

# Alert

November 22, 2024



## DOJ Announces New Considerations in Evaluating Corporate Compliance Programs

The Department of Justice's Antitrust Division (Antitrust Division) updated its Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (Antitrust Compliance Guidance) on November 12, 2024.<sup>1</sup> The new Antitrust Compliance Guidance updates earlier guidance to account for new and emerging technology and enforcement trends, with a focus on:

1. new means of communication and collaboration;
2. artificial intelligence (AI) and new pricing tools;
3. reporting and anti-retaliation training; and
4. a culture of compliance not just at the top, but throughout management.<sup>2</sup>

The Antitrust Compliance Guidance is useful to compliance officers when designing a robust compliance program, especially as companies implement a robust compliance program to prevent and hopefully mitigate the fall-out of civil or criminal antitrust violations. The new additions are discussed below.

### Electronic Communications

Post-pandemic, and with the increasingly widespread use of non-email methods of communication, authorities have increasingly focused on the use and preservation of non-email communications in civil and criminal investigations.<sup>3</sup> In light of the changes in how people most frequently communicate, the Federal Trade Commission (FTC) and the Antitrust Division jointly announced they were updating "their standard preservation letters and specifications for all second requests, voluntary access letters and compulsory legal process, including grand jury subpoenas, to address the increased use of collaboration tools and ephemeral messaging platforms in the modern workplace" on January 26, 2024.<sup>4</sup>

A key focus of these updates were ephemeral messages, or messages that are automatically destroyed after a particular period of time, and collaboration tools.<sup>5</sup> Examples of these platforms include Slack, Microsoft Teams, and Signal. Recently, the Antitrust Division has pursued sanctions in civil litigation against companies for failing to preserve various non-email communication methods.<sup>6</sup>

Unsurprisingly, this focus has now made its way into the Antitrust Compliance Guidance. As part of evaluating the effectiveness of any compliance program, the Antitrust Division will now consider what electronic communication channels a company and employees use, what mechanisms the company put in place to manage and preserve them, what guidance companies provide regarding the permissible use of these methods of communication, when employees must preserve them, and what the rationale is for a company's approach to preservation or deletion settings of various platforms.<sup>7</sup>

As a result of this change, companies need to be careful when implementing new collaboration tools and thoughtfully design policies for their use and preservation. To the extent companies permit or encourage employees to use them, steps must be taken to ensure the retention policies



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are appropriate and adequate based on the nature of their use.

## AI, Pricing Tools, and Revenue Management Software

The Antitrust Division also has been focused on the use of AI and similar tools, especially when used to set or help set prices.<sup>8</sup> This focus has filtered into the Antitrust Compliance Guidance. For example, the Antitrust Compliance Guidance asks whether the compliance program enforcers are evaluating is updated to account for newly developed technology.<sup>9</sup> Similarly, it asks whether a company's antitrust risk assessment addresses the use of AI and algorithmic revenue management software.<sup>10</sup>

## Reporting and Investigations

The Antitrust Compliance Guidance also significantly expands the scope of enforcers' questions about a compliance program's reporting mechanisms. It now asks how a company determines whether to investigate "antitrust complaints or red flags" and "[w]hat steps" "the company take[s] to ensure investigations are independent, objective, appropriately conducted, and properly documented."<sup>11</sup>

Further, it asks about anti-retaliation policies and whether any non-disclosure agreements a company uses with current and former employees are structured such that employees can report potential antitrust violations.<sup>12</sup> Importantly, it also inquires whether managers and supervisors are trained on anti-retaliation policies and, specifically, the Criminal Antitrust Anti-Retaliation Act.

## Culture of Compliance

The prior guidance focused on whether top management sufficiently supported the antitrust compliance program. The updates to the Antitrust Compliance Guidance retain the emphasis on culture at the top but also add a focus on managers of all levels, noting that "[p]rosecutors should examine the extent to which corporate management—both senior leadership and *managers at all levels*—have clearly articulated and conducted themselves in accordance" with a company's commitment to good corporate citizenship.<sup>13</sup> It similarly instructs enforcers to ask whether "managers at all levels" demonstrate the importance of compliance.<sup>14</sup>

## Civil Investigations and Litigation

Finally, while the earlier version of the Antitrust Compliance Guidance only dealt with compliance programs in criminal investigations, the Antitrust Compliance Guidance now recognizes that a well-designed compliance program has implications for civil investigations.<sup>15</sup> The Antitrust Compliance Guidance explicitly recognizes that "civil [investigation] team[s]" will "consider many of the same factors," especially if a company is seeking to "avoid court-mandated further compliance and reporting requirements or retention of and subversion by external monitors" in the event of a civil violation.<sup>16</sup>

## Conclusion

While a thoughtful and well-designed antitrust compliance program has always been an important tool in avoiding, detecting, and remedying antitrust violations, the Antitrust Division's most recent additions to the guidance reveal the Division's thinking on instances where prior compliance policies may have fallen short. There is a new focus on:

1. new means of communication and collaboration and the preservation thereof;
2. new AI and pricing tools;
3. reporting and anti-retaliation training; and
4. a culture of compliance not just at the top but throughout management.

We anticipate that these principles will remain unchanged despite the new incoming administration, as the original compliance guidance was developed in 2019 under the prior Trump Administration and the additions largely expand upon those concepts while also addressing conduct that the Antitrust Division has identified in the interim.

Cozen O'Connor's attorneys have experience dealing with all stages of civil and criminal investigations and are available to assist in revising and updating your company's antitrust compliance program.

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<sup>1</sup> Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations, U.S. Dep't of Justice, Antitrust Division (Nov. 2024) ("Antitrust Compliance Guidance").

<sup>2</sup> The Antitrust Division published guidance regarding compliance programs for the first time in 2019. The purpose of the Antitrust Compliance Guidance is to help prosecutors evaluate compliance programs at both the charging and sentencing stages of any investigation. Antitrust Compliance Guidance at 2. As a result, it is structured as a series of questions that enforcers should consider. The 2024 Antitrust Compliance Guidance is largely additive to the 2019 version and reflects revisions to the DOJ's Evaluation of Corporate Compliance Programs, updated in September 2024, and the accompanying revisions to the Justice Manual. See Justice Manual, U.S. Dep't of Justice, <https://www.justice.gov/criminal/criminal-fraud/page/file/937501/dl>.

<sup>3</sup> See, e.g., *Wall Street Firms to Pay over \$470 Million to Settle with U.S. Regulators over Texting*, Reuters (Aug. 15, 2024).

<sup>4</sup> *Justice Department and the FTC Update Guidance that Reinforces Parties' Preservation Obligations for Collaboration Tools and Ephemeral Messaging*, U.S. Dep't of Justice (Jan. 26, 2024).

<sup>5</sup> *Id.*

<sup>6</sup> See, e.g., Memorandum Opinion, *United States v. Google LLC*, 20-CV-3010 (D.D.C. Aug. 5, 2024), ECF No. 1033.

<sup>7</sup> Antitrust Compliance Guidance at 6.

<sup>8</sup> Press Release, Federal Trade Commission, FTC and DOJ File Statement of Interest in Hotel Room Algorithmic Price-Fixing Case (Mar. 28, 2024).

<sup>9</sup> Antitrust Compliance Guidance at 5.

<sup>10</sup> *Id.* at 9-10.

<sup>11</sup> *Id.* at 14.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 6 (emphasis added).

<sup>14</sup> *Id.* at 7.

<sup>15</sup> *Id.* at 2.

<sup>16</sup> *Id.* at 3.

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