

Newly Announced Antitrust Division Policy Rewards Effective Compliance Programs

by Michael A. Lindsay, John Marti, Jaime Stilson, and Anthony P. Badaracco

An effective antitrust compliance program is more valuable than ever, now that the Department of Justice has confirmed that such a program will influence government charging and sentencing decisions.

On July 11, 2019, Assistant Attorney General Makan Delrahim announced the Antitrust Division's new policy to incentivize compliance with the antitrust laws and encourage the adoption and implementation of effective compliance programs.¹ The Antitrust Division will consider corporate compliance programs when making criminal charging decisions and will consider signing deferred prosecution agreements even with companies that are not the first to report illegal conduct.

The Antitrust Division has exclusive jurisdiction to file federal criminal charges against companies and individuals for price-fixing, bid-rigging, and other hard-core violations of U.S. antitrust law. The Division adopted its Corporate Leniency Program in 1993. Under that program, the Division has historically applied an "all-or-nothing" philosophy to compliance: the first company to self-report an antitrust violation is eligible for complete immunity from prosecution, and any company that self-reports thereafter (*i.e.* the losers in the "leniency" race) must plead guilty and cooperate fully with the investigation to obtain sentencing credit.²

Historically, a company's antitrust compliance program played no role in charging decisions. As the Department's Justice Manual³ previously stated, in antitrust investigations, "credit should not be given at the charging stage for a compliance program," because although "it is entirely proper in many investigations for a prosecutor to consider the corporation's pre-indictment conduct," this "would not necessarily be appropriate in an antitrust investigation, in which antitrust violations, by definition, go to the heart of the corporation's business."⁴ In contrast with the Antitrust Division, other Justice divisions previously considered compliance programs in charging decisions.

In the Antitrust Division's sentencing recommendations, a compliance program's value

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has been less clear. The U.S. Sentencing Guidelines provide for up to a three-point reduction at sentencing for a corporate defendant accused of wrongdoing despite having an “effective” compliance program.⁵ The Guidelines recognize that failing to prevent an offense from occurring “does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.”⁶ The Antitrust Division never issued public guidance on consideration given to corporate compliance programs, and⁷ the Antitrust Division has never recommended a three-point reduction at sentencing for an effective compliance program.⁸

This month’s new policy announcement did not come out of the blue. In September 2014, Deputy Assistant Attorney General Brent Snyder announced that the Division had begun “actively considering ways in which we can credit companies that proactively adopt or strengthen compliance programs after coming under investigation.”⁹ In May 2018, Principal Deputy Assistant Attorney General Andrew Finch stated that the Division was evaluating “whether and under what circumstances it may be appropriate to consider pre-existing compliance programs” “at the charging stage or at sentencing.”¹⁰ And in May 2019, Mr. Delrahim signaled that “Going forward . . . leniency will no longer be the only benefit [of] good corporate citizenship.”¹¹

This month, Mr. Delrahim announced four specific changes to the Division’s policies:

1. Allowing consideration at the charging stage for effective compliance programs.¹²
2. Permitting consideration at the sentencing stage of a company’s compliance program (if found to be effective), by: (a) allowing a corporate defendant to obtain a three-point reduction under the Sentencing Guidelines; (b) affecting the corporate fine to be assessed within the Guidelines, or even below the Guidelines range; and (c) affecting the Division’s probation recommendation.¹³
3. Permitting a deferred prosecution agreement with a company, even if that company does not qualify under the leniency program, if the company has an effective compliance program.¹⁴
4. The Division has released, for the first time, a public guidance document explaining how it evaluates compliance programs in criminal investigations.¹⁵

In the new guidance document, the Division outlined the factors to be considered when evaluating the effectiveness of a company’s compliance program at both the charging and sentencing stages. These factors include: “(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.”¹⁶

The Division has clarified that its leniency program remains a top priority and a key incentive to encourage compliance. Non-prosecution agreements (as opposed to *deferred* prosecution agreements) will remain available only to the first company to self-report wrongdoing.¹⁷ This month’s policy changes reflect the Division’s position that “even a good corporate citizen with a comprehensive compliance program may nevertheless

find itself implicated in a cartel investigation. Precisely how much weight and credit to give a compliance program will depend on the facts of the case.”¹⁸

That last sentence is critical. Plainly, an effective antitrust compliance program is more important than ever before. But there is no such thing as a one-size-fits-all “effective” program. Instead, each company must evaluate the risks of antitrust violations that its various business units pose, and the company must design and implement a program designed to deter the violations and identify them (if committed).

Here are a few tips:

- Participation and buy-in at the top of the company is key. The Division’s new guidance document clarifies that senior executives must participate in implementing and assessing the program. And that is not enough; the company’s board of directors or audit committee should review and approve the program’s initial adoption and subsequent updating.
- Senior leadership of the company must convey, through their words and actions, the importance of compliance to company employees.
- The company should provide meaningful incentives for compliance and should impose meaningful discipline for any detected violations by employees, including senior executives.
- A general policy against colluding with one’s competitors is insufficient. The policy must specifically target the most at-risk employees and the specific business issues likely to create antitrust risk.
- The program must be refreshed and reviewed for needed updates. After initial compliance training, company lawyers or outside counsel should conduct refresher training. New employees should be trained as well—particularly those who work on pricing issues, those who frequently engage with trade associations or with competitors, and human resources staff and others who work in recruitment and hiring.
- Counsel should conduct regularly-scheduled audits of a sample of communications from employees in particularly sensitive areas and should regularly evaluate the company’s pricing practices to identify risks. The compliance program should be modified to address any newly identified risks.
- The company should provide a mechanism for employees to report violations without fear of retribution (such as a hotline or compliance portal managed by a third-party).
- If there is a charged offense, top management must personally commit to ensuring that the compliance program is meaningfully improved.

¹ Makan Delrahim, “Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs,” Remarks, NYU School of Law Program on Corporate Compliance and Enforcement (July 11, 2019), available at <http://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0>.

² *Id.*

³ The Justice Manual was previously known as the United States Attorneys’ Manual (USAM). It was comprehensively revised and renamed in 2018.

⁴ U.S. Dep’t of Justice Manual § 9-28.400 (3d ed. 2018), available at <http://www.justice.gov/jm/justice-manual>.

⁵ U.S.S.G. §§ 8B2.1, 8C2.5.

⁶ U.S.S.G. § 8B2.1(a)(2).

⁷ Delrahim, *supra* note 1 (acknowledging “a desire for greater clarity and transparency on the considerations weighed by the Antitrust Division when evaluating compliance programs”).

⁸ *Id.*

⁹ Brent Snyder, “Compliance is a Culture, Not Just a Policy,” Remarks, International Chamber of Commerce/ United States Council of International Business Joint Antitrust Compliance Workshop (Sept. 9, 2014), available at <http://www.justice.gov/atr/file/517796/download>.

¹⁰ Andrew Finch, “Antitrust in the Financial Sector,” Remarks, Fordham University (May 2, 2018), available at <http://www.justice.gov/opa/speech/file/1060981/download>.

¹¹ Makan Delrahim, “Algo Esta Cambiando: Innovation and Cooperation Among Antitrust Enforcers in the Americas,” Remarks, American Bar Association “Antitrust in the Americas” (May 10, 2019), available at <http://www.justice.gov/opa/speech/file/1161646/download>.

¹² See Justice Manual, *supra* note 4 (noting July 2019 revision).

¹³ See Delrahim, *supra* note 1.

¹⁴ See *id.*

¹⁵ U.S. Dep’t of Justice, Antitrust Division, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (July 2019), available at <http://www.justice.gov/atr/page/file/1182001/download>.

¹⁶ *Id.* at 3–4.

¹⁷ Delrahim, *supra* note 1.

¹⁸ *Id.*