

DOJ Antitrust Announces New Policies on Antitrust Compliance Programs

July 15, 2019

On July 11, 2019, the Antitrust Division of the U.S. Department of Justice announced major changes effective immediately to its policies regarding the effect antitrust compliance programs have on the Antitrust Division's criminal enforcement. In a sharp departure, which now better aligns the Antitrust Division with other parts of the Justice Department, the Division for the first time will consider the existence and adequacy of antitrust compliance programs at the charging stage in criminal antitrust investigations and will consider proceeding against companies by way of deferred prosecution agreements (DPAs). These new incentives for companies to have robust antitrust compliance programs should spur their adoption or enhancement.

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Background. The Antitrust Division has the statutory authority to bring criminal charges against individuals and companies that engage in offenses such as fixing prices, rigging bids, allocating markets, and poaching employees. To assist its ability to discover and investigate potential criminal antitrust violations, the Antitrust Division in 1993¹ enhanced its Corporate Leniency Program.²

The Corporate Leniency Program's benefits include: (i) immunity from criminal charges and penalties; (ii) non-prosecution protections for a company's covered cooperating employees; and (iii) a limitation to single damages (rather than the statutory treble damages) in follow-on civil litigation. However, only the first conspirator to confess, fully cooperate, and meet all other conditions specified in the Corporate Leniency Policy is eligible to receive leniency. This has often prompted a race for leniency. The Antitrust Division frequently gives the first leniency applicant a "marker" for a finite period to hold its place in line while the applicant's counsel gathers additional information through an internal investigation to perfect the leniency application. For companies that do not win the leniency race, the Antitrust Division

¹ The original version of the Corporate Leniency Program dates back to 1978, but it was rarely utilized—receiving on average one leniency application per year—and resulted in no detection of an international or large domestic cartel. The Antitrust Division revised its program in the 1990s to make it easier and more attractive for companies to come forward and cooperate.

² The Antitrust Division created its Individual Leniency Program in 1994.

until now has insisted that they plead guilty to a criminal charge, even if the company cooperated.

The Antitrust Division's longstanding policy, codified in the Justice Manual, has been "that credit should not be given at the charging stage for a compliance program" and that "the nature of some crimes, e.g., antitrust violations, may be such that national law enforcement policies mandate prosecution of corporations notwithstanding the existence of a compliance program." While there are other benefits to having a robust antitrust compliance program—such as reducing the risk of a violation—companies have not benefited at the charging stage.

The Newly Announced Changes. Assistant Attorney General Makan Delrahim announced the following three immediately effective changes:

- The Justice Manual's editors have deleted the provision that the Antitrust Division will not give credit at the charging stage for a compliance program. At the charging stage, prosecutors must now consider the antitrust compliance program's adequacy and effectiveness, both at the time of the offense and at the time of the charging decision.
- The Antitrust Division has clarified the three ways that antitrust compliance programs can be relevant to a company's sentencing: (i) permitting a three-point reduction in the culpability score if a company's compliance program is "effective"; (ii) helping determine the appropriate corporate fine; and (iii) affecting the Antitrust Division's probation recommendations.
- The Antitrust Division has published on its website a public guidance document that is intended to assist prosecutors in evaluating compliance programs at the charging and sentencing stages of criminal antitrust investigations.

The Antitrust Division's new approach permits prosecutors for the first time to proceed by way of a DPA against companies that are not eligible for leniency if the relevant factors, including the adequacy and effectiveness of the company's antitrust compliance program, weigh in favor of doing so. As the Justice Manual recognizes, DPAs "occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation." While non-prosecution agreements with companies that do not receive leniency will continue to be disfavored, the Antitrust Division's use of DPAs reflects a significant policy shift.

How This Might Affect You. It has long been prudent for companies to invest in antitrust compliance programs, which can prevent criminal antitrust violations from occurring in the first place. They also can detect a criminal violation early, enabling the

company to win the race to receive the marker from the Antitrust Division and ultimately perfect its leniency application. And compliance programs have numerous benefits in civil antitrust enforcement actions.

These new policies provide companies with further incentives to implement proactively effective and robust antitrust compliance programs. The Antitrust Division has recognized that even good corporate citizens with comprehensive compliance programs may nonetheless find themselves implicated in a cartel investigation. Now a company with a strong antitrust compliance program may receive substantial benefits even if it is not eligible for leniency. Moreover, given that the compliance program will also be considered at the time of the charging decision, a company already under investigation by the Antitrust Division has an incentive to create or strengthen its current antitrust compliance program.

How Debevoise Can Help. Debevoise lawyers are well-versed in criminal antitrust matters and antitrust compliance programs. We are available to assist in the creation, review, and training of antitrust compliance programs. Our Antitrust and White Collar lawyers are available to represent parties facing a criminal antitrust investigation.

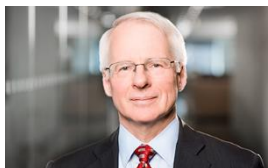
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