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DOJ Changes Criminal Policy to Recognize Antitrust Compliance Programs

July 18, 2019

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In a major policy shift, the Antitrust Division of the Department of Justice recently ***announced*** that it will now credit companies for effective corporate antitrust compliance programs in making charging decisions and penalty recommendations. In conjunction with this change, the Antitrust Division issued public ***written guidance*** to assist prosecutors' evaluation of antitrust compliance programs at the charging and sentencing stages of investigations, and to aid companies' efforts to strengthen their antitrust compliance procedures.

Previous longstanding policy at the Antitrust Division was to not recognize a company's compliance program when deciding whether to bring criminal antitrust charges. Instead, the Antitrust Division promulgated an "all-or-nothing" approach whereby only the first company to self-report a violation and cooperate fully could receive immunity from criminal charges and penalties under the Antitrust Division's Corporate Leniency Policy. This created a "race for leniency," with losers left to plead guilty to a criminal charge regardless of the effectiveness of the company's compliance program.

In announcing the new policy during a ***speech*** at NYU School of Law, Assistant Attorney General Makan Delrahim stated his view that "the time has now come to improve the Antitrust Division's approach and recognize the efforts of companies that invest significantly in robust compliance programs." The goals of the change, according to Delrahim, are to incentivize more companies to make antitrust compliance a priority and to increase prevention or early detection of potentially criminal conduct such as price fixing, bid rigging, and market allocation schemes between competitors. This brings the Antitrust Division more in line with other units of DOJ that have been willing to acknowledge preventative efforts.

In evaluating a corporate antitrust compliance program at the charging stage, prosecutors are instructed to consider three "fundamental" questions: (1) Is the program well designed? (2) Is it being applied earnestly and in good faith? (3) Does it work? While there is no checklist or formula for determining a compliance program's effectiveness, the Antitrust Division's guidance document sets out nine factors for prosecutors to consider, including:

(i) the design and comprehensiveness of the program;

(ii) the culture of compliance within the company;

(iii) responsibility for, and resources dedicated to, antitrust compliance;

(iv) antitrust risk assessment techniques;

(v) compliance training and communication to employees, including tailored training for different internal functions and lines of business;

(vi) monitoring and auditing procedures, including continued review, evaluation, and revision of the antitrust compliance program;

(vii) reporting mechanisms;

(viii) compliance incentives and discipline; and

(ix) remediation methods.

The Antitrust 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 company's compliance program, weigh in favor of doing so. Under a DPA, prosecutors agree to dismiss criminal charges after a period if a company satisfies certain requirements and makes certain changes. AAG Delrahim noted, however, that simply having a compliance program will not guarantee a DPA. Rather, prosecutors will consider a compliance program together with other relevant factors, including prompt self-reporting of misconduct, cooperation with the Antitrust Division's investigation, and remedial action.

In addition to credit at the charging stage, the new guidance document describes the ways in which an effective compliance program factors into sentencing recommendations, including a possible fine reduction, whether to seek corporate probation and require periodic compliance reports, and the use of an external monitor to ensure implementation of a compliance program.

The Antitrust Division's new policy has important practical implications for companies. Most significantly, it offers the possibility of entering into a DPA and avoiding criminal charges for companies that miss out on being first in the "race for leniency" but have a strong antitrust compliance program in place. It remains to be seen whether the new policy will undercut the Antitrust Division's corporate leniency program, which will continue unchanged and which has been a hallmark of the government's criminal antitrust framework for the past 25 years – leniency remains the only way to achieve immunity as well as other benefits such as reduced damages in related civil actions.

The new guidance document also provides welcome transparency regarding the Antitrust Division's view of the elements that make an "effective" antitrust compliance program. This should prove helpful to in-house legal and compliance personnel when designing and implementing compliance programs.

By offering incentives such as DPAs to companies with robust antitrust compliance programs that result in prompt self-reporting, the Antitrust Division's new policy also gives corporate counsel and compliance officers leverage to seek additional company resources for antitrust compliance efforts. Indeed, this development is a clear signal to companies that now is a good time to review and update their antitrust compliance programs.