

DOJ Announces New Model for Incentivizing Corporate Antitrust Compliance Programs in Criminal Investigations

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In a highly anticipated speech yesterday, the Assistant Attorney General for the Antitrust Division, Makan Delrahim, announced the Division's new approach to evaluating and crediting corporate compliance programs in criminal antitrust investigations. The new policy allows prosecutors to credit antitrust compliance programs at the charging stage, opening the door to proceed by way of a deferred prosecution agreement ("DPA") instead of a plea agreement where a company has a robust and effective compliance program and meets other factors, including prompt self-reporting, cooperation, and remedial action.

The Division has also clarified its approach to evaluating the effectiveness of compliance programs at the sentencing stage including considerations for recommending probation as well as guidance for selecting corporate monitors.

Finally, the Antitrust Division has issued a new written guidance document entitled [Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations](#) detailing questions and factors that prosecutors will consider in evaluating antitrust compliance programs at both the charging and sentencing stages. While it provides detailed questions and best practices, the new guidance document makes clear that there are no formulaic requirements for evaluating the effectiveness of a compliance program.

The Antitrust Division's past approach regarding compliance programs has been at odds with DOJ-wide policy. The United States Sentencing Commission has long incentivized effective compliance programs, and the Sentencing Guidelines provide that companies with existing programs can receive a reduced fine. However, the historical position of the Antitrust Division has been to refuse any credit in sentencing or charging decisions for preexisting compliance programs under the theory that any effective compliance program would necessarily have prevented the conduct or allowed the company to detect it in time to self-report and seek leniency under the Antitrust Division's Corporate Leniency Policy.

Over the past few years, the Antitrust Division's position has evolved toward increasingly incentivizing compliance, including by recommending reduced fines for companies that proactively undertake extraordinary efforts to implement new compliance programs, or strengthen existing programs, after coming under investigation. In April 2018, the Division hosted a public roundtable on criminal antitrust compliance during which in-house and defense counsel argued that companies would be willing to invest more in antitrust compliance if their efforts were

recognized and credited by the DOJ. For the past year, DOJ officials have been evaluating how – and to what extent – to credit well-tailored corporate compliance and ethics programs in place at the time of an investigation.

Yesterday’s announcement marks the culmination of that evolution and a significant policy shift by the Antitrust Division in recognizing that low-level or rogue employees may commit antitrust violations despite a company’s best efforts at compliance. The decision to incentivize compliance is intended to promote the Division’s primary goal of deterring criminal antitrust conduct. A company that can justify that it had a well-designed and robust compliance program in place at the time of the violation or the charging decision may be able to avoid entering into a plea agreement even if it is not the first company to seek leniency.

In light of the Division’s new policy, the time is ripe for companies to review and update their current compliance programs to ensure that they apply the best practices outlined in the Division’s new guidance. Led by a team of experienced antitrust counselors and numerous former federal prosecutors, including a recent Antitrust Division criminal supervisor, Winston & Strawn is uniquely situated to assist in implementing and updating robust and effective compliance programs specifically tailored to the particular business and risk profiles that companies face.

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