

Client Alert

Special Matters & Government Investigations | Antitrust

NOVEMBER 20, 2024

For more information, contact:

Alan R. Dial
+1 202 661 7977
adial@kslaw.com

Robert K. Hur (Rob)
+1 202 383 8969
rhur@kslaw.com

Jeffrey S. Spigel (Jeff)
+1 202 626 2626
jspigel@kslaw.com

Brian R. Meiners
+1 202 626 2910
bmeiners@kslaw.com

Michelle Jacob
+1 212 556 2237
mjacob@kslaw.com

Adriana Dunn
+1 202 626 5618
adunn@kslaw.com

King & Spalding

Washington, D.C.
1700 Pennsylvania Avenue, NW
Suite 900
Washington, D.C. 20006
T. +1 202 737 0500

New York
1185 Avenue of the Americas
34th Floor
New York, New York 10036
T. +1 212 556 2100

DOJ Releases Updated Antitrust Compliance Program Guidance

Last week DOJ published an updated version of its guidance on the Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (“Guidance”). These updates refresh the guidance originally issued in 2019, under the Trump administration. This Guidance, which assists prosecutors when making charging decisions and sentencing recommendations, describes how the DOJ assesses a compliance program’s effectiveness in preventing criminal violations of the Sherman Act. In its updated Guidance, the DOJ has expanded the guidance to include civil matters and added guidance focusing on persuading antitrust whistleblowers to speak out, ensuring that artificial intelligence and the increasing reliance on technology tools is adequately monitored and checked, and generally the need to have a robust antitrust compliance infrastructure. Many of these updates also align with recent updates to the DOJ Criminal Division’s related guidance, which was updated in September 2024.

Of course, DOJ has issued this Guidance in the waning days of the Biden administration, and it may be rescinded or amended by new leadership in the coming months. While time will tell, we anticipate that robust antitrust enforcement will continue during the next administration, based on actions taken during President Trump’s first term and positions taken by him and his advisors during his recent campaign.

EXPANDS SCOPE TO CIVIL ANTITRUST MATTERS

A key update to the Guidance is that it now extends to civil antitrust matters, in addition to criminal violations of the Sherman Act such as price fixing, bid rigging, and market allocation. It makes clear that a well-designed antitrust compliance program should also minimize risk of civil violations and that the DOJ’s civil teams will consider many of the same factors as criminal prosecutors when assessing the effectiveness of a company’s compliance program. The Guidance also alerts companies that “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 antitrust investigation.”

ANTI-RETALIATION, WHISTLEBLOWERS, AND USE OF NDAS

The Guidance makes clear that the government is focused on ensuring that the company is not providing any roadblocks to employees who may be whistleblowers. This is consistent with recent efforts by the DOJ’s Criminal Division to create incentives for whistleblowers to come forward, including introducing a new [Whistleblower Rewards Program](#) in August 2024. For more information on the Whistleblower Rewards Program, see our previous [Client Alert](#). The Guidance asks the following questions that DOJ will consider when assessing a company’s compliance program:

- 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, and are employees, including managers and supervisors, trained on it and the protections under the Criminal Antitrust Anti-Retaliation Act (CAARA)?
- Is the company’s use of non-disclosure agreements (NDAs) and other restrictions on current and former employees 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?

Companies should take a close look at any NDAs in use for current and former employees to ensure that nothing could be construed as an impediment to reporting misconduct. Companies should also ensure that their NDAs and policies make clear that employees can report antitrust violations internally and to government authorities, without fear of retaliation. The Guidelines note that a best practice is for companies to allow anonymous reporting and to train employees on their protections under CAARA.

CLOSER LOOK AT TECHNOLOGY AND AI

For the first time, the Guidance now addresses the use of artificial intelligence (AI) and other evolving technologies, which is consistent with recent changes to the DOJ Criminal Division’s related guidance. These updates underscore the importance of compliance professionals keeping apprised of how technology developments impact the business’s day to day and overall compliance. According to the Guidance, the DOJ will consider which AI technologies are used, whether a company assesses the antitrust risk associated with new technology tools as they are deployed, what steps a company is taking to mitigate the risk associated with the use of the technology, whether compliance personnel are involved in the deployment of AI and other technologies to assess risks, and the extent to which compliance programs (e.g., employee training) recognizes AI and technology tools and the risks they may pose.

As an example of such technologies, the Guidance references algorithmic revenue management software technology, which is the subject of a recent [DOJ Antitrust Division enforcement action](#).

FOCUS ON EPHEMERAL MESSAGING

The Guidance focuses on company policies governing the use of electronic communication channels, as well as companies’ document retention practices, noting that the DOJ will look to the following factors when assessing a company’s corporate compliance program:

- The types of electronic communication channels used by a company and its employees;
- Company policies regarding the use of ephemeral messaging and non-company methods of communication (if permitted), along with employee obligations to preserve such messages;
- Preservation or deletion settings employed by the company, including the basis for using such protocols;
- Training provided to company employees regarding document preservation and obstruction of justice; and
- Company processes to evaluate and manage antitrust risks associated with new manners of electronic messaging that employees are permitted to use.

“TONE AT THE MIDDLE”

The new updates emphasize the importance of the “tone at the middle” – making it clear that companies need to ensure a compliance culture is not only coming from senior leadership but that leadership implements “a culture of compliance at all levels of the organization.” The Guidance looks to how managers at all levels are demonstrating the importance of compliance and setting the tone from the middle.

EMPHASIS ON MORE ROBUST EFFORTS ALL AROUND

The changes go into more detail about the robust compliance infrastructure the government is looking for, including having a board of directors with compliance expertise, appropriate resource allocation for antitrust compliance, and compliance gap analysis and trend monitoring. The Guidance asks:

- Does antitrust training address lessons learned at the company but also companies operating in the same industry?
- Has the company undertaken a gap analysis to determine if particular areas of risk are not sufficiently addressed in its policies, controls, or training?
- Does the board of directors have compliance expertise?
- Have the board of directors and/or external auditors held executive or private sessions with compliance and control functions?
- 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?
- Has the Company evaluated the appropriate level of resources to devote to the compliance function? Have compliance requests for resources ever been denied?
- Is the level of technology devoted to compliance at the company similar to that devoted to other functions?
- Is there a process to identify emerging risks as the company’s business environment changes?

As a best practice, companies should ensure that adequate attention is allocated to its compliance infrastructure, including but not limited to resources, technology, and hiring—and retaining—the right expertise. Incorporating these factors into preexisting compliance programs will help mitigate against antitrust misconduct. Further, DOJ’s inclusion of factors such as how a company’s incentive structure reinforces its commitment to an ethical culture is consistent with DOJ’s increased effort to encourage companies to implement compensation policies that incentivize compliance-driven behavior.

KEY TAKEAWAYS

Companies should take a closer look at their antitrust compliance processes given the updated guidance from the DOJ. In particular, the updated Guidance emphasizes several features that should be in every company's corporate compliance program, including document retention and preservations policies, restrictions on the use of ephemeral messaging and the use of new types of messaging platforms and technologies, including AI, and policies designed to ensure that employees can report potential antitrust misconduct without fear of retaliation or violating an NDA. Often, the best policies are those that are clear and concise. As noted in the updated Guidance, "companies should seek to have clear, simple, and concise rules; to tailor guidelines to the needs of different business units and situations; to present the guidance in ways that make sense from a business perspective; and think about how to achieve maximum reach."

ABOUT KING & SPALDING

Celebrating more than 130 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 1,300 lawyers in 24 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered "Attorney Advertising."

View our [Privacy Notice](#).

Special Matters & Government Investigations Partners

Gary Adamson
New York
+1 212 556 2113
gadamson@kslaw.com

Adam Baker
New York
+1 212 556 2376
abaker@kslaw.com

J.C. Boggs
Washington, DC
+1 202 626 2383
jcboggs@kslaw.com

Christopher C. Burris
Atlanta
+1 404 572 4708
cburris@kslaw.com

Craig Carpenito
New York
+1 212 556 2142
ccarpenito@kslaw.com

Steve Cave
Northern Virginia
+1 703 245 1017
scave@kslaw.com

Michael J. Ciatti
Washington, DC
+1 202 661 7828
mciatti@kslaw.com

Daniel R. Coats
Washington, DC
+1 202 626 2642
dcoats@kslaw.com

Patrick M. Collins
Chicago
+1 312 764 6901
pcollins@kslaw.com

Ander M. Crenshaw
Washington, DC
+1 202 626 8996
acrenshaw@kslaw.com

Sumon Dantiki
Washington, DC
+1 202 626 5591
sdantiki@kslaw.com

Ethan P. Davis
San Francisco
+1 415 318 1228
edavis@kslaw.com

Alan R. Dial
Washington, DC
+1 202 661 7977
adial@kslaw.com

an Donovan
Washington, DC
+1 202 626 7815
ddonovan@kslaw.com

Robert L. Ehrlich, Jr.
Washington, DC
+1 202 626 9710
rehlich@kslaw.com

David Farber
Washington, DC
+1 202 626 2941
dfarber@kslaw.com

Zachary Fardon
Chicago
+1 312 764 6960
zfardon@kslaw.com

Emily Gordy
Washington, DC
+1 202 626 8974
egordy@kslaw.com

Leah B. Grossi
Washington, DC
+1 202 626 5511
lgrossi@kslaw.com

Ehren Halse
San Francisco
+1 415 318 1216
ehalse@kslaw.com

Zachary J. Harmon
Washington, DC
+1 202 626 5594
zharmon@kslaw.com

Ted Hester
Washington, DC
+1 202 626 2901
theater@kslaw.com

Max Hill, K.C.
London
+44 20 7551 2130
mhill@kslaw.com

Amy Schuller Hitchcock
Sacramento/San Francisco
+1 916 321 4819
ahitchcock@kslaw.com

John A. Horn
Atlanta
+1 404 572 2816
jhorn@kslaw.com

Andrew C. Hruska
New York
+1 212 556 2278
ahruska@kslaw.com

Rob Hur
Washington, DC
+1 202 383 8969
rhur@kslaw.com

Mark A. Jensen
Washington, DC
+1 202 626 5526
mjensen@kslaw.com

Dixie L. Johnson
Washington, DC
+1 202 626 8984
djohnson@kslaw.com

William Johnson
New York
+1 212 556 2125
wjohnson@kslaw.com

Barry Kamar
Miami
+1 305 462 6044
bkamar@kslaw.com

Allison F. Kassir
Washington, DC
+1 202 626 5600
akassir@kslaw.com

M. Alexander (Alec) Koch
Washington, DC
+1 202 626 8982
akoch@kslaw.com

Yelena Kotlarsky
New York
+1 212 556 2207
ykotlarsky@kslaw.com

Steve Kupka
Washington, DC
+1 202 626 5518
skupka@kslaw.com

Jade R. Lambert
Chicago
+1 312 764 6902
jlambert@kslaw.com

Jamie Allyson Lang
Los Angeles
+1 213 443 4325
jlang@kslaw.com

Raphael Larson
Washington, DC
+1 202 626 5440
rlarson@kslaw.com

Carmen Lawrence
New York
+1 212 556 2193
clawrence@kslaw.com

Brandt Leibe
Houston
+1 713 751 3235
bleibe@kslaw.com

Aaron W. Lipson
Atlanta
+1 404 572 2447
alipson@kslaw.com

Daniel E. Lungren
Washington, DC
+1 202 626 9120
dlungren@kslaw.com

William S. McClintock
Washington, DC
+1 202 626 2922
wmcclintock@kslaw.com

Amelia Medina
Atlanta
+1 404 572 2747
amedina@kslaw.com

Kendrick B. Meek
Washington, DC
+212 626 5613
kmeek@kslaw.com

Andrew Michaelson
New York
+212 790 5358
amichaelson@kslaw.com

Jim C. Miller III
Washington, DC
+1 202 626 5580
jmiller@kslaw.com

Patrick Montgomery
Washington, DC
+1 202 626 5444
pmontgomery@kslaw.com

Paul B. Murphy
Atlanta/Washington, DC
+1 404 572 4730
pbmurphy@kslaw.com

Grant W. Nichols
Austin/Washington, DC
+1 512 457 2006
gnichols@kslaw.com

Alicia O'Brien
Washington, DC
+1 202 626 5548
aobrien@kslaw.com

Patrick Otlewski
Chicago
+1 312 764 6908
potlewski@kslaw.com

Michael R. Pauzé
Washington, DC
+1 202 626 3732
mpauze@kslaw.com

Michael A. Plotnick
Washington, DC
+1 202 626 3736
mplotnick@kslaw.com

Olivia Radin
New York
+1 212 556 2138
oradin@kslaw.com

John C. Richter
Washington, DC
+1 202 626 5617
jrichter@kslaw.com

Rod J. Rosenstein
Washington, DC
+1 202 626 9220
rrosenstein@kslaw.com

Daniel C. Sale
Washington, DC
+1 202 626 2900
dsale@kslaw.com

Greg Scott
Sacramento/San Francisco
+1 916 321 4818
mscott@kslaw.com

Richard Sharpe
Singapore
+65 6303 6079
rsharpe@kslaw.com

Kyle Sheahen
New York
+1 212 556 2234
ksheahen@kslaw.com

Michael Shepard
San Francisco
+1 415 318 1221
mshepard@kslaw.com

Thomas Spulak
Miami
+1 305 462 6023
tspulak@kslaw.com

Aaron Stephens
London
+44 20 7551 2179
astephens@kslaw.com

Cliff Stricklin
Denver
+1 720 535 2327
cstricklin@kslaw.com

Jean Tamalet
Paris
+33 1 7300 3987
jtamalet@kslaw.com

Courtney D. Trombly
Washington, DC
+1 202 626 2935
ctrombly@kslaw.com

Rick Vacura
Northern Virginia
+1 703 245 1018
rvacura@kslaw.com

Anthony A. Williams
Washington, DC
+1 202 626 3730
awilliams@kslaw.com

David K. Willingham
Los Angeles
+1 213 218 4005
dwillingham@kslaw.com

David Wulfert
Washington, DC
+1 202 626 5570
dwulfert@kslaw.com

Sally Q. Yates
Atlanta/Washington, DC
+1 404 572 2723
syates@kslaw.com