

# Antitrust: How to Mitigate a Perilous But Underappreciated Risk Area

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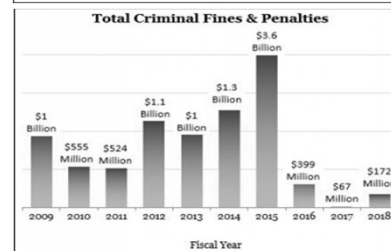
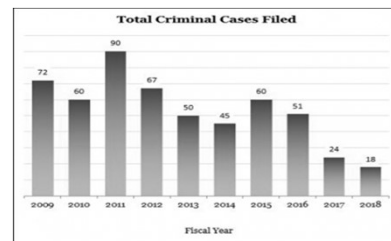


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## Antitrust Enforcement Risks

- > After a decade of robust enforcement, some signs of a slowdown
  - Fewest criminal cases in more than a decade
  - Recognition leniency programs have become burdensome
- > Inherent Risk (probability + impact) of enforcement remains
  - Impact should still be the key driver of compliance efforts
  - Probability of detection still should not be understated



Source: US Department of Justice, Antitrust Division

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## Understanding the Risk Factors: Cartel Conduct

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- > DOJ criminally prosecutes three types of conduct:
  - Price fixing
  - Bid rigging
  - Allocation of markets or customers
- > Other conduct enforced civilly (e.g. attempted monopolization, information exchange, tying, predatory pricing)
- > Risk of enforcement globally
  - European Commission, Brazil, China
- > Civil damages actions, class actions
  - Treble damages

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## Antitrust Division Compliance Guidance

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DOJ Antitrust Division recently announced it will credit companies for effective corporate antitrust compliance programs in charging decisions and penalty recommendations

- > Division also issued guidance on how it will evaluate programs
  - > Runs parallel to DOJ Criminal Division's guidance for corporate compliance programs and recent policy guidance for FCPA, OFAC sanctions, and FCA compliance
- > Announcement included that the Division will enter into Deferred Prosecution Agreements ("DPAs"), as appropriate (effective corporate compliance program, self-reporting, cooperation, remediation)
  - > Historically, the Division has disfavored DPAs to avoid undercutting the corporate leniency program

New policy will complement corporate leniency program

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## Fundamental Questions for Prosecutors

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- > Three “fundamental questions” for prosecutors:
  - > Is the compliance program well-designed?
  - > Is the program being applied earnestly and in good faith?
  - > Does the compliance program work?
- > In addition, three questions specifically on antitrust:
  - > Does the company’s compliance program address and prohibit criminal antitrust violations?
  - > Did the antitrust compliance program detect and facilitate prompt reporting of the violation?
  - > To what extent was a company’s senior management involved in the violation?

## Antitrust Division Compliance Guidance

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Nine factors in evaluating a compliance program:

- > Design and comprehensiveness – program design, format, comprehensiveness, and integration into company’s business
- > Culture of compliance – extent to which corporate management has articulated company’s commitment to good corporate citizenship
- > Responsibility for the compliance program – whether those with operational responsibility have sufficient means, authority, and autonomy
- > Risk assessment – extent to which program is tailored to company’s business and provides opportunities to detect violations through periodic collection and review of metrics and information
- > Training and communication – whether employees receive adequate training and communications about antitrust compliance

## Antitrust Division Compliance Guidance

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Nine factors in evaluating a compliance program (cont'd):

- > Periodic review, monitoring and auditing – whether program has review procedures and proactive audits specifically to uncover antitrust violations
- > Reporting – whether program includes mechanisms allowing employees to anonymously and confidentially report antitrust violations
- > Incentives and discipline – whether company implements proper incentives and discipline to ensure the program is integrated and enforced
- > Remediation and the role of the compliance program in discovery of the violation – remedial actions taken to prevent recurring violations

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## Risk Assessment is Key to Effective Compliance

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- > Risk assessment allows you to most effectively allocate resources – focusing preventative and detective measures on your highest risk areas
  - No “off the shelf” or “one size fits all” process; need to assess the specific risks for your company, industry, and jurisdiction(s)
  - Learn the business model / go to market strategies by interviewing business and legal / compliance teams
  - Assessment should consider a range of antitrust risks: cartel, information exchange, monopolization, vertical, M&A, bespoke risks (e.g. HR)
  - Formal risk assessment recommended at least once a year; always be alert to changing risk factors (new laws, new inquiries, shifting business risks)

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## Design and Comprehensiveness

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- > Administering antitrust controls presents a challenge to most companies
  - Safeguards can be put in place ex ante to reduce potential exposure, but they can be difficult to administer
  - Prohibiting or requiring pre-clearance for interactions with competitors can be effective, but can be difficult to successfully implement and maintain
- > Potential to focus resources on safeguards for higher risk areas:
  - Controls for trade associations and conferences
  - Safeguards for information exchange activities
  - Communication controls to flag suspicious conduct

## Conducting Antitrust Audits

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- > Audits are an important and effective tool for antitrust compliance
  - “What monitoring or auditing mechanisms does the company have in place to detect antitrust violations? 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?”
- > Audits should be tailored to the risk assessment and antitrust controls
  - Monitor antitrust controls for potential compliance breaches
  - Conduct in-depth audits of higher risk business areas

Questions?

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