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ANTITRUST TRADE AND PRACTICE

Expert Analysis

The DOJ's New Approach to Robust Corporate Compliance Programs

On July 11, 2019, Assistant Attorney General Makan Delrahim announced during a speech at NYU Law School that the Antitrust Division of the Department of Justice has revised its compliance program to "ensure we have the right framework for maximizing deterrence and detection." U.S. Dept. of Justice, Office of Public Affairs, *Assistant Attorney General Makan Delrahim Delivers Remarks at the New York University School of Law Program on Corporate Compliance and Enforcement, Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs* (July 11, 2019) (hereinafter Delrahim, *Wind of Change*). In light of the way that corporate compliance programs have evolved, Delrahim explained that "the Antitrust Division will: (1) change its approach to crediting compliance at the charging stage; (2) clarify its approach to evaluating the effectiveness of compliance programs at the sentencing stage; and (3) for the first time, make public a guidance document for the evaluation of compliance programs in criminal antitrust investigations." Id.

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Background

The long-standing policy of the Antitrust Division, as reflected in the Justice Manual, was that "'credit should not be given at the charging stage for a compliance program.'" Id. In other words, while a company's compliance program would ideally be designed to prevent illegal activity from occurring in the first place, or at least hinder the activity from continuing, the existence of a compliance program would not diminish the charges brought against a company believed to have broken the law. As a result, the only way to obtain leniency from the Antitrust Division—i.e., "not charging such a firm criminally for the activity being reported," U.S. Dept. of Justice, *Corporate Leniency Policy* 1 (Aug. 10, 1993)—was to be "the first one to come forward and qualify for leniency with respect to the illegal activity being reported." Id. at 2. AAG Delrahim explained that compliance programs were advertised as "the greatest chance of winning the race for leniency." Delrahim, *Wind of Change*. He explained that the "all-or-nothing philosophy was born of [the Antitrust Division's] efforts to highlight the value of winning the race for leniency at a time when the modern leniency program was establishing itself as the Division's most important investigative tool." Id. AAG Delrahim offered further support for the leniency program in a speech in April, observing that "despite some recent eulogies over the purported death of leniency, the division's leniency program is still alive and well." U.S. Dept. of Justice, Office of Public Affairs, *Assistant Attorney General Makan Delrahim Delivers Opening Remarks at Roundtable Discussing the Antitrust Criminal Penalty Enhancement & Reform Act* (April 11, 2019).

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AAG Delrahim observed that "the Antitrust Division's approach largely has remained unchanged" since the leniency program was first announced nearly 26 years ago. Delrahim, *Wind of Change*. The Antitrust

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Division, according to AAG Delrahim, "recognize[s] the progress that has been made over the years in antitrust awareness and increased compliance and want[s] to encourage companies to further invest in compliance efforts." Id. In recognition of this progress, the Antitrust Division has been increasingly interested in discussing the relationship between corporate compliance programs and criminal antitrust enforcement. In April 2018, the Antitrust Division held a public roundtable discussion "to explore the issue of corporate antitrust compliance and its implications for criminal antitrust enforcement policy." Press Release, U.S. Dept. of Justice, Office of Public Affairs, *Department of Justice to Hold Roundtable on Criminal Antitrust Compliance* (March 12, 2018).

Other Justice Department officials, particularly Former Deputy Attorney General Rod Rosenstein, have publicly discussed the value of these programs in recent years. In March of this year, Rosenstein foreshadowed this future policy when he advised that "the fact that some misconduct occurs shows that a program was not foolproof, but that does not necessarily mean that it was worthless. We can make objective assessments about whether programs were implemented in good faith." U.S. Dept. of Justice, Office of Public Affairs, *Deputy Attorney General Rod J. Rosenstein Delivers Keynote Address on FCPA Enforcement Developments* (March 7, 2019) (hereinafter Rosenstein, *Keynote Address*).

The New Policy

Under the Division's new policy, credit for a compliance program may now be given at the charging stage. AAG Delrahim explained that "when deciding how to resolve criminal charges against a corporation, Division prosecutors must consider the Division's Corporate Leniency Policy, the Principles of Federal Prosecution and the Principles of Federal Prosecutions of Business Organizations, 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.'" Delrahim, *Wind of Change*. Because of the fact specific nature of these inquiries, the Justice Manual states that there are "no formulaic requirements regarding corporate compliance programs." U.S. Dept. of Justice, *Justice Manual* §9-28.800 (July 2019). Instead, the Justice Manual states there are three "fundamental questions" that prosecutors should ask:

> 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?
>
> Id.

In addition to the revised policy, the Antitrust Division released a "guidance document" intended to "assist Division prosecutors in their evaluation of compliance programs at both the charging and sentencing stage of investigations, and to provide compliance officers and the public greater transparency of the Division's compliance analysis." Press Release, U.S. Dept. of Justice, Office of Public Affairs, *Antitrust Division Announces New Policy to Incentivize Corporate Compliance* (July 11, 2019).

The guidance instructs Division prosecutors to consider three different preliminary questions to help "focus the analysis…on the factors most relevant to the specific circumstances under review":

> 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?

U.S. Dept. of Justice, Antitrust Division, *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations* 3 (July 2019).

The guidance document also includes relevant considerations for 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.
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> Id. at 3-4.

For example, with respect to the comprehensiveness of the compliance program, the Division advises that "key considerations are the adequacy of the program's integration into the company's business and the accessibility of antitrust compliance resources to employees and agents." Id. at 4. Moreover, with respect to the "culture of compliance," Division prosecutors should consider, among other things, "[w]hat is the company's senior leadership doing to convey the importance of antitrust compliance to company employees?" and "[h]ow have senior leaders, through their words and actions, encouraged (or discouraged) antitrust compliance?" Id. at 5.

The guidance document also provides clarification on how "Division prosecutors should evaluate whether

to recommend a sentencing reduction based on a company's effective antitrust compliance program." Id. at 14. In his speech, AAG Delrahim discussed the role that compliance could play in a corporation's sentencing: (1) "the Sentencing Guidelines provide for a three-point reduction in a corporate defendant's culpability score if the company has an 'effective' compliance program under the Guidelines;" (2) "a compliance program may be relevant to determining the appropriate corporate fine to recommend within the Guidelines range, or in extraordinary circumstances, whether to recommend a fine below the Guidelines range;" and (3) "the existence and effectiveness of a compliance program is relevant to the Division's probation recommendation." Delrahim, *Wind of Change*. In sum, the new policy and its associated guidance are intended to increase the incentives for companies to adopt robust compliance programs, reducing the likelihood of misconduct while increasing the chances of any misconduct being discovered and eliminated.

The Caveats

While the new policy may provide more opportunities for leniency or reduced charges, there are limitations. First, AAG Delrahim qualified the new policy by noting that "the adequacy and effectiveness of a compliance program is but one of the ten factors the Justice Manual directs prosecutors to consider when weighing charges against a corporation pursuant to the Principles of Federal Prosecutions of Business Organizations." Id. He added that "[t]he Principles of Federal Prosecutions of Business Organizations counsel against crediting compliance programs" when the company does not also "promptly self-report,… cooperate in the Division's investigation, and…take remedial action." Id.

Second, AAG Delrahim explained that "[t]he Division's new approach allows prosecutors to proceed by way of a deferred prosecution agreement (DPA) when the relevant Factors, including the adequacy and effectiveness of the corporation's compliance program, weigh in favor of doing so." Id. That said, AAG Delrahim emphasized that the Division will "continue to disfavor non-prosecution agreements (NPAs) with companies that do not receive leniency because complete protection from prosecution for antitrust crimes is available only to the first company to self-report and meet the Corporate Leniency Policy's requirements." Id.

The Justice Department's new policy of considering robust compliance programs in its charging decisions reflects a recognition of the increased time and resources that companies have invested in compliance programs and further encourages companies to maintain robust compliance programs.

Thus, while having a robust compliance program may offer a corporation some reduction in penalties, being the first company to self-report remains the best way to avoid criminal prosecution.

Takeaways

There are several takeaways from the DOJ's new policy, both in terms of future enforcement activity as well as what companies should consider moving forward. First, the new policy should incentivize companies to create robust compliance programs and come forward to the DOJ if an issue arises.

Second, implementing and enhancing compliance programs may help the company curtail or discover any illegal behavior and may offer protection if such behavior does occur, now that companies can receive benefits at the charging and sentencing stages for compliance programs. That said, the DOJ guidance makes clear that not just any compliance program will receive a benefit at the charging stage. As Rod Rosenstein observed, effective compliance programs require businesses to focus on "how their compliance programs work in practice"; having a "written policy or a regular training program" is not enough. Rosenstein, *Keynote Address*.

Lastly, companies should regularly review the DOJ's guidance document when designing or evaluating their programs. While the questions are not an exhaustive list of what the DOJ may be looking for, they provide a foundation for the key considerations.

Conclusion

The Justice Department's new policy of considering robust compliance programs in its charging decisions reflects a recognition of the increased time and resources that companies have invested in compliance programs and further encourages companies to maintain robust compliance programs. As AAG Delrahim recognized in his speech, companies with "robust compliance programs" can "prevent crime or detect it early, thus reducing the need for enforcement activity; minimizing the harm to consumers earlier and saving precious taxpayer resources." Delrahim, *Winds of Change*.