

Shifting Antitrust Scrutiny Means Freshening Compliance Policies

- *Holland & Knight attorneys favor antitrust compliance updates*
- *Increased enforcement efforts create corporate compliance risk*

Companies should consider boosting their antitrust compliance programs in light of the growing regulatory intensity both domestically and internationally. A surge in US antitrust enforcement activities under the Biden administration underscores this urgency, particularly in health care and technology markets.

The Department of Justice and Federal Trade Commission are litigating cases they previously would have settled, such as the DOJ's litigated challenge to Assa Abloy's acquisition of Spectrum Brands' hardware and home improvement business, in which the DOJ ultimately accepted a divestiture remedy only in the middle of trial.

The agencies also are pushing novel legal theories. This includes the FTC reviving a "conglomerate" theory of competitive harm in its challenge to Amgen Inc.'s acquisition of Horizon Therapeutics or its focus on potential harm to workers in a lawsuit challenging the acquisition of Capri Holdings Ltd. by Tapestry Inc.—both owners of what the FTC referred to as "affordable luxury" fashion brands.

The DOJ has also for the first time in decades pursued allegation of illegal monopolization as a criminal antitrust violation. This demonstrated commitment to push traditional bounds of antitrust enforcement places additional pressure on corporations.

Staying ahead of potential legal risks means updating policies to align with recent DOJ and FTC announcements, such as when a DOJ representative declared during an American Bar Association event in December that human resource professionals must be trained on antitrust matters.

Demonstrating a robust antitrust compliance program can influence DOJ enforcement decisions, potentially avoiding prosecution or reducing penalties for organizations with effective programs.

In 2019, the DOJ announced a policy to reward efforts by companies to instill a "culture of compliance" through the adoption of effective antitrust compliance policies. Most companies aspire to achieve success legally and ethically, strive to engage in vigorous but fair competition within the market, and expect their employees to conduct themselves in a manner conducive to healthy competition.

The DOJ's policy position provides additional incentives for those companies to adopt compliance measures that meet DOJ standards. To accomplish this, companies must train and educate employees to recognize and avoid inadvertent anticompetitive behavior and establish effective reporting channels.

The objective goes beyond just evading enforcement and encompasses criminal and civil liability avoidance, as well as safeguarding against reputational harm from allegations of anticompetitive conduct.

Antitrust policies, like most compliance policies, are living documents that should be revisited as business practices and laws change. A successful antitrust policy is both accurate and achievable. Organizations can adopt the following best practices to ensure their policies are relevant and efficient.

Keep up with industry trends and data. Revise policies and training materials to adapt to an evolving industry landscape, including shifts in competitor strategies, market dynamics, and legal regulations.

Given the likelihood of rapid changes in the competitive environment in which a company operates, regularly updating compliance policies to account for new developments is crucial.

For instance, private and government enforcement against alleged collusion through common pricing algorithms means companies should review third-party software platforms they use for competitive decision-making to determine whether the software incorporates sensitive information derived from competitors.

Evaluating possible exposure to risks of involvement in other potential collusive activity requires learning about the current market, competitor identities, and inter-competitor relationships such as potential cooperation or involvement in trade associations. Staying informed can alert companies to the need for policy updates and improvements in training materials.

Use key lessons from recent cases. Update policies to reflect recent litigation outcomes, expressions of enforcement priorities, and emerging enforcement trends. There are several examples of instances that could influence antitrust compliance.

The DOJ's search advertising monopolization case alleged Google circulated a memorandum to its employees instructing them not to use certain "key" antitrust words in internal communications. The DOJ indicated that it might look at any such internal guidance as evidence that the company may be concealing anticompetitive behavior.

While communication directives are commonplace in organizations, they shouldn't be substitutes for robust compliance programs. Any communication guidance within antitrust policies should undergo careful review and updating.

Federal antitrust enforcement agencies have expressed concerns about companies' use of AI. Compliance policies should address potential antitrust risks associated with AI implementation and educate employees about how AI tools might inadvertently create such risks.

The DOJ and FTC withdrew antitrust policy statements that outlined enforcement “safety zones” for the exchange of competitively sensitive information, which creates further need for compliance policy updates.

This, coupled with other expressions of concern about the exchanging sensitive information (including bringing an enforcement action against Agri Stats Inc. for facilitating the exchange of sensitive information among meat processors), suggests heightened agency scrutiny of benchmarking and competitor information exchanges. Companies engaged in such exchanges should review and update antitrust compliance protocols to reflect the current, less-permissive enforcement environment.

The DOJ and FTC are actively enforcing competition laws in labor markets, prompting companies to enhance their compliance policies and training to avoid potential criminal conduct.

This includes monitoring developments related to noncompete agreements, including the FTC’s April decision to ban noncompetes, no-poaching agreements, and compensation discussions. It’s crucial to educate key personnel, including human resources professionals, on these matters.

Offer training after any compliance policy training. Companies should provide regular and mandatory antitrust training, especially following policy updates. Training sessions conducted in small groups and in person can facilitate meaningful discussions and enable employees to address challenging scenarios effectively.

All key business employees, not just the legal team, should undergo such training to reduce the risk of engaging in anticompetitive behavior.

The antitrust enforcement landscape requires proactive measures to safeguard against potential risks. Regular policy updates and comprehensive training programs are essential mechanisms for minimizing antitrust exposure.

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