

# Shoring Up Compliance Amid Change In Antitrust Tack

By **Kathryn Mims, Ira Raphaelson and Charles Moore** (May 20, 2021)

We are witnessing a sea change in U.S. antitrust policy that may well shift the focus from consumer benefit to a more aggressive and amorphous focus on alleged abuse of dominance.

Politicians and enforcers are calling for strengthened legislation that, among other things, shifts more of the burden onto defendants, increases prosecutions and multiplies enforcement resources.

This momentum has been building over the last decade — e.g., increased multiagency, cross-border cooperation to secure evidence, prosecute and collect fines, even when some enforcement actions are undertaken for national as opposed to global market protection in both anti-corruption and competition matters.[1]

President Joe Biden signaled support for this change by naming Tim Wu[2] to the National Economic Council, as a special assistant to the president for technology and competition policy; and then nominating Lina Khan[3] as commissioner on the Federal Trade Commission.

Both appointees were professors at Columbia Law School. There, they helped shape a new school[4] of thought on antitrust, a stark contrast to the Chicago School of Antitrust[5] theories that have prevailed for much of the past 50 years.

The shift could be seismic. The Chicago School is rooted in the belief that big is good, big is efficient, and low prices are king, whereas Columbia's framework recalls the earliest days of the Teddy Roosevelt trustbusters' belief that big is bad.

In anticipating this shift, businesses should consider revisiting the relationship between compliance and antitrust leniency.

## Corporate Compliance and Antitrust Leniency

For decades, defense counsel have made presentations about the adequacy of, and improvements to, clients' corporate compliance programs to the prosecutors of all but one of the criminal components of the U.S. Department of Justice.

Counsel made these presentations to secure the greatest leniency possible.

Presentations mirrored the elements of DOJ policies on what constituted an effective compliance program, including appropriate remedial conduct.

Within the DOJ, only the Antitrust Division rejected this compliance as mitigation policy.

Before 2019, the Antitrust Division had its own standards of mitigation, through its much-touted leniency program.



Kathryn Mims



Ira Raphaelson



Charles Moore

Starting in 1993, the Antitrust Division chose to incentivize early reporting of cartel behavior, providing amnesty to the first conspirator to identify and cooperate against the conspiracy.[6]

The amnesty program took fines from single-digit millions to triple-digit millions.

Cartel members rushed to be first in the door to secure all of the benefits available.

For antitrust crimes, it was all or nothing — immunity for the first company, and increasing penalties for each subsequent company to report.[7]

For the rest of DOJ, prosecutors could, for any company, decline to bring or defer most criminal charges, charge-bargain, entity-bargain, negotiate the factual narrative and otherwise reduce the penalty/collateral consequences of a prosecution, based on compliance and cooperation.

On July 11, 2019,[8] Makan Delrahim, then an assistant attorney general for the Antitrust Division, joined the rest of DOJ in offering mitigation credit based on adherence to corporate governance principles.

### ***Compliance in Antitrust Enforcement***

Businesses succeed through effective competition. Prosecutions occur where corporations compete unfairly through employees or agents — rogue or otherwise.

Unfair competition occurs when companies unilaterally or collusively act to rig the game.

Examples of unilateral action include:

- Bribery and kickbacks;
- Exploiting nonpublic information from the target;
- Cost-cutting violations, e.g., environmental, labor and safety;
- Providing mechanisms to evade money laundering/tax laws; and
- Circumventing sanction/boycott regimes.

Antitrust laws typically punish collusives: price-fixing, geographic market allocation, customer allocation, tie-in arrangements and price-gouging.

Designing an effective compliance through the lens of competition helps rationalize the policies — to train employees and monitor behavior to prevent and detect violations of law. Once achieved, an effective program also can support an argument for leniency.

Fair competition can depend on the extent to which the organization performs and documents risk-based due diligence on its employees and other business counterparties, as well as holding those affiliates to its compliance standards through management and audit.

### ***Evolution of Compliance Credit***

In 1991, the U.S. Sentencing Commission's new Organizational Sentencing Guidelines included mitigation credit — a reduction in fine — for organizations convicted, notwithstanding an otherwise effective compliance program.[9]

The defense bar then sought a full range of leniency from nonprosecution and deferred prosecution to civil resolution in lieu of prosecution citing the criteria.

The DOJ provided three forms of guidance binding the DOJ and its 93 United States Attorney's Offices:

1. The Principles of Federal (Corporate) Prosecution of 1988, later called the Justice Manual;
2. Deputy Attorney General Memoranda; and
3. Guidance from the Fraud Section of the Criminal Division through the statutory Foreign Corrupt Practices Act, or FCPA, opinion letters,[10] joint guidance with the U.S. Securities and Exchange Commission focusing on the controls[11] provisions of the FCPA,[12] and its landmark February 2017 guidance on the elements of an effective compliance program.[13]

The U.S. Treasury Department and the SEC launched substantial guidance on what these critical components of the federal prosecutive apparatus consider the core elements of an effective compliance program.[14]

With the Commodity Futures Trading Commission's announcement in 2019[15] that it had joined the ranks of FCPA governance controls oversight, its pronouncements on crediting cooperation (2017)[16] and compliance (2020)[17] reinforced the importance of maintaining a strong compliance program.

### ***The Antitrust Division Adds Compliance Credit***

In conjunction with Delrahim's July 2019 remarks, the Antitrust Division: (1) revised the Justice Manual to permit antitrust prosecutors to consider compliance programs at the charging stage;[18] and (2) issued its own compliance evaluation guidance.[19]

The Antitrust Division's guidance began with three questions from the Justice Manual, Section 9-28.800, and Criminal Division:[20]

1. "Is the corporation's compliance program well designed?"
2. "Is the program being applied earnestly and in good faith?"
3. "Does the corporation's compliance program work?"[21]

The Antitrust Division then added:

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

### ***Building a Comprehensive Program***

Even a tailor-made program is not guaranteed to receive a path to Antitrust Division

leniency. It is, however, the one most likely to do so. Here are some commonsense tips to consider:

First, start your fully integrated compliance program with a tone-from-the-top pronouncement designed to meet existing standards.

Build, train, monitor, audit and discipline from there in the real world.

At minimum, the entire company should know that compliance is a core value, that violations will be investigated and addressed, and that the company is confident in its ability to compete and win fairly.

Second, articulate policies so that all employees can easily understand them.

Use competition compliance as a building block. Include the fundamentals, such as prohibiting employees from agreeing or even discussing with competitors to set prices, set bids, or allocate customers or territories.

Consider also setting boundaries regarding exchanges of information, joint ventures/collaborations, purchasing from or selling to competitors, and participation in trade shows.

Third, use these building blocks to document policies for handling the major activities of the business. Where company employees are likely to encounter competitors, concrete rules become even more critical.

Design considerations should include ease of application and training.

Fourth, harmonize policies where at all possible. Where ordinary business activities raise multiple compliance questions — e.g., antitrust, securities, anti-bribery and anti-kickback, or even standard employment issues — ensure interdisciplinary consistency in policymaking, training, audit and internal enforcement.

Using the businesses' enterprise risk management mechanisms, develop clear rules to ensure compliance on all fronts.

Finally, review and update policies in light of the June 2020 Justice Manual update emphasizing, among other things, that the program:

- Be dynamic, undergoing periodic review and enhancement;
- Monitor compliance through the use of data; and
- Be adequately resourced — not only financially, but with personnel and other resources as well.[22]

To the extent that the Antitrust Division is willing to consider leniency on the same criteria as the rest of DOJ, companies should track and build upon the latest pronouncements.

## **Conclusion**

While the full impact of the philosophical shift in U.S. antitrust policy upon enforcement initiatives develops, businesses should anticipate the increased importance of designing and

maintaining a dynamic compliance program.

Such a program would best take advantage of the potential for leniency under the often-overlooked 2019 Antitrust Division policy.

Doing so before the Antitrust Division is knocking at the door is a task worth undertaking sooner rather than later.

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*Kathryn Mims is a partner, Ira Raphaelson is senior counsel and Charles Moore is counsel at White & Case LLP.*

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[1] The tendency to nation-state protectionism during the last 3½ years has even resulted in the proliferation of laws governing foreign direct investment (US CIFIUS, PRC, UK, GDR, France, etc.).

[2] See e.g., Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (2018), [https://www.amazon.com/Curse-Bigness-Antitrust-New-Gilded-ebook/dp/B07HRLQSLG/ref=sr\\_1\\_2?dchild=1&keywords=the+curse+of+bigness&qid=1615301038&sr=8-2](https://www.amazon.com/Curse-Bigness-Antitrust-New-Gilded-ebook/dp/B07HRLQSLG/ref=sr_1_2?dchild=1&keywords=the+curse+of+bigness&qid=1615301038&sr=8-2).

[3] Professor Kahn played an important role in the House Judiciary Committee Staff Report on Big Tech.

[4] See <https://www.bloomberg.com/news/articles/2020-10-26/how-big-is-bad-has-become-a-big-big-deal>.

[5] See <https://www.law.uchicago.edu/news/reassessing-chicago-school-antitrust-law>.

[6] See Leniency Program, U.S. Dep't of Just., <https://www.justice.gov/atr/leniency-program> (2021).

[7] Scott D. Hammond, Deputy Assistant Attorney General, U.S. Dep't of Just., *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, at 3 (Feb. 25, 2010) ("Effective leniency programs create a race among conspirators to disclose their conduct to enforcers."), <https://www.justice.gov/atr/file/518241/download>.

[8] See Makan Delrahim, Assistant Attorney General, U.S. Dep't of Just., *Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs* (July 11, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0>; U.S. Dep't of Justice, *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations* (July 2019), <https://www.justice.gov/atr/page/file/1182001/download>.

[9] See U.S. Sent'g Guidelines Manual ch. 3 (Nov. 1, 1991), [https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1991/manual-pdf/Chapter\\_8.pdf](https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1991/manual-pdf/Chapter_8.pdf).

[10] See Opinion Procedure Releases, U.S. Dep't of Just., <https://www.justice.gov/criminal-fraud/opinion-procedure-releases> (last visited Feb. 19, 2021).

[11] Securities Exchange Act of 1934 § 13(b), 15 U.S.C. § 78m, <https://www.sec.gov/spotlight/fcpa/fcpa-recordkeeping.pdf>.

[12] See, e.g., U.S. Dep't of Just., Foreign Corrupt Practices Act Review Opinion Procedure Release, No. 04-02 (July 12, 2004), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/0402.pdf>; U.S. Dep't of Just., Foreign Corrupt Practices Act Review Opinion Procedure Release, No. 10-02 (July 16, 2010) <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/07/22/1002.pdf>; U.S. Dep't of Just., Foreign Corrupt Practices Act Review Opinion Procedure Release, No. 14-02 (Nov. 7, 2014), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2014/11/14/14-02.pdf>.

[13] U.S. Dep't of Just., Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (June 2020), <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

[14] By way of example, see OFAC Issues a Framework for Compliance Commitments, U.S. Dep't of the Treasury (May 2, 2019), <https://home.treasury.gov/news/press-releases/sm680> (providing guidance on effective programs), and A Resource Guide to the U.S. Foreign Corrupt Practices Act, Second Edition, U.S. Dep't of Just. & U.S. Secs. Exch. Comm'n (first issued in 2012 and updated in 2020), <https://www.justice.gov/criminal-fraud/fcpa-resource-guide>. See also the Seaboard Factors, U.S. Secs. Exch. Comm'n, <https://www.sec.gov/litigation/investreport/34-44969.htm>, as well as the SEC's administrative orders in FCPA matters which provide substantial guidance on how government will judge an effective controls program (financial and compliance).

[15] James M. McDonald, Director of Enforcement, U.S. Commodity Futures Trading Commission, Remarks at the American Bar Association's National Institute on White Collar Crime (Mar. 6, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald2>.

[16] Advisory on Self Reporting and Cooperation for CEA Violations Involving Foreign Corrupt Practices, U.S. Commodity Futures Trading Comm'n, <https://www.cftc.gov/sites/default/files/2019-03/enfadvisoryselfreporting030619.pdf>.

[17] Press Release, U.S. Commodity Futures Trading Comm'n, CFTC Issues Guidance on Factors Used in Evaluating Corporate Compliance Programs in Connection with Enforcement Matters (Sept. 10, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8235-20>.

[18] See Press Release, Antitrust Division of the U.S. Dep't of Just., Antitrust Division Announces New Policy to Incentivize Corporate Compliance (July 11, 2019), <https://www.justice.gov/opa/pr/antitrust-division-announces-new-policy-incentivize-corporate-compliance>.

[19] See *id.*; see also Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (July 2019), *supra* note 4.

[20] Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (July

2019), *supra* note 4, at 1.

[21] *Id.* at 2 (citing U.S. Dep't of Just., Just. Manual § 9-28.800).

[22] See U.S. Dep't of Justice, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (June 2020), *supra* note 16, at 3.