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July 23, 2019

"A New Model for Incentivizing Antitrust Compliance Programs": Changes to DOJ Antitrust Enforcement

Advisory

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I. Overview

On July 11, 2019, Makan Delrahim, Assistant Attorney General for the Antitrust Division (the Division) of the DOJ, announced the Division's new approach to incentivizing and evaluating corporate antitrust compliance programs. This involves three major components: (1) crediting compliance programs at the charging stage; (2) clarifying how the Division evaluates the effectiveness of compliance programs at the sentencing stage; and (3) publishing a guidance document, "Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations" (the Guidance Document or Guidance), which explains how prosecutors will actually evaluate these compliance programs at both the charging and sentencing stages. The new policy will allow companies with "effective" antitrust compliance programs, as detailed in the Guidance Document, that have not obtained leniency under the Division's existing Corporate Leniency Policy to obtain deferred prosecution agreements.

It is not evident just how much the new policy will affect enforcement. During a panel that followed the announcement —which included Andrew Finch (Principal Deputy AAG, Antitrust Division, DOJ) and Richard Powers (Deputy AAG for Criminal Enforcement, Antitrust Division, DOJ)—Finch and Powers reiterated that the existing leniency program has been the Division's most important tool for criminal antitrust enforcement for twenty-five years, and it is not expected to change in light of this new approach. Assistant Attorney General Delrahim emphasized the same point, noting that non-prosecution agreements continue to be disfavored for all except leniency applicants.[1] Moreover, the current enforcement scheme already encourages companies to provide early and substantial cooperation and to plead guilty to criminal charges in order to receive reductions in penalties; the Guidance Document explains that early detection of misconduct and prompt reporting of violations is essential to an "effective" compliance program. Therefore, the most likely beneficiaries of this policy change are corporations that may already have been early cooperators, i.e., those that self-report misconduct, but are not the "first in the door." As noted by Delrahim, Finch and Powers, time will be the ultimate judge of the effectiveness of the program in terms of criminal antitrust enforcement.

Delrahim emphasized repeatedly that the primary goal of the policy is deterrence, focusing on the maxim that "an ounce of prevention is worth a pound of cure." Delrahim noted that the current enforcement scheme has focused on identifying and correcting past misconduct,[2] but the new policy recognizes that effective compliance programs can prevent harm in the first place. The new approach recognizes the efforts of companies that invest significantly in robust compliance programs, and it corrects the "outdated" position that the very fact of misconduct means that a compliance program failed. It also sends a strong signal to companies to undertake efforts to evaluate and improve their compliance programs.

A. Crediting Compliance Programs at the Charging Stage

Notably, the Division has changed its approach to crediting compliance programs at the charging stage; in revisions of Sections 9-28.400 and 9-28.800 of the Justice Manual, prosecutors must now consider "the adequacy and effectiveness of compliance at the time of the offense and at the time of the charging decision." Described in the Justice Manual as a "middle ground between declining prosecution and obtaining the conviction of a corporation," the new policy allows for a deferred prosecution agreement (DPA)—a voluntary alternative to adjudication whereby the government agrees not to

prosecute in exchange for a defendant's agreement to provide full cooperation in an investigation — when relevant factors weigh in favor of a more lenient approach. When the government enters into a DPA, it retains the right to file charges if the company violates the conditions of the agreement. The Division will continue to disfavor non-prosecution agreements — an agreement by the government not to file charges against a company — for companies that do not receive leniency.

Delrahim, Finch, and Powers emphasized that the evaluation of a compliance program is a case-by-case and highly fact-specific exercise. The Guidance Document notes that there are no "formulaic requirements," but that prosecutors should consider three fundamental questions in their evaluation: (1) "Is the corporation's compliance program well-designed?"; (2) "Is the program being applied earnestly and in good faith?"; and (3) "Does the corporation's compliance program work?"

These preliminary questions act as guideposts for the overall inquiry. The Guidance Document explains that the keys for successful compliance programs are "efficiency, leadership, training, education, information, and due diligence," and it enumerates nine factors that prosecutors should consider in their evaluation:

(1) Design & Comprehensiveness

Division prosecutors will consider the "design, format, and comprehensiveness" of a company's compliance program; most important to this analysis are the adequacy of the program's integration into the company's business and the accessibility of antitrust compliance resources to employees.

(2) Culture of Compliance

In determining whether a company promotes a "culture of compliance," prosecutors will examine the "extent to which corporate management has clearly articulated — and conducted themselves in accordance with—the company's commitment to good corporate citizenship." Under this factor, the Division will consider the role of senior leadership in promulgating the compliance program, both through policies and individual behavior, and the extent to which senior leadership is involved in antitrust misconduct.

(3) Responsibility for Antitrust Compliance

An "effective" compliance program, according to the Guidance, requires those with "operational responsibility for the program" to have "sufficient autonomy, authority, and seniority within the company's governance structure, as well as adequate resources for training, monitoring, auditing, and periodic evaluation of the program." In general, this factor aims to determine whether appropriate personnel and resources are allocated to compliance. Among other questions, prosecutors will ask whether the company has dedicated personnel responsible for the program overall, as well as who is tasked with day-to-day operations; whether and how often employees with oversight of the program meet with the Board, audit committee, or other governing body; and whether the company allocates sufficient resources to educating employees on antitrust law.

(4) Risk Assessment

An effective compliance program "should be appropriately tailored to account for antitrust risk" and is "designed to detect the particular types of misconduct most likely to occur in a particular corporation's line of business." Companies must ensure their compliance programs are "consistent with industry best practice," use information and metrics to help detect antitrust violations, and update their programs periodically in light of developments in the industry.

(5) Training and Communication

Prosecutors will examine whether the compliance program includes such training and communication of policies that employees "understand their antitrust compliance obligations." DOJ will ask, among other questions, how the company communicates antitrust policies and procedures to employees, whether antitrust policies are included in a company Code of Conduct or other materials, and how the company ensures that employees understand and follow compliance policies. Other questions key to this analysis include which employees go through training, how often training occurs, and whether training is tailored to address different potential antitrust concerns based on the employee's position (i.e., do sales people receive training on communicating with competitors and price-fixing?).

(6) Periodic Review, Monitoring & Auditing

According to the Guidance Document, a critical part of an antitrust compliance program is the "effort to review the compliance program and ensure that it continues to address the company's antitrust risks." The Guidance specifies that an effective compliance program includes "monitoring and auditing functions to ensure that employees follow the compliance program." The periodic assessment of the company's program and business practices allows the company to determine "whether it is moving closer to its antitrust compliance objectives," as well as to communicate that there is "continued, clear and unambiguous commitment to antitrust compliance from the top down." Key inquiries here relate to the company's monitoring and auditing mechanisms to detect antitrust violations, the company's internal evaluation of the program, and the company's process for designing and implementing revisions to its antitrust compliance policies.

(7) Reporting Mechanisms

The Guidance Document explains that an effective compliance program includes "reporting mechanisms that employees can use to report potential antitrust violations anonymously or confidentially and without fear of retaliation." The company should ensure there are systems in place for employees to freely report or seek guidance on potentially illegal conduct, and that the company periodically analyzes reports or investigation findings for patterns or red flags.

(8) Compliance Incentives & Discipline

An effective compliance program must also include "systems of incentives and discipline [] that ensure the compliance program is well-integrated into the company's operations and workforce." For this factor, it is important that the company consider the implications of antitrust compliance on employee incentives, compensation structure, rewards, and disciplinary measures. Prosecutors will ask whether and how employees who commit antitrust violations are disciplined, and they will examine the structures in place for implementing those disciplinary measures, including treatment of culpable executives.

(9) Remediation and the Role of the Compliance Program in the Discovery of the Violation

Remedial efforts are "relevant to whether the antitrust compliance program was effective at the time of the antitrust violation" as well as at the time of a charging decision or sentencing recommendation. Prosecutors must consider the remedial actions taken by the company, including "revisions to corporate compliance programs in light of lessons learned" and what modifications the company has implemented to "help prevent similar violations from occurring." Importantly, the Guidance Document notes that "early detection and self-policing are hallmarks of an effective compliance program." Although these hallmarks will frequently "enable a company to be the first applicant for leniency," the new policy allows prosecutors to consider that—even where the company has not secured leniency—timely remediation and self-reporting are strong indicators that the compliance program was working effectively even at the time of the violation. Other key inquiries for this factor include whether the company has conducted an analysis to identify weak points in the program that allowed a violation to occur or continue undetected whether the company has acted to correct those points, and how long it took the company to report a violation.

In previewing these factors, Delrahim reiterated that they are not intended to function as a checklist, as the analysis is fact-dependent. Delrahim also explained that good corporate citizens (1) implement robust and effective compliance programs, and when misconduct occurs, they (2) promptly self-report, (3) cooperate in the Division's investigation, and (4) take remedial actions. He also emphasized that the new approach should not be mistaken for an "automatic pass" for corporate misconduct. Instead, where these four hallmarks of good corporate citizenship are present, the Division should reward the company and provide incentives for companies to engage in ethical behavior.

B. Evaluating the Effectiveness of Compliance Programs at the Sentencing Stage

The Sentencing Guidelines already provide a three point reduction in culpability score for effective compliance programs. DOJ has previously articulated the view that an effective compliance program generally is one that allows a company to detect misconduct and seek leniency, meaning that the three point reduction is typically not available to companies that are being sentenced.[3] The Guidance Document also notes the limitations on the three point reduction, explaining that the Sentencing Guidelines are clear that a sentencing reduction does not apply in cases in which there has been an "unreasonable delay in reporting the illegal conduct to the government." Moreover, the Sentencing Guidelines explain there is a rebuttable presumption that a compliance program is not effective where high-level personnel, or personnel with "substantial authority," have participated in or condoned the offense, or where they have acted with willful ignorance. The Guidance Document states that a "key factor" in determining whether this presumption can be rebutted is "whether and when the company applied for a leniency marker." An effective compliance program may also be relevant to determining whether to recommend a fine within the Guidelines range or below it. Additionally, the Division will consider

whether a company has implemented an effective compliance program, even after the violation has occurred, in making probation recommendations. Although the three point reduction at sentencing pre-dates the Guidance Document, the Division's new policy towards corporate compliance signals an intention to increase the focus on compliance at sentencing and opens the door to crediting compliance programs previously presumed ineffective.

II. Effect of the New Policy

As has always been the case, an effective compliance program may lessen or avoid the time and expense of defending against antitrust litigation and investigations. Although it is not yet clear how the policy will affect enforcement, it is clear that DOJ has increased its focus on incentivizing the development of strong compliance programs, reflected by the decision to assess and credit these programs even where the program has not enabled a company to seek leniency.

This new policy is a rejection of the previous view that a compliance program was ineffective because it did not prevent a crime. The Division's new approach to crediting corporate compliance programs lends credibility to the notion that a "rogue employee" may have acted alone and in violation of an otherwise effective compliance policy. It appears that a compliance policy violated under these circumstances could still be credited as "effective." However, detection and reporting continues to be a critical consideration in the effectiveness of a compliance program, and it is unclear whether even the most sophisticated compliance program that fails to detect a violation could qualify as "effective," especially in the absence of self-disclosure.

Therefore, in-house counsel should read the Guidance Document with a critical eye and consult other internal officers, executives, and employees, as well as outside counsel, to implement any necessary changes to strengthen compliance programs.

Several themes emerge from a review of the Guidance Document that in-house counsel and personnel responsible for implementing and overseeing compliance programs should note:

- The antitrust compliance program should be memorialized in writing;
- The program should include tailored training so that employees receive general antitrust information and guidance on specific issues and potential conduct they may encounter in their specific capacity with the company;
- The program should be overseen by an employee/(s) who is adequately trained herself, who has sufficient independence to act, and who regularly reports issues and potential violations to senior leadership, as well as monitors data and information to improve the program;
- Employees should feel comfortable reporting possible violations without fear of retaliation, and the company should have mechanisms in place for investigating and responding to those reports, including clear incentives to comply and disciplinary measures for violators; and
- The program must live off the page: the company should perform periodic reviews of the program, including unannounced audits and other monitoring functions, to be sure it is working effectively to detect potential antitrust violations and to allow the company to report promptly any misconduct to DOJ.

III. Key Takeaways

- DOJ's new guidance justifies an increased focus on compliance generally, as well as more air-time for antitrust compliance in particular. This includes increased emphasis on implementing more comprehensive programs, whose scope exceed obvious violations.
- This policy change provides incentives to re-evaluate compliance programs to determine how closely they adhere to the factors discussed in the Guidance Document, and encourages active promotion of a corporate culture where compliance is treated seriously.
- While the new policy is intended in large part to curtail antitrust violations by incentivizing renewed focus on compliance, it is also intended to credit compliance programs that fall short of preventing violations but succeed in "promptly" discovering, reporting, and remediating those violations.
- The Guidance Document provides valuable insight into the factors the Division will weigh most heavily in determining whether a compliance program is effective, but this is ultimately a subjective decision that is not constrained by the same binary choice as the Leniency Program.

Arnold & Porter's Antitrust/Competition practice is recognized worldwide for its breadth, depth, and excellence. Firm attorneys—including former DOJ and FTC senior officials—can assist in developing and implementing effective compliance programs.

[1] Delrahim explained that DOJ intends to endorse the reauthorization of ACPERA, set to expire in 2020, as it is written currently, which limits de-trebling and elimination of joint and several liability to the leniency program

[2] Although this new policy makes clear that DOJ will examine compliance programs closely at the charging and sentencing stages, DOJ has considered compliance efforts in the past. For example, in December 2011, DOJ announced that it would not prosecute GE Funding Capital Market Services (GE Funding) for its role in anticompetitive activity in the municipal bond investments market; DOJ noted that it agreed not to prosecute GE Funding because GE Funding had admitted its conduct, cooperated with DOJ, made monetary and non-monetary commitments to federal and state enforcers, and made "remedial efforts to address the anticompetitive conduct." While this example illustrates compliance efforts made *after* the anticompetitive conduct occurred, the new policy will also credit compliance efforts in place at the time of a violation.

[3] Brent Snyder, Deputy Assistant Attorney General, Remarks at Sixth Annual Chicago Forum on International Antitrust (June 8, 2015), ("A compliance program that fails to deter or detect cartel behavior cannot qualify for that credit.").