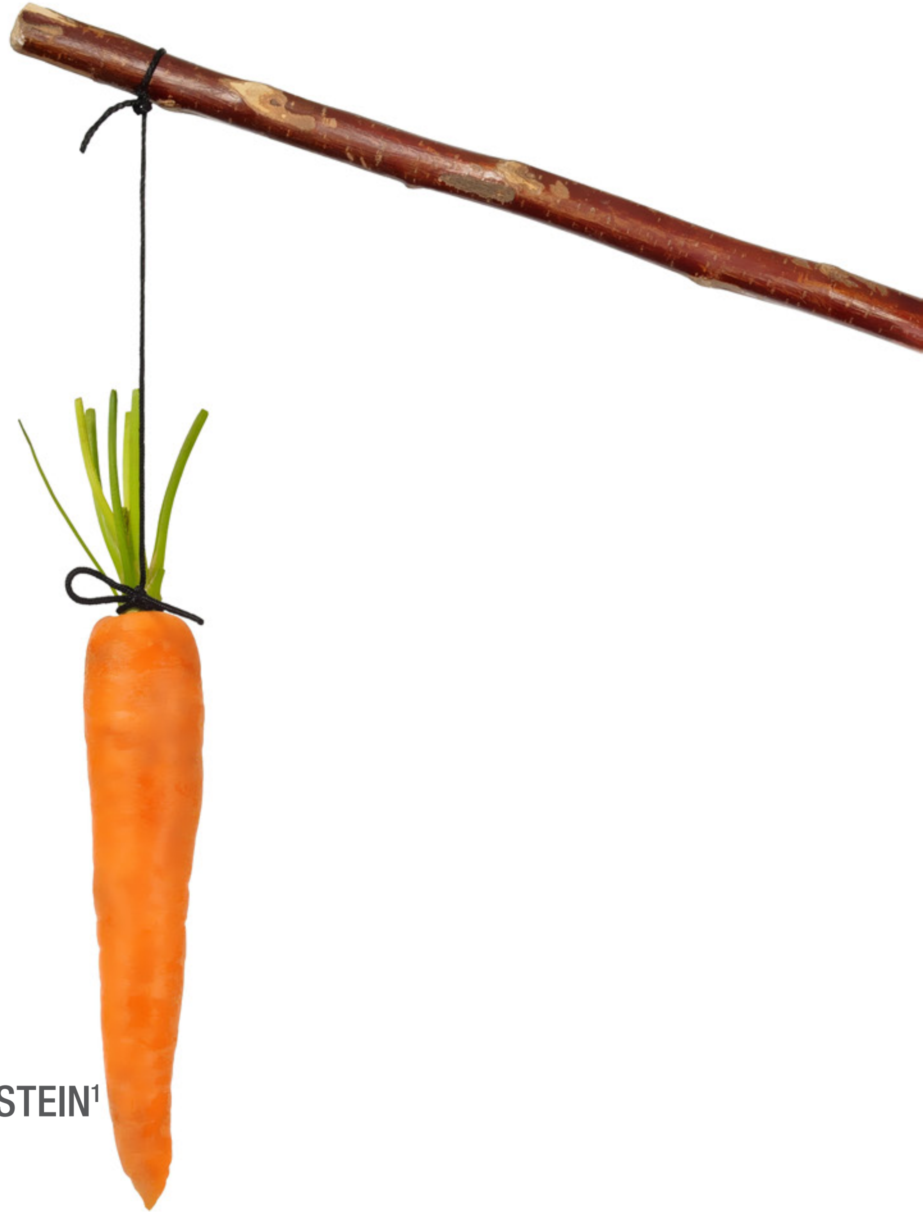
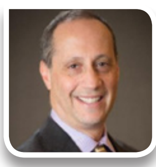
ENHANCING THE "CARROT": A PRACTICAL PERSPECTIVE ON DOJ CREDIT FOR ANTITRUST COMPLIANCE



BY ROBIN D. ADELSTEIN & GERALD A. STEIN[1]



1 Robin D. Adelstein is the U.S. Head of Antitrust and Competition at global law firm Norton Rose Fulbright US LLP. Robin's pragmatic approach to the practice of law is informed by her experience, having served as in-house antitrust and litigation counsel at Swiss healthcare company Novartis and UK alcohol beverage leader Diageo, before becoming North American General Counsel of Sandoz, the generics and biosimilars division of Novartis. Gerald A. Stein is a Senior Counsel in the New York Office of Norton Rose Fulbright US LLP and a member of the firm's Antitrust and Competition Group. A former attorney at the Bureau of Competition (Northeast Region) of the Federal Trade Commission, Gerald counsels and represents clients before the U.S. antitrust enforcement agencies and in all aspects of private antitrust litigation. The authors were assisted in writing this article by law clerk Emily Woolbank, who works under the direct supervision of Ms. Adelstein.

CPI ANTITRUST CHRONICLE
NOVEMBER 2019

Turn the Page: The Antitrust Division's New Approach to Incentivizing Antitrust Compliance Programs
By Richard A. Powers, Ann M. O'Brien & James W. Attridge

Why Screening is a "Must Have" Tool for Effective Antitrust Compliance Programs
By Rosa M. Abrantes-Metz & Albert D. Metz

Antitrust Compliance – Reluctance to Embrace and Recognize Corporate Compliance Efforts
By Anne Riley

"It Didn't Work": Antitrust Compliance and the Role of the Senior Executive
By Donald C. Klawiter

Navigating Antitrust Compliance Under the DOJ's New Guidance
By Renata Hesse, Benjamin Walker & Christopher Viapiano

Create Your Own: Bespoke Antitrust Compliance Programs for Effective Compliance
By Leonor Davila, Gabrielle Kohlmeier, Anjali B. Patel & John Seward

Recruiting Companies in the Fight Against Antitrust Violations: Government Could do Better!
By Joe Murphy

Balancing Privacy Protections With Antitrust Compliance Efforts: Key Issues and Potential Solutions
By Fiona Schaeffer, Nathaniel Mattison & Jenna Weinblatt

Why isn't "Deterrence" Included in the Measurements of Antitrust "Enforcement"?
By Lawrence J. White

Enhancing the "Carrot": A Practical Perspective on DOJ Credit for Antitrust Compliance
By Robin D. Adelstein & Gerald A. Stein

Rewarding Positive Behavior: Improving Antitrust Compliance in Developing Countries
By Carlos Mena Labarthe & Édgar Martín Padilla

Visit www.competitionpolicyinternational.com for access to these articles and more!

I. INTRODUCTION

In July 2019, the U.S. Department of Justice Antitrust Division (the "Division") announced a new policy to encourage the implementation of robust and effective antitrust compliance programs by companies that operate in the United States. Division prosecutors will now consider providing credit at the charging and sentencing stages of an antitrust criminal investigation to a company that maintains an antitrust compliance program that meets certain specified requirements.

As part of the policy announcement, the Division published guidance entitled "Evaluation of Corporate Compliance Programs" ("Guidance"),[2] which sets forth the nine factors that Division prosecutors will evaluate in considering whether a compliance program is sufficient to support a reduction of criminal charges and sentences. Applying only to criminal antitrust violations (such as price fixing, bid rigging and market allocation), the Division's new policy provides credit at both the charging and sentencing stages of criminal prosecutions if a company can establish that such violations took place during a time in which it maintained an "effective compliance program" as defined in the Guidance. The Guidance also provides transparency and useful instruction to the business community and practitioners regarding what the Division considers best practice in antitrust compliance.

While the Guidance sets out the nine key elements of an effective compliance program, both the Guidance and comments from the Division front office made during a panel discussion at NYU School of Law immediately following the Division's announcement of the policy change, strongly underscore that credit will be given only if a company "promptly self-reports" a potential cartel violation after it is detected through its internal compliance measures. A failure to promptly self-report – despite a company maintaining a best practice compliance program – likely will result in no credit given.

2 U.S. Department of Justice Antitrust Division, "Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations," July 2019. Available at: https://www.justice.gov/atr/page/file/1182001/download.

www.competitionpolicyinternational.com
Competition Policy International, Inc. 2019© Copying, reprinting, or distributing this article is forbidden by anyone other than the publisher or author.

II. "EVALUATION OF CORPORATE COMPLIANCE PROGRAMS"

The Division has now departed from its hardline approach of refusing to grant credit during charging or sentencing for companies that had pre-existing antitrust compliance programs, which was based on the theory that the occurrence of an antitrust violation meant that such a program was ineffective. According to Assistant Attorney General Makan Delrahim, this position reflected "an outdated view of the real world."

The Guidance explains in considerable detail the elements of a robust and effective antitrust program and is intended to be read in conjunction with other prosecutorial guidance materials, including the "Principles of Federal Prosecution of Business Organizations" and the United States Sentencing Guidelines.[3]

The Division acknowledges that while it has "no formulaic requirements regarding the evaluation of a compliance program," prosecutors should ask three preliminary questions about a company's compliance efforts to focus their analysis on a case-by-case basis:

1. "Does the company's compliance program address and prohibit criminal antitrust violations?

2. Did the antitrust compliance program detect and facilitate prompt reporting of the violation?

3. To what extent was a company's senior management involved in the violation?"[4]

The change brings the Division in alignment with the position taken by the U.S. Department of Justice in non-antitrust matters, namely that "no compliance program can ever prevent all criminal activity by a corporation's employees."[5] In doing so, the Guidance identifies *nine factors* that the Division should consider when evaluating a compliance program's effectiveness at the *charging stage*:

1. **Design and Comprehensiveness:** Division prosecutors will consider "the design, format and, comprehensiveness" of the program, including its integration into a company's business, the accessibility/type of resources for employees, and whether it existed prior to the investigation. Focus will also be on how often it is reviewed or updated.

2. **Culture of Compliance:** Emphasis is placed on whether "management has clearly articulated – and conducted themselves in accordance with – the company's commitment to good corporate citizenship." This includes consideration of the actions of senior management, their response to violations, and personal accountability for prior failures.

3. **Responsibility for the Compliance Program:** A chief compliance officer or executive should be given "operational responsibility for the program," including "autonomy, authority, and seniority within the company's governance structure." He or she should also be given adequate resources for training, monitoring, auditing and evaluating the program.

4. **Risk Assessment:** A compliance program must be tailored to the company's industry and internal business lines, including common types of misconduct. Antitrust policies should be implemented accordingly, utilizing information or metrics to help detect violations and reviewed to keep abreast of legal or technological advances and lessons learned.

5. **Training and Communication:** The Guidance directs prosecutors to consider whether a program's training and communications allow employees to understand their antitrust obligations. Communication issues include the nature of the communication and method of distribution, whether antitrust policies are included in a Code of Conduct, and whether employees must certify that they have read the policy. Training considerations include who receives training, whether that training is tailored to business lines and seniority, the type, timing and format of training and whether training is updated to reflect developments.

---

3 U.S. Department of Justice, Justice Manual § 9-28.300, "Principles of Federal Prosecution of Business Organizations." Available at https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.800. United States Sentencing Guidelines, Chapter 8. Available at https://www.ussc.gov/guidelines/2015-guidelines-manual/2015-chapter-8.

4 See Guidance, p. 3.

5 U.S. Department of Justice, Justice Manual § 9-28.800.

www.competitionpolicyinternational.com
Competition Policy International, Inc. 2019© Copying, reprinting, or distributing
this article is forbidden by anyone other than the publisher or author.

6. **Review, Monitoring and Auditing:** Regular review and audits should be undertaken to ensure the program continues to address relevant antitrust risks, to reinforce a company's commitment to compliance and to identify violations quickly. The Division will consider the method used to evaluate or audit the program and the frequency of review.

7. **Reporting:** The program should utilize anonymous or confidential reporting methods that employees can use without fear of retaliation. Relevant factors include the type of mechanism, whether the reporting system is publicized internally, whether employees have a duty to report, and whether reports are periodically reviewed.

8. **Incentives and Discipline:** The Division will consider the incentive and discipline features of the program, including the nature of any incentives for compliance (e.g., bonus clawbacks or denial of promotions) and the type of discipline inflicted for prior violations, such as management turnover, termination or ongoing supervision.

9. **Remediation and Role of the Compliance Program in the Discovery of the Violation:** The Guidance emphasizes the importance of early detection and self-policing, as well as any remedial efforts, which should enable a company to be the first applicant for leniency. Considerations here include the role of the program in uncovering the violation, individual knowledge prior to detection, the role of senior leadership in addressing the violation and whether the program assisted the company to promptly self-report.

With respect to credit at the *sentencing stage*, prosecutors will follow the United States Sentencing Guidelines, which enable a three-point reduction in a company's culpability score if the company has an "effective" compliance program.[6] First, like at the charging stage, what is considered effective will be assessed on a case-by-case basis. Most importantly, sentencing credit will not be available, and a compliance program will be deemed ineffective, if (i) the company failed to promptly report a violation to the Division, or (ii) members of the senior management were involved in the violation. Second, as AAG Delrahim explained, when determining the appropriate corporate fine under the Sentencing Guidelines, Division prosecutors may take into account the existence of a compliance program. Third, the existence of an effective compliance program is relevant to a probation recommendation or the recommendation of an external monitor.[7]

III. IMPLICATIONS FOR IN-HOUSE COUNSEL

The Division's Guidance is a positive step towards assisting companies and their antitrust counsel in drafting and implementing an antitrust compliance program. Although the Guidance applies only to criminal cartel conduct, the Division's about-face in compliance program policy marks a significant and important shift that applies to companies of all sizes and will assist in-house counsel to craft and implement a comprehensive antitrust compliance program. The Guidance is a helpful reminder of the importance of compliance and will incentivize companies to review, update and modify their programs. It will also assist to frame the discussion as to the type of antitrust compliance program to implement, including the content and format of antitrust policies, the type of training to be implemented, employees to be targeted by the program, the regularity with which a policy or program is reviewed and revised, and the effectiveness of an internal whistleblower mechanism. The clear articulation of what is considered "robust and effective" can only be considered a positive in compliance circles.

Antitrust compliance should already be very familiar to in-house counsel, given that companies must ensure their employees understand their antitrust obligations, with non-compliance potentially resulting in civil penalties of hundreds of millions of dollars. Issues such as resale price maintenance, civil cartel conduct, group boycotts, tying and bundling, predatory pricing and gun jumping are issues that already should be addressed by corporate compliance programs. Furthermore, many of the elements of a robust and effective compliance program, as detailed in the Guidance, will likely be familiar to in-house counsel or compliance officers that are already tasked with ensuring compliance with other regulatory regimes, including FCPA, anti-bribery and anti-corruption laws, money laundering, and obstruction of justice.

Yet, the myriad of regulatory regimes presents another issue for compliance – corporate compliance is already a crowded space, where antitrust counsel is required to compete to obtain "airtime" to ensure their company meets its antitrust compliance obligations. In this respect, the possibility of obtaining credit at the charging and sentencing stages may be critical to achieving the buy-in required from company senior management to implement a robust and effective compliance program, and is a welcome development for in-house counsel. The Division's Guidance will also be helpful in informing the development of compliance programs outside the antitrust space.

---

6 See Guidance, p. 14.

7 "Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs," speech by AAG Makan Delrahim, July 11, 2019.

www.competitionpolicyinternational.com
Competition Policy International, Inc. 2019© Copying, reprinting, or distributing this article is forbidden by anyone other than the publisher or author.

The best practice compliance program envisioned by the Guidance may not be obtainable by all companies. While compliance programs will need to be tailored to company size, industry type and risk level posed, it may be difficult for small to medium sized businesses to meet the requirements of the Guidance. There is uncertainty as to whether any credit will be given to a compliance program implemented by a smaller company that meets many, but not all of the Guidance's nine steps, but is adequately and appropriately tailored to the specific needs and size of a small to medium sized company. While the Division states that it will address each compliance program on a case-by-case basis, this may be an impossibly high standard for certain companies to achieve, particularly if the Division will only grant credit on a very narrow basis (that is, if all nine steps are met).

IV. SELF-REPORTING

Significant questions remain regarding the extent to which the opportunity for compliance credit will incentivize companies to self-report criminal antitrust violations, particularly given the enormous risk of follow-on civil litigation (both within the U.S. and abroad) and how the Guidance interacts with the Division's Leniency Program.

The Division has taken a positive step towards recognizing that a company can have an effective compliance program even in the face of a violation. In such instance, a company may still receive credit at both the charging and sentencing stages if its compliance program bears the hallmarks of a program that is robust and effective as described in the Division's Guidance.

However, it is critical to note that simply maintaining a best-practice compliance program will only go so far in reducing or eliminating a company's exposure and culpability under the antitrust laws. In his speech announcing the Division's Guidance, AAG Delrahim emphasized that, to benefit under the policy, a company must be a "good corporate citizen," which requires both an effective compliance program, as well as prompt self-reporting, cooperation with the Division's investigation and remedial action.[8]

The Division has indicated that what amounts to "prompt" self-reporting will be assessed on a case-by-case basis, but there remains considerable uncertainty as to how the self-reporting requirement will play out in practice. It is not clear whether "prompt" self-reporting requires reporting to the Division immediately upon discovery of the potential violation, or whether credit still will be given for a robust and effective compliance program that uncovered misconduct but where the company chose not to report until after it had conducted an internal investigation and carried out any appropriate remedial action.

While credit for compliance may certainly increase the "carrot" for companies to pursue effective compliance programs, that incentive may be outweighed by other company considerations. Consider a situation where a company with a best practice compliance program detects a violation. In that scenario, the company may have a Code of Conduct which every employee must sign, a written antitrust compliance policy and training program that includes in-person and online training with real life examples of issues relevant to the company completed on a yearly basis. The program is regularly audited by antitrust in-house counsel, with a whistleblower hotline, and regular communication between the antitrust in-house counsel or compliance officer and senior company management. This program would meet the requirements of the Division's Guidance.

Yet, even if the in-house counsel uncovered the price fixing, conducted an internal investigation, identified that the price fixing was carried out by a rogue employee, took steps to terminate the contravening employee, and then reviewed and revised its compliance program policies, all of its compliance efforts may go unrecognized by the Division if it decided not to self-report and the Division later uncovers the violation. Even if the company does choose to self-report, but does so at a later point in time (for example, after an internal investigation), it also may not receive any credit.

But, there are many reasons why a company may choose not to self-report. The most significant reason is that even if leniency is obtained under the Division's Leniency Program, notifying the Division could result in potentially ruinous follow-on civil litigation by private plaintiffs, state Attorneys General and other global antitrust litigation or government regulators. AAG Delrahim made clear that there is no intention to have de-trebling and other benefits of the Antitrust Criminal Penalty Enhancement & Reform Act ("ACPERA")[9] apply in the absence of leniency. Any benefits of prompt self-reporting, while perhaps providing credit at the charging and sentencing stages at the U.S. federal level, must therefore be weighed against the potential for additional civil and criminal liability. This will significantly inform both the financial and time investment made by antitrust counsel in their company's compliance program.

8 "Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs," speech by AAG Makan Delrahim, July 11, 2019.

9 The Antitrust Criminal Penalty Enhancement & Reform Act of 2004; Pub. L. No. 108-237, § 213(a)-(b), 118 Stat. 661, 666-668 (June 22, 2004).

www.competitionpolicyinternational.com
Competition Policy International, Inc. 2019© Copying, reprinting, or distributing this article is forbidden by anyone other than the publisher or author.

Another factor for in-house counsel to consider is the interaction between credit for robust and effective compliance programs and non-prosecution decisions by the Division. It appears that maintaining an effective compliance program will not result in non-prosecution of a company for cartel conduct, nor will it result in shifting the dial from criminal prosecution to civil action. However, the Division has indicated that it may consider a deferred prosecution agreement ("DPA") where appropriate.[10] A DPA involves the Division filing criminal charges but deferring prosecution subject to compliance with certain conditions for a period of time. A decision to proceed by way of DPA depends not only on the effectiveness of a compliance program, but also many other discretionary factors that the Division is required to apply.[11] It remains to be seen whether we will see a rise in the use of DPAs, and whether the availability of a DPA will encourage a company to invest in a best-practice compliance program.

V. CONCLUSION

The compliance program policy is an encouraging step towards greater transparency for businesses in determining their level of investment in internal antitrust compliance. This should provide in-house counsel and compliance officers with the support they need to encourage senior management to invest in a company's antitrust compliance efforts. It is clear, however, that a company's management will face tough decisions in determining whether the "carrot" – credit at the charging and sentencing stages – is worth the risks that flow from prompt self-reporting. There are many competing factors at play and, in some instances, the availability of such credit may be outweighed by other interests. Despite the Division's efforts, it appears that its Leniency Program continues to remain the ultimate incentive for early detection of antitrust violations, as the only way for a company and its executives to obtain amnesty from criminal enforcement action.

Despite these uncertainties, the issuance of these Guidelines is a strong step in the direction of recognizing the efforts companies take toward encouraging antitrust compliance and serves as a useful reminder of the importance of having a robust and effective antitrust compliance policy.

10 *Id.*

11 U.S. Department of Justice, Justice Manual § 9-28.300.

www.competitionpolicyinternational.com
Competition Policy International, Inc. 2019© Copying, reprinting, or distributing this article is forbidden by anyone other than the publisher or author.

CPI COMPETITION POLICY INTERNATIONAL

CPI Subscriptions

CPI reaches more than 20,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.