

## DOJ Antitrust Division Still Looking for a “Gold Standard” Compliance Program

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In recent remarks, Deputy Assistant Attorney General Richard Powers revealed that the DOJ Antitrust Division has yet to find a corporate defendant whose compliance program fits the Division’s “gold standard.”<sup>[1]</sup> Back in July 2019, the Antitrust Division announced that it would begin considering the strength of a corporate defendant’s compliance program when making charging and sentencing decisions in criminal antitrust cases. Under this policy, which was accompanied by Guidance from the Antitrust Division, a robust compliance program could potentially be rewarded with a deferred prosecution agreement (DPA).

But on Tuesday, Powers suggested that the Antitrust Division has not yet encountered a compliance program that was strong enough to warrant such leniency at the charging stage. While the possibility of increased protection from criminal liability should be a positive development, the fact that the DOJ has yet to identify a sufficient compliance program means that companies have no concrete examples on which to model their own programs.

Powers, who led the Antitrust Division’s criminal enforcement efforts before becoming the Division’s senior official last week (until President Biden nominates, and the Senate confirms, a new head of the Antitrust Division), also noted that compliance programs are only one of a number of factors that the DOJ considers when making charging decisions. But while maintaining that charging determinations are “fact specific,” Powers nevertheless promised that when the Agency does identify a defendant with a compliance program that is worthy enough to warrant a DPA, the ensuing DPA will clearly explain the features and merits of the program. The Antitrust Division may also issue some additional public statements and updated guidance once it has acquired enough experience with these “gold standard” compliance programs.

Until then, companies developing or updating their own antitrust compliance procedures should continue to rely on the Antitrust Division’s July 2019 Guidance on the Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations. Separately, the DOJ’s Criminal Division has a similar framework for evaluating corporate compliance programs (last updated in June 2020), which can also serve as a helpful resource.

Of note, the Antitrust Division’s July 2019 Guidance lays out the factors that the Division examines to determine a corporate compliance program’s effectiveness. These factors include:

- The compliance program’s design and comprehensiveness;

- The company’s culture of compliance;
- The “operational responsibility” and resources provided to the program;
- The program’s ability to assess antitrust risks;
- The level of training and communication the program provides;
- The periodic review, monitoring, and auditing of the program’s effectiveness;
- The program’s mechanisms for reporting potential antitrust issues;
- The incentives and discipline provided by the program; and
- The program’s discovery and remediation methods.

Until the Antitrust Division identifies a DPA-worthy compliance program, the “gold standard” will remain elusive and companies will be left without a concrete means of measuring their own compliance efforts. Even without a sufficient model, companies could also benefit from additional guidance from the Division on why other compliance programs were previously deemed insufficient. However, notwithstanding the uncertainty surrounding the Division’s policy, there are still good reasons for companies to continue investing in their compliance programs. Compliance efforts that effectively deter and detect potential antitrust issues remain the best safeguard against criminal and civil exposure, even if it is unclear whether a given program would warrant a DPA.

The DOJ’s factors for an effective compliance program are explained in more detail in our [previous briefing](#), and the key takeaways from the DOJ’s June 2020 policy update can be found in [this blog post](#).

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<sup>[1]</sup> Max Fillon, *DOJ still on lookout for ‘gold standard’ compliance program, Powers says*, [MLex](#) (Jan. 26, 2021) (reporting on Deputy Assistant Attorney General Richard Powers’ remarks at the annual meeting of the New York State Bar Association Antitrust Law Section, held on January 25, 2021).

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