

## Effective Corporate Compliance Programs Now Even More Important in Criminal Antitrust Investigations

July 29, 2019

### Key Points:

- The Department of Justice (DOJ) will now evaluate corporate compliance programs as a factor in determining whether to bring criminal antitrust charges.
- New guidance also clarifies how compliance programs factor into the DOJ sentencing recommendations.

On July 11, 2019, Assistant Attorney General Makan Delrahim announced an important change in the Antitrust Division (“Division”) approach to criminal antitrust enforcement that underscores the crucial value of a robust corporate antitrust compliance program. Following this announcement, the Division published for the first time [guidance for the evaluation of corporate compliance programs in criminal antitrust investigations](#). The document: (1) describes the Division’s new policy of evaluating a company’s compliance program in determining whether to bring criminal antitrust charges; and (2) clarifies guidance regarding the impact of compliance programs on sentencing recommendations.

Previously, the Division’s policy, reflected in the DOJ’s Justice Manual, was to consider a company’s compliance program only at the sentencing stage; no credit was given at the charging stage. The revised policy, which is reflected in both the Justice Manual and the Antitrust Division Manual, directs Division prosecutors to conduct a fact-specific investigation into the design, application and effects of a corporate compliance program as a factor in determining whether to bring criminal charges against a company. The policy requires evaluation of the company’s compliance program both at the time of the offense and at the time a charging decision is made.

Division prosecutors will evaluate the effectiveness of a corporate antitrust compliance program under the same standards used by the DOJ in other contexts, focusing on three fundamental questions: “(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?”

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The Division guidance document identifies and describes in some detail several considerations in evaluating the effectiveness of a 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.”

Under the Division’s new approach, the adequacy and effectiveness of the corporation’s compliance program, along with other relevant factors, may support a deferred prosecution agreement.

Efficacy of a corporate compliance program also factors into the DOJ’s sentencing recommendations through the Federal Sentencing Guidelines provisions and in corporate fine and/or probation recommendations. The newly published guidance document provides additional clarity on how these programs are to be considered at sentencing. The DOJ may recommend credit for a company’s extraordinary prospective compliance efforts in the form of a reduction in a corporate fine. Companies who fail to implement or improve their antitrust programs may face a recommendation from the Division for probation or an external monitor in egregious cases.

The new approach also makes clear that the DOJ expects that companies that did not have a preexisting antitrust compliance program at the time of the antitrust violation will put “an effective compliance program” in place after they become aware of the violation. If a company does not put such a program in place after learning of the violation, the DOJ “may recommend probation and, in appropriate cases, periodic compliance reports as a condition of probation. The Division also will consider whether an external monitor is necessary to ensure implementation of a compliance program and timely reports.”

Assistant Attorney General Makan Delrahim said that the new guidance is an effort to “recognize efforts to institute, strengthen, and improve compliance programs,” which in turn will strengthen “a company’s incentives . . . to invest in compliance in the first place, and to incentivize others to do the same.”

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