SULLIVAN & CROMWELL LLP

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DOJ Issues Guidance on the Evaluation of Antitrust Compliance Programs

Antitrust Division Reverses Longstanding Policy of Refusing to Consider Compliance Programs in Charging Decisions and Issues Detailed Guidance for Assessing Effectiveness of Antitrust Compliance Programs

SUMMARY

On July 11, 2019, Assistant Attorney General Makan Delrahim announced that the Antitrust Division of the U.S. Department of Justice ("DOJ") is reversing its longstanding policy of insisting on guilty pleas for companies involved in criminal violations of the antitrust laws that do not otherwise qualify for leniency under the Division's Corporate Leniency Policy.[1] This shift opens a new path to a potential deferred prosecution agreement ("DPA") for companies with "effective" antitrust compliance programs, measured under new guidance (the "Guidance") issued by the Division for evaluating such programs.[2] The Guidance provides a detailed set of factors that Antitrust Division attorneys are to consider in assessing, among other considerations, companies' pre-existing antitrust compliance programs in making charging decisions. The Guidance also clarifies the Division's policy on evaluating the effectiveness of compliance programs in making sentencing recommendations. Companies should review the Guidance carefully to understand the Antitrust Division's expectations regarding antitrust compliance.

BACKGROUND

For more than 25 years, the Antitrust Division has relied on its Corporate Leniency Policy to incentivize corporations to establish effective compliance programs. Pursuant to that policy, leniency is granted to the first corporation that self-reports an antitrust offense (and meets the Corporate Leniency Policy's other requirements). The benefits of leniency include immunity from criminal charges and penalties,

non-prosecution protections for certain cooperating employees, and reduced damages and other benefits in related civil actions under the Antitrust Criminal Penalty Enhancement & Reform Act.

With respect to corporations that do not win the "race for leniency" but self-report early, the Antitrust Division has historically insisted upon a guilty plea,[3] regardless of the effectiveness of the corporation's compliance program.[4] Specifically, the DOJ's Justice Manual stated: "[T]he Antitrust Division has established a firm policy, understood in the business community, that credit should not be given at the charging stage for a compliance program and that amnesty is available only to the first corporation to make full disclosure to the government."[5] It further explained that "the nature of some crimes, e.g., antitrust violations, may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program."[6] Under this prior policy, non-prosecution agreements ("NPAs") and DPAs were typically unavailable to such corporations, and their only opportunity to receive any credit for their compliance programs, self-reporting, cooperation, or remediation was at the sentencing stage.

DISCUSSION

Pursuant to new Antitrust Division policy announced on July 11, 2019, Antitrust Division prosecutors will now consider the corporation's compliance program at the charging stage in criminal antitrust matters. The DOJ has removed from the Justice Manual the language reflecting the Antitrust Division's former policy. According to Delrahim, this shift in approach recognizes "the progress that has been made over the years in antitrust awareness and increased compliance" and a desire to "encourage companies to further invest in compliance efforts."[7] The change in policy creates the potential for companies that have robust compliance programs, but do not win the "race for leniency," to obtain a DPA (although not an NPA) instead of a guilty plea.

In the charging phase, Antitrust Division prosecutors must consider the Principles of Federal Prosecution of Business Organizations (collectively, the "Principles") that apply to all federal prosecutors considering criminal charges against companies. The Principles set forth ten factors, including "the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of the charging decision" as well as other factors relating to "good corporate citizenship," such as "timely and voluntary disclosure of wrongdoing," "willingness to cooperate," and "remedial actions."[8]

To assist its attorneys in evaluating compliance programs for this purpose, and to respond to a "desire for greater clarity and transparency on the considerations weighed by the Antitrust Division when evaluating compliance programs," the Antitrust Division published the Guidance on July 11, 2019.[9]

The Guidance has two sections. The first section sets forth a comprehensive set of factors that prosecutors are to consider in evaluating an antitrust compliance program at the charging stage. The second section clarifies the Antitrust Division's policy regarding how prosecutors should evaluate the effectiveness of a compliance program at the sentencing stage.

A. EVALUATING AN ANTITRUST COMPLIANCE PROGRAM AT THE CHARGING STAGE

Preliminary Questions. The Guidance begins with preliminary questions intended to "focus the analysis":

- "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?"

Elements of an Effective Compliance Program. The Guidance explains that there is no "checklist or formula" for an effective antitrust compliance program but sets forth nine factors to consider. For each factor, the Guidance lists questions that the prosecutors should consider.

- ***"Design and Comprehensiveness."*** The Guidance states that "key considerations" in evaluating the design and comprehensiveness of a compliance program include its "integration" into the company's business and the accessibility of antitrust compliance resources to employees. The Guidance then provides a list of questions focusing on how the program is implemented, and to whom it is communicated.
- ***"Culture of Compliance."*** The Guidance states that prosecutors should examine the extent to which corporate management "has clearly articulated – and conducted themselves in accordance with – the company's commitment to good corporate citizenship." It then provides a list of questions relating to senior leaders' conduct, their role in promoting compliance, and the extent of their involvement (if any) in the antitrust violations at issue.
- ***"Responsibility for the Compliance Program."*** The Guidance states that for an antitrust compliance program to be "effective," those with operational responsibility for the program must have sufficient autonomy, authority, and seniority, and there must be adequate resources for training, monitoring, auditing, and periodic evaluation of the program. The Guidance lists questions relating to the organization of the compliance function; how it compares with other functions in the company in terms of stature, compensation, seniority, resources, etc.; antitrust experience of compliance personnel; and resources dedicated to education and training.
- ***"Risk Assessment."*** The Guidance states that a "well-designed" compliance program is tailored to account for antitrust risk where it might arise in light of the corporation's lines of business, and lists questions relating to that subject. Additional questions focus on antitrust risk detection methods implemented by the company, and how the company manages new antitrust risks associated with any changes to the company's business. The questions highlight the need for the company to provide specialized antitrust compliance training for human resources personnel and executives responsible for overseeing recruitment and hiring, building on prior Antitrust Division guidance in the area of human resources.[10]
- ***"Training and Communication."*** The Guidance directs prosecutors to examine the company's antitrust policies and training and lists questions that focus on the extent to which the company's policies have been disseminated, and whether the manner of communication "promotes and ensures employees' understanding." Prosecutors are directed to consider who receives antitrust-specific training, as well as the timing, frequency, form, and content of that training (such as whether it is tailored to the employees' duties, whether it uses examples that could arise in the relevant business, and whether it addresses lessons learned from prior incidents).
- ***"Periodic Review, Monitoring and Auditing."*** The Guidance stresses the importance of periodically assessing antitrust compliance. It directs prosecutors to consider how the company evaluates the effectiveness of its program and how it audits/updates the program.
- ***"Reporting."*** The Guidance states that reporting mechanisms should allow employees to report violations anonymously or confidentially without fear of retaliation. It then lists questions relating to how

the reporting mechanisms function, the incentives or disincentives for reporting antitrust violations, and the extent to which the company periodically analyzes its business for patterns or other red flags of an antitrust violation.

- ***"Incentives and Discipline."*** The Guidance instructs prosecutors to consider the extent to which the company incentivizes antitrust compliance. It lists questions relating to the company's compensation structure and disciplinary policies. Prosecutors are directed to consider past examples of discipline, including for senior executives, for antitrust or other compliance failures.
- ***"Remediation and Role of the Compliance Program in the Discovery of the Violation."*** The Guidance provides that a company's remedial efforts are relevant to the effectiveness of the compliance program both at the time of the antitrust violation and at the time of the charging decision or sentencing recommendation. The Guidance lists questions relating to how the antitrust violation at issue was identified, how the company has since revised its compliance program, whether outside counsel was involved in assisting the company in that regard, and how the changes have been conveyed to employees.

B. SENTENCING CONSIDERATIONS

The second section clarifies the Antitrust Division's guidance relating to evaluating a company's compliance program when making sentencing recommendations. At the sentencing phase, a corporation may receive credit for its compliance program in three ways. First, U.S. Sentencing Guidelines § 8C2.5(f) provides for a three-point reduction in a corporate defendant's culpability score if the company had an effective compliance program (absent unreasonable delay in reporting the offense to appropriate governmental authorities). Second, the existence and effectiveness of a compliance program may be relevant to determining whether a company should be sentenced to probation.[11] Third, the effectiveness of a compliance program, including post-violation remedial efforts, may be relevant to determining the appropriate corporate fine to recommend within the guideline range, or whether to recommend a fine below that range.[12]

Guidelines Credit for an Effective Compliance Program. In evaluating whether a company qualifies for a three-point reduction in its culpability score for having an "effective" compliance program, the Sentencing Guidelines establish a rebuttable presumption that a compliance program is not "effective" when certain "high-level personnel" or "substantial authority personnel" were involved in the violation. The Guidance directs prosecutors to assess the application of the rebuttable presumption on a case-by-case basis, according to the factor set forth in the Sentencing Guidelines, and adds that a "key factor" should be whether and when the company applied for a leniency marker under the Corporate Leniency Policy.

Compliance Considerations Relevant to Recommendation Probation. The Guidance states that the Antitrust Division may recommend probation in cases in which the company has not established an antitrust compliance program that meets the requirements of an effective compliance program. It further states that the Division "is likely to seek probation" if it will recommend that the company receive a "Penalty Plus" fine enhancement for the recurrence of antitrust violations.

Statutory Fine Reduction for Recurrence Prevention Efforts. The Guidance states that Antitrust Division prosecutors may recommend a fine reduction pursuant to 18 U.S.C.§ 3572(a)(8) in the case of "extraordinary post-violation compliance efforts." Relevant considerations include whether there was a "dedicated effort" by senior management to change company culture and efforts to prevent the recurrence of violations, such as improvements to the compliance program and disciplinary measures taken against individuals involved in the violation.

IMPLICATIONS

Assistant Attorney General Delrahim's speech, and the new policies he announced, highlight the Antitrust Division's focus on the need for companies to establish and maintain effective antitrust compliance programs. Although an effective compliance program should "not be misconstrued as an automatic pass for corporate misconduct,"[13] it could mean the difference between a DPA and a guilty plea under the new regime.

While this shift in approach creates a new path to a DPA for certain corporations, it does not obviate the importance of the Corporate Leniency Policy. Leniency remains the only way to achieve immunity.[14] But the best way to maximize the chances of winning the "race to leniency"—and the prospect of avoiding prosecution if you do not—is to ensure that an effective compliance program is in place that encourages and facilitates prompt reporting of misconduct. The Guidance should assist companies in achieving that goal.

Companies should carefully review the Guidance, particularly with respect to the new detail provided by the DOJ regarding its areas of interest in assessing compliance programs, and should consider the Guidance a useful resource for understanding the Antitrust Division's expectations for both the design and implementation of antitrust compliance programs. Companies would also be well advised to consult with counsel experienced in these matters to assist with assessing and enhancing their compliance programs.

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ENDNOTES

1 Makan Delrahim, Asst. Att'y Gen., U.S. Dep't Justice, Antitrust Div., Remarks at New York University School of Law Program on Corporate Compliance and Enforcement (July 11, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0.

2 U.S. Dep't of Justice, Antitrust Division, "Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations" (July 2019), https://www.justice.gov/atr/page/file/1182001/download.

3 There have been instances in which the Antitrust Division has entered into a DPA with a corporation, but they are exceedingly rare.

4 Delrahim Remarks, *supra*.

5 Justice Manual § 9-28.400 cmt.

6 Justice Manual § 9-28.800.

7 Delrahim Remarks, *supra*.

8 Justice Manual § 9-28.300.

9 Delrahim Remarks, *supra*.

10 U.S. Dep't Justice & Fed. Trade Comm'n, "Antitrust Guidance for Human Resource Professionals" (Oct. 2016), https://www.justice.gov/atr/file/903511/download.

11 U.S. Sentencing Guidelines § 8D1.1.

12 U.S. Sentencing Guidelines § 8C2.8; 18 U.S.C. § 3572.

13 Delrahim Remarks, *supra*.

14 Delrahim Remarks, *supra*.

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