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Department of Justice Antitrust Division Announces Important New Policy Regarding Compliance Programs

On July 11, Assistant Attorney General for the Antitrust Division Makan Delrahim made a significant and important announcement regarding a change to the Division's criminal antitrust prosecutorial policy: unlike in the past, corporate antitrust compliance programs will now factor into prosecutors' charging and sentencing decisions and may allow companies to qualify for deferred prosecution agreements or otherwise mitigate exposure, even when they are not the first to self-report criminal conduct. The Division also issued new and detailed guidance outlining the factors that prosecutors are to consider in evaluating the effectiveness of compliance programs. These announcements underscore the importance and benefits of effective antitrust compliance programs, and present an opportunity for companies to re-evaluate their existing programs or establish new ones in light of the Division's new guidance.

As we discussed in a recent Client Memorandum, the Antitrust Division has not historically rewarded corporations with strong compliance programs at the time of a criminal violation. Rather, the Division has taken an "all or nothing" approach, under which a company has to qualify for the Division's leniency program (which would result in a company not being criminally charged) or at least engage in early and significant cooperation in the government's investigation (which may result in a penalty reduction). Indeed, it has been the Division's "longstanding policy 'that credit should not be given at the charging stage for a compliance program.'" With Mr. Delrahim's announcement, this approach is poised to change.

In a speech announcing the new policy, Mr. Delrahim said "time has now come to improve the Antitrust Division's approach and recognize the efforts of companies that invest significantly in robust compliance programs." Under the new policy, prosecutors will now take into account a company's pre-existing compliance program along with other factors and, where appropriate, agree to enter into a deferred prosecution agreement (DPA) as an alternative to charging a company with a criminal antitrust violation and entering into a plea agreement. Mr. Delrahim stressed that "a compliance program does not guarantee a DPA." However, DPAs "occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation," and under the Division's new approach, the adequacy and effectiveness of a corporate compliance program may weigh in favor of a DPA. Thus, companies that are unable to satisfy all of the Division's leniency criteria because they were not the first to report a violation now have an alternative avenue to advocate for the avoidance or mitigation of criminal antitrust charges.

New Guidance on the Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations

In connection with the Division's new approach allowing for credit for effective corporate compliance programs at the charging and sentencing stages, the Division has issued new guidance for prosecutors to use in evaluating the effectiveness of these programs. In general, an effective compliance program should "address and prohibit criminal antitrust violations" and "detect and facilitate prompt reporting of the violation."

Reflecting this, the Division's guidance document sets out nine factors for consideration in prosecutors' charging decisions:

- "**design and comprehensiveness of the program**," including the "adequacy of the program's integration into the company's business and the accessibility of antitrust compliance resources to employees"
- "**culture of compliance within the company**," including support and buy-in "from the company's top management"
- "**responsibility for, and resources dedicated to, antitrust compliance**," including having employees with appropriate authority and knowledge
- "**antitrust risk assessment techniques**," including the design of a program "appropriately tailored to" a company's particular "antitrust risk"
- the adequacy of "**compliance training and communication to employees**"
- "**monitoring and auditing techniques**, including continued review, evaluation, and revision of the antitrust compliance program" designed "to ensure that employees follow the compliance program"
- "**reporting mechanisms**" allowing employees "to report potential antitrust violations anonymously or confidentially and without fear of retaliation," which the Division characterizes as "an integral element of an effective compliance program"
- "**compliance incentives and discipline**"
- "**remediation methods**," including "whether and how the company conducted a comprehensive review of its compliance training, monitoring, auditing, and risk control functions following the antitrust violation."

While "the Division has no checklist or formulaic requirements for evaluating the effectiveness of corporate compliance programs," the guidance makes clear that antitrust compliance programs should be well-designed, appropriately tailored, regularly monitored and updated. In addition, these programs should inform the company's internal control function, and senior leadership should work to establish a "culture of compliance" and ensure that the appropriate employees receive training and that proper reporting mechanisms are in place.

According to the Division's new guidance document, an effective compliance program should also be considered when applying sentencing guidelines, in prosecutors' decisions regarding whether to seek probation for a company and in the application of statutory fine reductions.

Mr. Delrahim cautioned that "[t]he Antitrust Division's new approach to compliance programs should not be misconstrued as an automatic pass for corporate misconduct." Indeed, one should bear in mind that, as the new guidance states, "[a]lthough the evaluation of antitrust compliance programs is an important factor in the prosecutorial decision-making process at both charging and sentencing, a number of other important factors not addressed by this compliance-specific guidance also must be considered." Among these other factors, which Mr. Delrahim highlighted, are a company's efforts to self-report a violation, its cooperation in the investigation and the remedial action it takes.

Significance and Takeaways

Ideally, an antitrust compliance program will prevent an antitrust violation. Absent that, it will allow early detection of a violation and allow a company to qualify for leniency from the Antitrust Division by being the first to self-report a violation. According to Mr. Delrahim, "[l]eniency . . . will continue to be the ultimate credit for an effective compliance program that detects antitrust crimes and allows prompt self-reporting."

With the announcement of the Division's new approach, however, the potential benefits of an effective antitrust compliance program have expanded significantly. The Division's announcement provides a potential avenue for mitigating criminal antitrust penalties for a company that detects early on a criminal antitrust violation but does not qualify for leniency from the Antitrust Division if it is not the first to report to the Division. In certain circumstances, an effective compliance program can provide meaningful relief at the charging and sentencing stage.

This new approach provides increasingly strong incentives for companies to re-evaluate (or establish) thoughtful and comprehensive antitrust compliance programs. Indeed, among the Division's motivations for publishing its guidance document is that it "could be a useful tool [for in-house counsel] in lobbying internally for increased antitrust compliance resources;" and Mr. Delrahim expressed the "hope" that the Division's announcement "will incentivize more companies to make antitrust compliance a top priority."

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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