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July 31, 2019

Compliance Is King: DOJ Announces Policy to Incentivize Corporate Antitrust Compliance Programs



The [U.S. Department of Justice \(DOJ\) announced](#) a new policy on July 11, 2019, designed to incentivize the development and implementation of corporate antitrust compliance programs.

In [remarks made at the New York University School of Law Program on Corporate Compliance](#), Assistant Attorney General Makan Delrahim announced that for the first time, the DOJ will formally consider corporate antitrust compliance programs at both the charging and sentencing stages of criminal antitrust prosecutions. AAG Delrahim stated that, "[t]he Antitrust Division is committed to rewarding corporate efforts to invest in and instill a culture of compliance." Although AAG Delrahim pointed to the Antitrust Division's leniency program as an example of the type of consideration the Division has afforded to companies that aggressively undertake antitrust compliance efforts, the July 11 announcement represents a meaningful departure from the DOJ's previous policy that "credit should not be given at the charging stage for a compliance program."

The DOJ also circulated a [policy document](#) to guide Antitrust Division prosecutors at both the charging stage of an investigation and at the sentencing stage of a prosecution.

### **Charging Stage**

When deciding whether and to what extent to bring criminal charges against a corporation, prosecutors are now instructed to ask three preliminary questions:

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?; and

### 3. to what extent was a company's senior management involved in the violation?

Additionally, the DOJ's guidance document states that when evaluating whether to give credit for a corporate compliance program, Division prosecutors must look at whether the corporate compliance program is "adequately designed for maximum effectiveness." The DOJ provided a list of nine factors that will be considered when evaluating the effectiveness of an antitrust compliance program:

1. the design and comprehensiveness of the program;
2. the culture of compliance within the company;
3. responsibility for, and resources dedicated to, antitrust compliance;
4. antitrust risk assessment techniques;
5. compliance training and communication to employees;
6. monitoring and auditing techniques, including continued review, evaluation and revision of the antitrust compliance program;
7. reporting mechanisms;
8. compliance incentives and discipline; and
9. remediation methods.

To further guide prosecutors, the Division published questions keyed to each of the above nine factors. Although the revised guidance makes clear that the foregoing factors are not a complete formula for establishing an effective compliance program, they nevertheless serve as a helpful roadmap of the types of questions corporations should consider when implementing and administering an antitrust compliance program.

## **Sentencing Stage**

In addition to potentially affecting charging decisions, AAG Delrahim explained that a corporate antitrust compliance program could be relevant at the sentencing stage of a prosecution in at least three different ways. First, an "effective" compliance program could provide for a three-point reduction in a corporate defendant's culpability score when calculating a fine range under the Sentencing Guidelines. Second, an effective compliance program could be relevant to determining the appropriate corporate fine and—in exceptional circumstances—it could also lead to a recommended fine below the guideline range. Finally, AAG Delrahim noted that the existence of an effective compliance program will be relevant to the Division's probation recommendation at sentencing.

## **Takeaways**

It is unclear how this new policy will work in practice. Before, the DOJ did not credit a defendant's compliance program when the corporation agreed to plead guilty because the violation was proof that the program did not work. Now, the DOJ is acknowledging that no compliance program is perfect, and that credit should be given where it is due. On the other hand, the effectiveness of the program (e.g., did the antitrust compliance program detect and facilitate prompt reporting of the violation?) will apparently still be a key factor in the DOJ's analysis.

Given these developments, it is more important than ever that corporations take a close look at their antitrust compliance program to ensure that it meets each of the factors of an effective compliance program identified in the DOJ's latest guidance.

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