July 26, 2019

DOJ's Antitrust Division Announces New Policy to Incentivize Corporate Compliance at Charging

Attorneys
Kaede Toh
David Zhang
Mark S. Popofsky
Kennan Khatib
Stefan P. Schropp

On July 11, 2019, the Antitrust Division of the U.S. Department of Justice (the "Division") announced for the first time that it would consider, and potentially reward, effective compliance programs at the charging stage in criminal antitrust investigations. Previously, and for more than 25 years, the Division had only considered compliance programs and efforts at the sentencing stage. Announcing the significant policy change, Assistant Attorney General Makan Delrahim noted the Division's continued commitment to "rewarding corporate efforts to invest in and instill a culture of compliance." Revisions to the policy are reflected in the Division's updated Justice Manual, which now addresses the evaluation of compliance programs at both the charging and sentencing stages as well as Division processes for recommending indictments, plea agreements, and selecting monitors. Among the many changes ushered in with this new guidance, the Division will now consider entering Deferred Prosecution Agreements ("DPAs") as a resolution option for companies with effective antitrust compliance programs. There are significant legal and business implications as a result of the new policy, which further underscore the importance of establishing and maintaining an effective and robust compliance program to minimize risks and exposure.

I. Preexisting Corporate Leniency Policy

While the Division's Corporate Leniency Policy also allowed companies to receive credit, and ultimately leniency, in criminal antitrust investigations, it had two conditions which lessened the incentive to develop and maintain rigorous antitrust compliance programs. First, the Division's "first-in-the-door" requirement only considered the first company to come forward with material information about suspected violations for potential leniency even if a later-reporting corporation maintained a stronger corporate antitrust compliance program. Given the existence of similar rules in other jurisdictions globally, the first-to-report requirement also disincentivized reporting in *any* location unless a company was the first to report in *every* location. Second, notwithstanding a company's "first reporter" status, the Division did not explicitly consider the scope of the company's preexisting compliance program when making a leniency determination. These factors reduced the incentive for companies to implement and maintain robust compliance programs. At the same time, and for the same reasons, developing a robust enforcement program did not generate incentives for firms to self-report.

Further, under the existing policy, the Division was not permitted to award credit for effective compliance programs at the charging stage of an investigation. Although the Division has credited *prospective* compliance efforts at sentencing by reducing fines where pleading companies substantially *improved* their compliance programs after the wrongful conduct was detected, the Division did not award credit for preexisting compliance efforts. In fact, the Department's Justice Manual explicitly stated that "credit should *not* be given at the charging stage for a compliance program." The new policy strikes that language.

II. Compliance Considerations at the Charging Stage

The updated guidance has the potential to address several of the perceived problems with the preexisting Corporate Leniency Policy and sets forth nine factors that Division prosecutors should consider when evaluating the effectiveness of an antitrust compliance program at the charging stage of a criminal antitrust investigation:

Factor	Description
Design and Comprehensiveness	The compliance program should be comprehensive and adequately designed, focusing specifically on integrating the program into the company's business and ensuring that compliance resources are accessible to employees.
Culture of Compliance	The compliance program should be part of a broader culture of compliance at the company and should be built on visible and vocal support from top management.
Responsibility for the Compliance Program	The individuals responsible for the compliance program should have sufficient autonomy, authority, and seniority, and adequate resources should be dedicated to the program.
Risk Assessment	The compliance program should be appropriately tailored to account for antitrust risk of the individual company considering the nature of the business and industry best practices.
Training and Communication	The company should provide employees with adequate compliance training and communication so they are clear on what is and is not permissible and can effectively resist both internal and external pressures.
Periodic Review, Monitoring, and Auditing	The company should conduct periodic review, monitoring, and auditing of the compliance program to ensure that it continues to address the company's antitrust risks.
Reporting	Employees should be able to report potential antitrust violations anonymously or confidentially and without fear of retaliation.
Incentives and Discipline	The company should have incentive and discipline systems in place to ensure that the compliance program is integrated throughout the company.
Remediation and Role of the Compliance Program in the Discovery of the Violation	The company should take remedial action upon discovery of potential antitrust violations and should review its compliance program as part of those efforts.

The Division's guidance is careful to note that these factors are not a checklist or formula. Nonetheless, the updated guidance contains a helpful catalogue of individual factors that the Division should consider under each of the nine, broad categories outlined above. Although the relevance and importance of each of these factors will inevitably vary from case to case, they are designed to help prosecutors determine whether a compliance program is well-designed, effective, and enforced in earnest and in good faith.

III. Implications of the New Policy

Crediting effective compliance programs is undoubtedly a major shift in policy for the Division. Companies with strong compliance programs stand to benefit from the new policy whereas companies with limited or ineffective compliance programs may now face criticisms and consequences for their deficiencies. The new policy presents additional opportunities for companies to mitigate the impact of isolated violations or rogue employee conduct by shifting away from the "all-or-nothing" leniency reward system. Most significantly, a company has a chance to seek a more desirable resolution in the form of a DPA. The first DPA under the new policy will set the watermark for cases to come.

Of course, there have not been any resolutions under this new policy, and the practical impact on the Division's approach to criminal antitrust enforcement is currently unclear. However, companies can look toward other divisions within the Department of Justice ("DOJ") with more developed corporate evaluation and enforcement policies. For instance, DOJ's Criminal Division has recently revised their FCPA Corporate Enforcement Policy, which aims to encourage companies to make timely and voluntary disclosures of wrongdoing under the FCPA, while providing concrete incentives that reward corporations for cooperation and remediation. Similarly, in April 2019, the Criminal Division also published updated guidance on evaluating corporate compliance programs designed to bring those standards in line with other DOJ guidance and to provide additional context to the multifactor analysis. While an imperfect guidepost relative to real-world enforcement by the Division, the factors considered by these other divisions are similar to the nine outlined above and their application could provide valuable insight into the new policy's potential impact.

In the interim, companies should strongly consider assessing their corporate compliance program's alignment with the Division's revised guidance and should proactively strengthen any identified areas for improvement. Potential steps for companies to consider include (1) assessing compliance responsibilities and resources on antitrust compliance; (2) reviewing existing antitrust policies and procedures; (3) implementing appropriate antitrust training programs and messaging from leadership to establish "tone from the top" and a culture of compliance; (4) establishing appropriate reporting channels for related misconduct; (5) implementing effective antitrust monitoring and control mechanisms; (6) conducting proactive antitrust risk assessments and audit review; and (7) deploying investigation resources when issues arise.

IV. Conclusion

The Division's new policy underscores the importance of establishing and maintaining an effective compliance program. Under the new regime, companies have an opportunity to potentially prevent or mitigate any exposure from antitrust violations. Ropes & Gray will monitor the Division's application of these factors to pending and future criminal antitrust investigations.