What guidance has been provided to employees who could flag potential antitrust violations (*e.g.*, those with approval authority for pricing changes and participation in industry meetings, certification responsibilities for bidding activity, or human resources/hiring authority)? Do they know what antitrust risks the company faces and what conduct potentially indicates an antitrust violation?

- □ What electronic communication channels do the company and its employees use, or allow

[6] *See* JM § 9-28.800; CRIMINAL DIVISION ECCP; INTERNATIONAL CHAMBER OF COMMERCE, ICC ANTITRUST COMPLIANCE TOOLKIT SECOND EDITION 6 (2024).

to be used, to conduct business? How does the process vary by jurisdiction and business function, and why? What mechanisms has the company put in place to manage and preserve information contained within each of the electronic communication channels? Does the company have clear guidelines regarding the use of ephemeral messaging or non-company methods of communication including the extent to which those communications are permitted and when employees must preserve those communications? What preservation or deletion settings are available, and what is the rationale for the company's approach to what settings are permitted?[7]

- What guidance has been provided to employees about document destruction and obstruction of justice? Does the company have clear document retention guidelines and does it educate employees on the ramifications of document destruction and obstruction of justice?

2. Culture of Compliance

An effective compliance program will "promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law." U.S.S.G. § 8B2.1(a). Support from the company's senior leadership—the board of directors and executives—is critical to the success of an antitrust compliance program,[8] and employees should be "convinced of the corporation's commitment to [the compliance program]." JM § 9-28.800. An effective compliance program requires leadership to implement a culture of compliance at all levels of the organization.

Prosecutors should examine the extent to which corporate management—both senior leadership and managers at all levels—has clearly articulated and conducted themselves in accordance with the company's commitment to good corporate citizenship.[9]

- What are the company's senior leadership and managers across the organization doing to convey the importance of antitrust compliance to company employees? How have they, through their words and actions, encouraged (or discouraged) antitrust compliance? What concrete actions have they taken to demonstrate commitment to the company's antitrust compliance and compliance personnel, including remediation efforts if relevant? Have they

[7] CRIMINAL DIVISION ECCP at 20.

[8] Brent Snyder, Deputy Assistant Att'y Gen., U.S. Dep't Justice, Antitrust Div., Compliance is a Culture, Not Just a Policy, Remarks as Prepared for the International Chamber of Commerce/United States Council of International Business Joint Antitrust Compliance Workshop 4-5 (September 9, 2014), https://www.justice.gov/atr/file/517796/download ("If senior management does not actively support and cultivate a culture of compliance, a company will have a paper compliance program, not an effective one.").

[9] *See* U.S.S.G. § 8B2.1(b)(2)(A)–(B) (the company's "governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight" of it; "[h]igh-level personnel . . . shall ensure that the organization has an effective compliance and ethics program.").

persisted in that commitment in the face of competing interests or business objectives? How do senior leadership and management model ethical behavior to employees?

- □ Has senior leadership tolerated antitrust violations in pursuit of new business, greater revenues, hiring or retaining employees, maintaining or increasing market share, or maintaining customers, territories, or markets? Was senior leadership involved in the violation(s)?

- □ Has there been personal accountability by senior leadership for failures in the company's antitrust compliance?

- □ What else is the company's senior leadership doing to set the tone from the top or bring about culture change throughout the company?

- □ How are managers at all levels demonstrating to employees the importance of compliance? What are managers doing to set the tone from the middle?

- □ 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? What steps has the company taken in response to its measurement of the compliance culture?

- □ Does the board of directors have compliance expertise? Have the board of directors and/or external auditors held executive or private sessions with the compliance and control functions? What types of information have the board of directors and senior leadership examined in overseeing the area in which the misconduct occurred?

3. Responsibility for the Compliance Program

For the antitrust compliance program to be effective, those with operational responsibility for the program must have sufficient qualifications, autonomy, authority, and seniority within the company's governance structure, as well as adequate resources for training, monitoring, auditing and periodic evaluation of the program. *See* U.S.S.G. § 8B2.1(b)(2)(C) ("To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.")

- □ Who has overall responsibility for the antitrust compliance program? Is there a chief compliance officer or executive within the company responsible for antitrust compliance? If so, to whom does the individual report, *e.g.*, the board of directors, audit committee, or other governing body? How often does the compliance officer or executive meet with the Board, audit committee, or other governing body? How does the company ensure the independence of its compliance personnel?

- □ How does the compliance function compare with other functions in the company in terms of stature, experience and compensation levels, rank/title, reporting line, resources, and access to key decision-makers? Are compliance personnel in place long enough to be effective,

without excessive turnover? Is the compliance function sufficiently senior within the organization to command respect and adequate resources?

- □ Are compliance personnel dedicated to compliance responsibilities, or do they have other, non-compliance responsibilities within the company? If so, what proportion of their time is dedicated to compliance responsibilities? Why has the company chosen the compliance structure it has in place? Has the company's size impacted that decision?

- □ Do compliance personnel report to senior leadership, including the board of directors and executives, on the effectiveness of antitrust compliance? What is the format of their report? *See* U.S.S.G. § 8B2.1(2)(b)(2)(C).

- □ Who is delegated day-to-day operational responsibility for the antitrust compliance program? Do compliance personnel responsible for antitrust compliance have adequate experience and familiarity with antitrust law? Has the level of experience and qualifications in these roles changed over time?

- □ Does the company allocate sufficient compliance resources to educating employees on antitrust law? Are such resources allocated efficiently by focusing on high antitrust risk areas? For example, does the compliance program identify and adequately train employees who have frequent contact with competitors?

- □ Has the company evaluated the appropriate level of resources to devote to the compliance function? Are there times where requests for resources from the compliance function have been denied? If so, on what grounds? How do the resources allocated to antitrust compliance compare to those devoted to other functions of the company? Is the level of technology devoted to compliance comparable to the level of technology devoted to other functions? Does the company measure the value to the organization of its investments in the compliance function?

- □ Who reviews the effectiveness of the compliance function and what is the review process?

4. Risk Assessment

A well-designed compliance program is "designed to detect the particular types of misconduct most likely to occur in a particular corporation's line of business." JM § 9-28.800. Thus, an effective antitrust compliance program should be appropriately tailored to account for antitrust risk.[10]

[10] *See* U.S.S.G. § 8B2.1, application note 7 ("If, because of the nature of an organization's business, there is a substantial risk that certain types of criminal conduct may occur, the organization shall take reasonable steps to prevent and detect that type of criminal conduct. For example, an organization that, due to the nature of its business, employs sales personnel who have flexibility to set prices shall establish standards and procedures designed to prevent and detect price-fixing.").

- □ Is the company's antitrust compliance program tailored to the company's various industries/business lines and consistent with industry best practice? Does the compliance program provide specialized antitrust compliance training for human resources personnel and executives responsible for overseeing recruitment and hiring? What efforts has the company made to implement antitrust-related policies and procedures that reflect and address the antitrust risks it faces, including legal and technical changes in the way the company conducts business? For example, as employees utilize new methods of electronic communication, what is the company doing to evaluate and manage the antitrust risk associated with these new forms of communication?

- □ What information or metrics has the company collected and used to help detect antitrust violations? How has the information or metrics informed the company's antitrust compliance program, *e.g.*, through training, modifications, or internal controls? For example, if the company bids on contracts, is bid information subject to evaluation to detect possible bid rigging? Does the company evaluate pricing changes for possible price fixing?

- □ Is the company's antitrust risk assessment current and subject to periodic review? Is there a process to identify emerging risks as the company's business environment changes? Has the company undertaken a gap analysis to determine if particular areas of risk are not sufficiently addressed in its policies, controls, or training? Have there been any updates to antitrust policies and procedures in light of lessons learned or marketplace, legal, technological, or other developments? Do these updates account for risks discovered through prior antitrust violations or compliance incidents?

- □ How does the company's risk assessment address its use of technology, particularly new technologies such as artificial intelligence (AI)[11] and algorithmic revenue management

[11] The term "artificial intelligence" has the meaning set forth in the OMB Memo M-24-10 at pages 26–27, available at https://www.whitehouse.gov/wp-content/uploads/2024/03/M-24-10-Advancing-Governance-Innovation-and-Risk-Management-for-Agency-Use-of-Artificial-Intelligence.pdf, and includes the following:

1. Any artificial system that performs tasks under varying and unpredictable circumstances without significant human oversight, or that can learn from experience and improve performance when exposed to data sets.

2. An artificial system developed in computer software, physical hardware, or other context that solves tasks requiring human-like perception, cognition, planning, learning, communication, or physical action.

3. An artificial system designed to think or act like a human, including cognitive architectures and neural networks.

4. A set of techniques, including machine learning, that is designed to approximate a cognitive task.

software, that are used to conduct company business? As new technology tools are deployed by the company, does the company assess the antitrust risk the tools pose? What steps is the company taking to mitigate risk associated with its use of technology? Are compliance personnel involved in the deployment of AI and other technologies to assess the risks they may pose? Does the compliance organization have an understanding of the AI and other technology tools used by the company? How quickly can the company detect and correct decisions made by AI or other new technologies that are not consistent with the company's values?

5. Training and Communication

An effective antitrust compliance program includes adequate training and communication so that employees understand their antitrust compliance obligations. Companies should seek to "[h]ave clear, simple, and concise rules"; to "[t]ailor guidelines to the needs of different business units and situations; to "[p]resent the guidance in ways that make[ ] sense from a business perspective; and "[t]hink about how to achieve maximum reach."[12] For example, training can teach relevant personnel that competitor communications could signal an antitrust violation if they are not part of a legitimate joint venture or other procompetitive or competitively neutral collaboration. In addition, training should instruct employees involved in such collaboration that a legitimate collaboration between competitors can become problematic if it develops into an exchange of competitively sensitive business information or future pricing information, or if other

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5. An artificial system designed to act rationally, including an intelligent software agent or embodied robot that achieves goals using perception, planning, reasoning, learning, communicating, decision making, and acting.

Additionally, the following technical context should guide the interpretation of the definition:

1. This definition of AI encompasses, but is not limited to, the AI technical subfields of machine learning (including, but not limited to, deep learning as well as supervised, unsupervised, and semi-supervised approaches), reinforcement learning, transfer learning, and generative AI.

2. This definition of AI does not include robotic process automation or other systems whose behavior is defined only by human-defined rules or that learn solely by repeating an observed practice exactly as it was conducted.

3. For this definition, no system should be considered too simple to qualify as a covered AI system due to a lack of technical complexity (e.g., the smaller number of parameters in a model, the type of model, or the amount of data used for training purposes).

This definition includes systems that are fully autonomous, partially autonomous, and not autonomous, and it includes systems that operate both with and without human oversight.

[12] ICC COMPLIANCE TOOLKIT at 15.

antitrust violations occur. Training should address what to do when an employee thinks activity is potentially unlawful.

- □ How has the company communicated its antitrust policies and procedures to all employees? Did the company introduce antitrust policies in a way that promotes and ensures employees' understanding? In what specific ways are antitrust compliance policies and procedures reinforced through the company's internal controls?

- □ If the company has a Code of Conduct, are antitrust policies and principles included in the document? If the company has foreign subsidiaries, are there cultural, linguistic, or other barriers to implementing the company's antitrust compliance polices, and how are those barriers addressed?

- □ What mechanisms does the company have in place to ensure that employees follow its compliance program? *See* U.S.S.G. § 8B2.1(b)(5)(A). How is the compliance program distributed to employees? Are the compliance program and related training materials easily accessible to employees, *e.g.*, via a prominent location on the company's intranet? How does the company confirm that employees in practice know how to access compliance materials?

- □ Must employees certify that they have read the compliance policy? If so, how? Do the certification policies apply to all employees? Do they apply to the board of directors? How often must employees certify their antitrust compliance?

- □ Does the company provide antitrust compliance training? In what form is the antitrust training and who provides it? Is the training provided online or in-person (or both), and what is the company's rationale for its choice? Has the training addressed lessons learned from prior compliance incidents? Is there a process by which employees can ask questions raised by the trainings? Has the company evaluated the employees' engagement with the training session?

- □ Who receives antitrust compliance training? What analysis has the company undertaken to determine whom to train and to tailor training to the company's lines of business and antitrust risks? Are compliance personnel and managers trained to recognize antitrust red flags?

- □ Does training include senior leadership (including the board of directors)? What is the lowest level employee who must receive antitrust compliance training? Are contractors or agents included in the training?

- □ How often does antitrust compliance training occur? Is antitrust compliance training required when an employee begins work? Is antitrust compliance training required before attending trade shows or trade association or other meetings with competitors? Are employees required to certify their completion of the training program? *See* U.S.S.G. § 8B2.1(b)(4). If so, how? How is attendance at the training recorded and preserved? Who ensures that employees attended the required training and certified their attendance?

- How does the training test the level of employees' understanding of the antitrust laws and their engagement with the training materials? Does the training incorporate specific materials tailored to the industries the company operates in or specific antitrust violations that have occurred in those industries in the past? Is training tailored to the employee's duties and does it provide examples that could arise in the business unit he or she is a part of? For example, if the company bids on contracts, does the company's compliance program educate employees on bid rigging and market allocation? Are those with pricing authority educated about price fixing? To the extent that employees are trained on antitrust "hot" words, is the focus on detecting and deterring antitrust violations, as opposed to making violations harder to detect?

- How often is antitrust training updated to reflect marketplace, legal, technological, or other developments? How does the training address permissible and nonpermissible uses of new technology including AI? Has the training addressed lessons learned from prior antitrust violations or compliance incidents at the company, as well as other companies operating in the same industries?

6. Periodic Review, Monitoring and Auditing

A critical part of an effective antitrust compliance program is the effort to review the compliance program and ensure that it continues to address the company's antitrust risks. *See* U.S.S.G. § 8B2.1(b)(5). An effective compliance program includes monitoring and auditing functions to ensure that employees follow the compliance program. *See* U.S.S.G. § 8B2.1(b)(5)(A).[13] "Periodically assessing whether parts of [a] company's business or certain business practices are complying with antitrust laws in practice allows senior managers to know whether the company is moving closer to its antitrust compliance objectives."[14] Such periodic testing also "helps ensure that there is continued, clear and unambiguous commitment to antitrust compliance from the top down, that the antitrust risks identified or the assessment of these risks have not changed (or if they have changed, to reassess controls) and that the risk mitigation activities/controls remain appropriate and effective."[15] Review also may help "identify substantive antitrust concerns, rectify any illegal [behavior], and to assess if it is appropriate to apply to one or more antitrust agency for [leniency]."[16]

- What methods does the company use to evaluate the effectiveness of its antitrust compliance program? Who evaluates the antitrust compliance program? For example, is there a compliance committee that meets periodically? How often is the program evaluated? *See* U.S.S.G. § 8B2.1(b)(5)(B). Has the company revised its compliance

[13] *Id.* at 65–70.

[14] *Id.* at 68.

[15] *Id.*

[16] *Id.*

program in light of any prior antitrust violations or compliance incidents?

- What monitoring or auditing mechanisms does the company have in place to detect antitrust violations? *See* U.S.S.G. § 8B2.1(b)(5)(A). For example, are there routine or unannounced audits (*e.g.*, a periodic review of documents/communications from specific employees; performance evaluations and employee self-assessments for specific employees; interviews of specific employees)? Does the company use any type of screen, communications monitoring tool, or statistical testing designed to identify potential antitrust violations? If so, what is the process for reviewing the monitored communications? What if any actions were taken as a result of issues identified through monitored communications?

- How do compliance personnel utilize company data to audit and monitor employees? Can compliance personnel access all relevant data sources promptly? Is the compliance program using data analytics tools in its compliance and monitoring? Does the compliance program monitor and detect decision-making by AI or other technology tools to ensure they are not violating antitrust laws?

- What is the company's process for designing and implementing revisions to its antitrust compliance policy, and has that process changed over time? Does the company consult business units before making changes? How do the monitoring and auditing performed by compliance personnel inform changes to the compliance policy? How does the company amend its compliance program to account for previous antitrust violations at the company or in the industry in which it participates, to avoid repetition of previous violations?

7. Confidential Reporting Structure and Investigation Process

An effective compliance program includes reporting mechanisms that employees can use to report potential antitrust violations anonymously or confidentially and without fear of retaliation. Confidential reporting mechanisms can facilitate the company's detection of an antitrust violation and are an integral element of an effective compliance program.[17]

- Is there a publicized system in place whereby employees may report or seek guidance about potentially illegal conduct? Are there positive or negative incentives for reporting antitrust violations?

[17] *See* JM § 9-28.900 (requiring prosecutors to evaluate whether the company has "established an information and reporting system in the organization reasonably designed to provide management and directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law."); U.S.S.G. § 8B2.1(b)(5)(C) (an effectively working compliance program will have in place, and have publicized, "a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation").

- □ Do supervisors or employees who become aware of a potential antitrust violation have a duty to report it to those with responsibility for compliance? What disciplinary measures does the company have for those who fail to report such conduct?

- □ How does the company determine which antitrust complaints or red flags merit further investigation? What steps does the company take to ensure investigations are independent, objective, appropriately conducted, and properly documented? How does the company determine who should conduct an investigation, and who makes that determination? Does the company periodically analyze reports or investigation findings for patterns or other red flags of a potential antitrust violation?

- □ What mechanisms does the company have in place to allow employees to report or seek guidance regarding potential criminal conduct without fear of retaliation? May employees make anonymous and confidential reports? 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? Are employees, including managers and supervisors, trained regarding the anti-retaliation policy and the protections provided under the Criminal Antitrust Anti-Retaliation Act (CAARA)?[18]

- □ Is the company's use of non-disclosure agreements (NDAs) and other restrictions on current and former employee 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? Are the company's NDAs and other employee policies clear that employees can report antitrust violations internally and to government authorities?

8. Incentives and Discipline

Also relevant to an antitrust compliance program's effectiveness are the "systems of incentives and discipline [] that ensure the compliance program is well-integrated into the company's operations and workforce."[19]

- □ What incentives does the company provide to promote performance in accordance with the compliance program? *See* U.S.S.G. § 8B2.1(b)(6)(A).

- □ Has the company considered the implications of its incentives, compensation structure, and rewards for its compliance policy? Have there been specific examples of actions taken (*e.g.*, promotions or awards denied, or bonuses clawed back) because of compliance considerations? Who determines the compensation, including bonuses, as

[18] 15 U.S.C. § 7a-3.

[19] CRIMINAL DIVISION ECCP at 2.

well as discipline and promotion of compliance personnel?

- What disciplinary measures does the company have for those who engage in antitrust violations or those who fail to take reasonable steps to prevent or detect violations? *See* U.S.S.G. § 8B2.1(b)(6)(B).

- Has the company disciplined anyone because of an antitrust violation? Has there been any management turnover because of the company's participation in the violation? Were the actual reasons for discipline communicated to employees? If not, why not?

- Are antitrust violations disciplined in the same manner as other types of misconduct? Can the company provide examples or data on this point?

- What is the employment status of culpable executives who have not cooperated and accepted responsibility for antitrust violations? If the company still employs culpable executives, what are their positions? What role do they have with regard to pricing, the company's compliance and internal investigation, and supervision of any potential witnesses in the government's investigation?

9. Remediation and Role of the Compliance Program in the Discovery of the Violation

Although a compliance program may not prevent every antitrust violation, remedial efforts and improvements to the company's compliance program may prevent recurrence of an antitrust violation. The Justice Manual directs prosecutors to consider "any remedial actions taken by the corporation, including . . . revisions to corporate compliance programs in light of lessons learned." JM § 9-28.800. The thoroughness of the company's remedial efforts is relevant to whether the antitrust compliance program was effective at the time of the antitrust violation.

Remedial efforts are also relevant to whether the compliance program was effective at the time of a charging decision or sentencing recommendation. Therefore, prosecutors should assess whether and how the company conducted a comprehensive review of its compliance training, monitoring, auditing, and risk control functions following the antitrust violation. Prosecutors should also consider what modifications and revisions the company has implemented to help prevent similar violations from reoccurring, and what methods the company will use to evaluate the effectiveness of its antitrust compliance program going forward.

In addition, early detection and self-policing are hallmarks of an effective compliance program and frequently will enable a company to be a successful applicant for Type A of the Corporate Leniency Policy. Early detection and self-policing are also relevant at the charging stage of an investigation. As articulated in the Justice Manual, "the Department encourages such corporate self-policing, including voluntary disclosures to the government of any problems that a corporation discovers on its own." JM § 9-28.800; *see* JM § 9-28.900. "If a compliance program did effectively identify misconduct, including allowing for timely remediation and self-reporting, a prosecutor should view the occurrence as a strong indicator that the compliance program was

working effectively."[20]

- □ What is the company's root cause analysis of the antitrust misconduct at issue? Were any systemic issues identified? Who in the company was involved in producing the analysis?

- □ What role did the antitrust compliance program play in uncovering the antitrust violation?

- □ Did anyone who had responsibility to report misconduct to the compliance group/officer know of the antitrust violation? If so, when was the violation discovered, by whom, and how was it uncovered? If not, why not?

- □ What controls failed? Has the company conducted an analysis to detect why the antitrust compliance program failed to detect the antitrust violation earlier, or at all?

- □ Has the company revised its antitrust compliance program as a result of the antitrust violation and lessons learned? How did the company address, and determine how to address, failures in the compliance program? Was outside counsel or an advisor involved?

- □ What role did the senior leadership play in addressing the antitrust violation, identifying and internally disciplining employees and supervisors, and revising the compliance program to better detect the conduct that resulted in the antitrust violation?
- □ Does the company believe that changes to the antitrust compliance program will prevent the recurrence of an antitrust violation? What modifications and revisions did the company make? How will the company evaluate the continued effectiveness of its antitrust compliance training?

- □ How did the company convey the changes to antitrust policies and procedures to employees? Were employees required to certify they understood the new policies?

- □ Does the antitrust compliance program provide guidance on how to respond to a government investigation? Does the program educate employees on the ramifications of document destruction and obstruction of justice?

- □ Did the compliance program assist the company in promptly reporting the illegal conduct? Did the company report the antitrust violation to the government before learning of a government investigation? How long after becoming aware of the conduct did the company report it to the government?

[20] *Id.* at 13.

II. Sentencing Considerations

In accordance with the U.S. Sentencing Guidelines and 18 U.S.C. § 3572, when a decision is made to charge a company, prosecutors should evaluate whether to recommend a sentencing reduction based on a company's effective antitrust compliance program.

A. Guidelines Credit for an Effective Compliance Program

The Sentencing Guidelines provide several avenues for a company to receive credit for an effective compliance program. U.S.S.G. § 8C2.5(f) provides for a three-point reduction in a corporate defendant's culpability score if the company has an "effective" compliance program. The existence and effectiveness of a compliance program also may be relevant to determining whether a company should be sentenced to probation pursuant to U.S.S.G. § 8D1.1. In addition, a compliance program may be relevant to determining the appropriate corporate fine to recommend within the Guidelines range or whether to recommend a fine below the Guidelines range. *See* U.S.S.G. § 8C2.8; 18 U.S.C. § 3572. The Sentencing Guidelines' criteria are minimum requirements. As explained above, the Department has no formulaic requirements regarding corporate compliance programs. Compliance programs are to be evaluated on a case-by-case basis and will depend on the program's implementation and operation.

The Sentencing Guidelines are clear that a sentencing reduction for an effective compliance program does not apply in cases in which there has been an unreasonable delay in reporting the illegal conduct to the government. *See* U.S.S.G. § 8C2.5(f)(2). In addition, there is a rebuttable presumption that a compliance program is not effective when certain "high-level personnel" or "substantial authority personnel" "participated in, condoned, or [were] willfully ignorant of the offense." U.S.S.G. § 8C2.5(f)(3)(A)–(C). Under the Sentencing Guidelines, "high- level personnel" and "substantial authority personnel" include individuals in charge of sales units, plant managers, sales managers, or those who have the authority to negotiate or set prices or negotiate or approve significant contracts. U.S.S.G. § 8A1.2, application note 3(B)–(C).

Prosecutors should consider whether the Guidelines' presumption that a compliance program is not effective applies and, if it does, whether the presumption can be rebutted under U.S.S.G. § 8C2.5 (f)(3)(C)(i)–(iv). Relevant to this inquiry is whether: (i) individuals with operational responsibility for the compliance program had direct reporting obligations to the governing authority of the company (*e.g.*, an audit committee of the board of directors if applicable); (ii) the compliance program detected the antitrust violation before discovery outside of the company or before such discovery was reasonably likely; (iii) the company promptly reported the violation to the Antitrust Division; and, (iv) no individual with operational responsibility for the compliance program "participated in, condoned, or was willfully ignorant" of the antitrust violation. U.S.S.G. § 8C2.5.

Prosecutors must assess application of the rebuttable presumption on a case-by-case basis. For antitrust violations, whether the company applied for the Corporate Leniency Policy often will be a key factor in assessing whether the presumption can be rebutted.

B. Compliance Considerations Relevant to Recommending Probation under U.S.S.G. § 8D1.1

In each criminal case in which a company will be sentenced, prosecutors must also recommend whether a corporate defendant be placed on probation pursuant to U.S.S.G. § 8D1.1. Antitrust prosecutors generally will not seek corporate probation for corporations that cooperate with the investigation and accept responsibility, except in limited circumstances, such as when a company has left culpable individuals in positions of authority, or has received a "Penalty Plus" fine adjustment for failing to report other cartel conduct at the time of a prior plea. In contrast, when a company is found guilty at trial, prosecutors may seek probation if the company does not accept responsibility and declines to take measures to implement or improve its antitrust compliance program. *See, e.g.*, U.S.S.G. § 8D1.1(a)(3).

If a company did not have a pre-existing antitrust compliance program at the time of the antitrust violation, prosecutors should inquire whether the company has put in place a compliance program that meets the requirements of an effective compliance program under U.S.S.G. § 8B2.1. If the company has not established an adequate compliance program, prosecutors may recommend probation and, in appropriate cases, periodic compliance reports as a condition of probation. Prosecutors will also consider whether an external monitor is necessary to ensure implementation of a compliance program and timely reports. *See* JM 9-28.1700. Moreover, if the Antitrust Division will recommend that the company receive a "Penalty Plus" fine enhancement for the recurrence of antitrust violations, prosecutors are likely to seek probation and recommend periodic compliance reports as a condition of probation.

C. Statutory Fine Reduction for Recurrence Prevention Efforts

In addition to the Sentencing Guidelines, Title 18 of the United States Code provides a mechanism for recognizing remedial efforts and reducing a corporation's fine. In determining whether to impose a fine, and the amount and timing of that fine, courts shall consider any measure taken by a company to discipline personnel responsible for the offense and to prevent recurrence of the offense. *See* 18 U.S.C. § 3572(a)(8). Prosecutors should thus consider whether a company's extraordinary post-violation compliance efforts warrant a fine reduction.[21] A company's dedicated effort to change company culture after the antitrust violation and to prevent its recurrence are relevant to whether prosecutors should recommend such a fine reduction under 18 U.S.C. § 3572(a)(8). In making a recommendation for a fine reduction under 18 U.S.C. § 3572, prosecutors should consider:

- **Tone from the Top** – What steps has senior leadership and management across the organization taken to require and incentivize lawful behavior and participation in compliance training? Has the company demonstrated that ensuring future compliance and culture change is paramount? Has senior leadership accepted personal accountability for the

[21] *See* Makan Delrahim, Assistant Att'y Gen., U.S. Dep't Justice, Antitrust Div., *Don't "Take the Money and Run": Antitrust in the Financial Sector* 12-13 (May 1, 2019), https://www.justice.gov/opa/speech/file/1159346/download.

violation (*e.g.*, accepted a reduced bonus, included antitrust compliance in the company's compliance program, actively participated in and encouraged antitrust-related training)? Did senior leadership participate in the revision and implementation of a more robust compliance program in response to the antitrust violation?

- **Improvements to Pre-Existing Compliance Program** – Has the company conducted a comprehensive review of its compliance, training, monitoring, auditing, and risk control functions following the antitrust violation? How did the company modify and revise its compliance program to prevent similar conduct from reoccurring? What methods will the company use to evaluate the effectiveness of its antitrust compliance training going forward?

- **Creation of Compliance Program** – If the company had no antitrust compliance program in place before the charged antitrust violation, did the company create a robust program tailored to the company's business and aimed at preventing recurrence of an antitrust violation? Does the company's new antitrust compliance program educate employees about the illegal conduct that occurred as well as other antitrust risks? Does the compliance program provide guidance on how to respond to a government investigation? What resources are devoted to antitrust compliance? Did the company hire outside counsel or an advisor to assist the company in creating the program? What methods will the company use to evaluate the effectiveness of its antitrust compliance program going forward?

- **Disciplinary Procedure** – Did the company have or create disciplinary procedures for employees who violate the law or the company's compliance program? Did the company discipline employees who engaged in the violation?