NAVIGATING ANTITRUST COMPLIANCE UNDER THE DOJ'S NEW GUIDANCE

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I. INTRODUCTION

The Antitrust Division of the U.S. Department of Justice ("DOJ") has for many years insisted on guilty pleas for companies involved in criminal violations of the antitrust laws that do not otherwise qualify for leniency under the Antitrust Division's Corporate Leniency Policy. On July 11, 2019, Assistant Attorney General Makan Delrahim announced that the Antitrust Division was reversing this policy.[2] The Antitrust Division also announced new guidance (the "Guidance") for evaluating antitrust compliance programs.[3] This represents a significant shift that has opened a new path to a potential deferred prosecution agreement ("DPA") for companies with "effective" antitrust compliance programs, as measured under the Guidance.

Companies should review the Guidance carefully to understand the Antitrust Division's expectations regarding antitrust compliance. This article provides a primer on the Guidance and suggestions for companies thinking through how to navigate antitrust compliance issues under the new regime.

II. BACKGROUND

For more than 25 years, the Antitrust Division has relied on its Corporate Leniency Policy to incentivize companies to establish effective compliance programs. Pursuant to that policy, leniency is granted to the first company that self-reports a violation of the antitrust laws (and meets the Corporate Leniency Policy's other requirements). The benefits of leniency include immunity from criminal charges and penalties, non-prosecution protections for certain cooperating employees, and reduced damages and other benefits in related civil actions under the Antitrust Criminal Penalty Enhancement & Reform Act.

For companies that do not win the "race for leniency" but self-report early, the Antitrust Division has historically insisted upon a guilty plea,[4] regardless of the effectiveness of the company's compliance program.[5] Specifically, the DOJ's Justice Manual stated:

> [T]he Antitrust Division has established a firm policy, understood in the business community, that credit should not be given at the charging stage for a compliance program and

2 Makan Delrahim, Asst. Att'y Gen., U.S. Dep't Justice, Antitrust Div., Remarks at New York University School of Law Program on Corporate Compliance and Enforcement (July 11, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0; see also *CPI Talks with Makan Delrahim*, CPI Antitrust Chronicle, Summer 2019, at 11-12.

3 U.S. Dep't of Justice, Antitrust Division, "Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations" (July 2019), https://www.justice.gov/atr/page/file/1182001/download.

4 There have been instances in which the Antitrust Division has entered into a DPA with a company, but they have been exceedingly rare.

5 Delrahim Remarks, *supra* note 2.

that amnesty is available only to the first corporation to make full disclosure to the government."[6] It further explained that "the nature of some crimes, e.g. antitrust violations, may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program.[7]

Under this prior policy, non-prosecution agreements ("NPAs") and DPAs were typically unavailable to such companies, and their only opportunity to receive any credit for their compliance programs, self-reporting, cooperation, or remediation was at the sentencing stage.

III. DISCUSSION

Pursuant to new Antitrust Division policy announced on July 11, 2019, Antitrust Division prosecutors will now consider the company's compliance program at the charging stage in criminal antitrust matters. The DOJ has removed from the Justice Manual the language reflecting the Antitrust Division's former policy. According to Delrahim, this shift in approach recognizes "the progress that has been made over the years in antitrust awareness and increased compliance" and a desire to "encourage companies to further invest in compliance efforts."[8] The change in policy creates the potential for companies that have robust compliance programs, but do not win the "race for leniency," to obtain a DPA (although not an NPA) instead of a guilty plea.

In the charging phase, Antitrust Division prosecutors must now consider the Principles of Federal Prosecution of Business Organizations (collectively, the "Principles") that apply to all federal prosecutors considering criminal charges against companies. The Principles set forth ten factors, including four that Delrahim has noted relate to "good corporate citizenship"[9]: (i) "the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of the charging decision"; (ii) "timely and voluntary disclosure of wrongdoing"; (iii) "willingness to cooperate"; and (iv) "remedial actions."[10]

To assist its attorneys in evaluating compliance programs, and to respond to a "desire for greater clarity and transparency on the considerations weighed by the Antitrust Division when evaluating compliance programs," the Antitrust Division published the Guidance.[11]

The Guidance has two sections. The first section sets forth a comprehensive set of factors that prosecutors are to consider in evaluating an antitrust compliance program at the charging stage. The second section clarifies the Antitrust Division's policy regarding how prosecutors should evaluate the effectiveness of a compliance program at the sentencing stage.

A. Evaluating an Antitrust Compliance Program at the Charging Stage

Preliminary Questions. The Guidance begins with preliminary questions intended to "focus the analysis":

- "*Does the company's compliance program address and prohibit criminal antitrust violations?*"
- "*Did the antitrust compliance program detect and facilitate prompt reporting of the violation?*"
- "*To what extent was a company's senior management involved in the violation?*"

Elements of an Effective Compliance Program. The Guidance explains that there is no "checklist or formula" for an effective antitrust compliance program, but sets forth nine factors to consider. For each factor, the Guidance lists questions that the prosecutors should consider.

6 Justice Manual § 9-28.400 cmt.

7 Justice Manual § 9-28.800.

8 Delrahim Remarks, *supra* note 2.

9 *CPI Talks with Makan Delrahim*, available at https://www.competitionpolicyinternational.com/cpi-talks-14/.

10 Justice Manual § 9-28.300.

11 Delrahim Remarks, *supra* note 2.

"Design and Comprehensiveness." The Guidance states that "*key considerations*" in evaluating the design and comprehensiveness of a compliance program include its "*integration*" into the company's business and the accessibility of antitrust compliance resources to employees. The Guidance then provides a list of questions focusing on how the program is implemented, and to whom it is communicated.

"Culture of Compliance." The Guidance states that prosecutors should examine the extent to which the company's management "has clearly articulated – and conducted themselves in accordance with – the company's commitment to good corporate citizenship." It then provides a list of questions relating to senior leaders' conduct, their role in promoting compliance, and the extent of their involvement (if any) in the antitrust violations at issue.

"Responsibility for the Compliance Program." The Guidance states that for an antitrust compliance program to be "*effective*," those with operational responsibility for the program must have sufficient autonomy, authority, and seniority, and there must be adequate resources for training, monitoring, auditing, and periodic evaluation of the program. The Guidance lists questions relating to the organization of the compliance function; how it compares with other functions in the company in terms of stature, compensation, seniority, resources, etc.; antitrust experience of compliance personnel; and resources dedicated to education and training.

"Risk Assessment." The Guidance states that a "*well-designed*" compliance program is tailored to account for antitrust risk where it might arise in light of the company's lines of business, and lists questions relating to that subject. Additional questions focus on antitrust risk detection methods implemented by the company, and how the company manages new antitrust risks associated with any changes to the company's business. The questions highlight the need for the company to provide specialized antitrust compliance training for human resources personnel and executives responsible for overseeing recruitment and hiring, building on prior Antitrust Division guidance in the area of human resources.[12]

"Training and Communication." The Guidance directs prosecutors to examine the company's antitrust policies and training and lists questions that focus on the extent to which the company's policies have been disseminated, and whether the manner of communication "promotes and ensures employees' understanding." Prosecutors are directed to consider who receives antitrust-specific training, as well as the timing, frequency, form, and content of that training (such as whether it is tailored to the employees' duties, whether it uses examples that could arise in the relevant business, and whether it addresses lessons learned from prior incidents).

"Periodic Review, Monitoring and Auditing." The Guidance stresses the importance of periodically assessing antitrust compliance. It directs prosecutors to consider how the company evaluates the effectiveness of its program and how it audits/updates the program.

"Reporting." The Guidance states that reporting mechanisms should allow employees to report violations anonymously or confidentially without fear of retaliation. It then lists questions relating to how the reporting mechanisms function, the incentives or disincentives for reporting antitrust violations, and the extent to which the company periodically analyzes its business for patterns or other red flags of an antitrust violation.

"Incentives and Discipline." The Guidance instructs prosecutors to consider the extent to which the company incentivizes antitrust compliance. It lists questions relating to the company's compensation structure and disciplinary policies. Prosecutors are directed to consider past examples of discipline, including for senior executives, for antitrust or other compliance failures.

"Remediation and Role of the Compliance Program in the Discovery of the Violation." The Guidance provides that a company's remedial efforts are relevant to the effectiveness of the compliance program both at the time of the antitrust violation and at the time of the charging decision or sentencing recommendation. The Guidance lists questions relating to how the antitrust violation at issue was identified, how the company has since revised its compliance program, whether outside counsel was involved in assisting the company in that regard, and how the changes have been conveyed to employees.

12 U.S. Dep't Justice & Fed. Trade Comm'n, "Antitrust Guidance for Human Resource Professionals," (Oct. 2016), https://www.justice.gov/atr/file/903511/download.

B. Sentencing Considerations

The second section clarifies the Antitrust Division's guidance for evaluating a company's compliance program when making sentencing recommendations. At the sentencing phase, an entity may receive credit for its compliance program in three ways. First, U.S. Sentencing Guidelines § 8C2.5(f) provides for a three-point reduction in a corporate defendant's culpability score if the company had an effective compliance program (absent unreasonable delay in reporting the offense to appropriate governmental authorities).[13] Second, the existence and effectiveness of a compliance program may be relevant to determining whether a company should be sentenced to probation.[14] Third, the effectiveness of a compliance program, including post-violation remedial efforts, may be relevant to determining the appropriate corporate fine to recommend within the guideline range, or whether to recommend a fine below that range.[15]

IV. PRACTICAL IMPLICATIONS

Assistant Attorney General Delrahim's speech, and the new policies he announced, highlight the Antitrust Division's focus on the need for companies to establish and maintain effective antitrust compliance programs. To be clear, compliance is not a panacea. As noted above, the Justice Manual instructs prosecutors to consider all of the Principles when making charging decisions. As Delrahim explained, "[g]ood corporate citizens not only implement robust compliance programs, but if misconduct occurs, they promptly self-report, cooperate, and take remedial action," and "prosecutors will not credit compliance programs when the other hallmarks of good corporate citizenship are absent."[16]

That said, although an effective compliance program should "not be misconstrued as an automatic pass for corporate misconduct,"[17] it could mean the difference between a DPA and a criminal conviction under the new regime. Compliance and self-reporting are intertwined. An effective compliance program is one that helps to promptly identify misconduct. The effectiveness of a compliance program and the promptness of self-reporting are two of the factors that prosecutors are directed to consider in making charging decisions. Moreover, having a robust compliance program remains the best way to maximize the chances of being the first to self-report a violation and potentially obtain the benefits of non-prosecution under the DOJ's Corporate Leniency Policy.

What follows below is a practical approach to understanding the Guidance in the context of your own company's compliance program. We provide suggestions for companies looking to be proactive in assessing and, if appropriate, enhancing their antitrust compliance programs in light of the Guidance.

Risk Assessment. Risk assessment is the fourth "*element*" of an effective compliance program listed in the Guidance, but it is where any company should start. There is no one-size-fits-all antitrust compliance program; the Guidance emphasizes that an effective compliance program should be tailored to the particular risks presented by the company's activities. Companies re-evaluating compliance in light of the Guidance should thus conduct a review across their business to develop an understanding of the particular risks presented by their operations. The approach to the other "*elements*" under the Guidance — training, guidance, reporting, etc. — should flow from that risk assessment.

Companies should consider retaining external antitrust experts to assist with the risk assessment and to make recommendations for specific enhancements, which should make it more likely that all antitrust risks are identified, including those that may be less obvious. Pricing and bidding are familiar areas of antitrust risk. Recent developments have made clear, however, that the Antitrust Division intends to prosecute other forms of antitrust violations that may seem less apparent.

13 When an organization is convicted of a federal crime, the court will consider the U.S. Sentencing Guidelines in determining the appropriate sentence, including any fine the organization may be required to pay. Likewise, prosecutors typically consider the U.S. Sentencing Guidelines when negotiating the resolution of a criminal matter. The organization's culpability score under the Sentencing Guidelines (which depends on six factors) is used to calculate the recommended fine range. See U.S. Sentencing Guidelines §§ 8C2.6, 8C2.7.

14 U.S. Sentencing Guidelines § 8D1.1.

15 U.S. Sentencing Guidelines § 8C2.8; 18 U.S.C. § 3572.

16 *CPI Talks with Makan Delrahim*, *supra* note 2, at 12.

17 Delrahim Remarks, *supra* note 2.

For example, in recent years, the Antitrust Division has shined a spotlight on the antitrust implications of HR-related activities. In October 2016, the Antitrust Division announced that it intended to "proceed criminally against naked wage-fixing or no-poaching agreements" (i.e. agreements unconnected to a legitimate collaboration between employers) because "these types of agreements eliminate competition in the same irredeemable way as agreements to fix the prices of goods or allocate customers."[18] Simultaneously, the Antitrust Division and the Federal Trade Commission ("FTC") jointly issued guidance making clear that naked no-poaching and wage-fixing agreements are illegal and that sharing information with competitors about terms and conditions of employment also could run afoul of the antitrust laws.[19] In April 2018, the Antitrust Division announced a settlement with Knorr-Bremse AG and Westinghouse Air Brake Technologies Corp, two of the world's largest rail equipment suppliers, relating to no-poach agreements among the companies.[20] Clearly, HR-related antitrust issues have become a significant focus for the Antitrust Division.

Notwithstanding the publicity concerning this issue, the individuals involved may not have appreciated that their activities carried antitrust risk, particularly in the context of no-poach agreements and the sharing of commercially sensitive HR information (such as salary data). Engaging an antitrust expert to assist with assessing and enhancing a compliance program can help identify antitrust risks before they become the Antitrust Division's next enforcement focus.

In conducting the risk assessment, companies should take care to survey all touchpoints with competitors. Risk for cartel conduct and price fixing can be most acute at relatively high levels within the organization, as that is often where the authority to enter into agreements that bind the company resides. But antitrust risk can and does arise in low levels of an organization as well. All areas in which employees have direct or indirect communications with competitors should be considered. Companies should inventory all industry groups in which employees participate, as these could be a mechanism for potentially improper information exchanges. Even if participation in industry groups is widespread and frequent, there should be adequate controls to manage the antitrust risk. The risk assessment should look at relationships with vendors, especially if those vendors work with or provide information about competitors. The risk assessment should include any areas in which contracts are frequently entered into (e.g. corporate finance, mergers and acquisitions) to understand the practice in the industry with respect to non-solicitation or no-poach provisions. The assessment should cover not only the company's lines of business, but also support functions (such as HR).

A risk assessment should be the first step for companies wishing to be proactive about the Antitrust Division's new Guidance. As the Guidance contemplates, however, antitrust risks are not static. Companies should periodically refresh their risk assessments to take into account changes in the industry, law, technology, and the company's lines of business. An accurate risk assessment can help tailor your compliance program to the risks actually presented by the business and promptly responds to changes.

Antitrust Policy, Training and Guidance. Antitrust policies, training and guidance materials are critical elements of an effective compliance program under the Guidance. Companies can assess and enhance these materials on the basis of a thoughtful risk assessment.

First, the risk assessment should identify which groups of employees need training and guidance. As noted above, this could extend to senior employees, even in large organizations. It may be appropriate to train senior executives and members of the Board of Directors. As an added benefit, appropriate training for senior employees can help to promote a culture of compliance throughout the organization. Beyond that, training and guidance should be tailored to the particular groups of employees that engage in activities that carry antitrust risk. It may be true for many organizations that all employees need some level of antitrust training. At some companies, it may even include contractors and agents.

Second, the training and guidance for each different group of employees should be designed to address the particular antitrust risks faced by that group, as identified during the risk assessment. Depending on the size and scope of the organization, it may be appropriate to have multiple sets of training materials, and subject-specific antitrust guidance, tailored to different groups within the company. For example, at a large institution, an effective program may have one set of materials for employees in the sales and trading businesses, another for employees in the corporate finance function, and another for HR and Legal. Consider also whether there are cultural or linguistic variations across the company that require adapting the training and guidance.

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18 U.S. Dep't of Justice, "Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation," (October 20, 2016), https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals.

19 *Id.*

20 U.S. Dep't Justice, *Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees* (Apr. 3, 2018), https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete.

Training and guidance should cover the scope of the company's competitors, which may not always be obvious. Drawing once again from the HR context, a technology company's competitors for talent might include not only other technology companies but also any other company with a technology department. With respect to certain positions in HR, competitors for talent may even include external headhunters that work with the company. The risk assessment should identify these nuances so that they inform the design of the company's training and guidance materials.

Under the Guidance, companies should give their training and guidance materials real-world applicability. To illustrate the concepts, materials should use examples that the employees who are receiving them are most likely to experience. It would not be useful, for example, for an HR employee to receive training using example scenarios in which salespeople share pricing models. Potential sources for real-world examples include the company's past experiences with competition issues (including those identified during the risk assessment, if any), examples from the news, and specific public enforcement actions against other companies. The goal should be to make training and guidance materials easily digestible and useful for the employees receiving them.

Companies can also institute a procedure to provide antitrust training to new hires and employees who have changed job functions, and repeat that antitrust training periodically. Likewise, companies can provide their antitrust policies and guidance materials to new hires upon joining the company and periodically thereafter. The risk assessment, again, should govern the frequency with which this occurs. Employees who have regular contact with competitors may need training that is more frequent. Likewise, it may be appropriate to provide one-off refresher training to particular employees before they attend industry group meetings with competitors.

In addition to updating training and guidance materials in light of a thorough risk assessment, companies that wish to be proactive can take a few easy steps right now:

- Companies can establish a procedure for reviewing and updating their antitrust policies, training and guidance materials on a periodic basis to account for changes in the industry, technology, law, and the business.

- Companies can institute systems for tracking participation in trainings and appropriate consequences for employees who do not complete required trainings.

- It may be appropriate to involve senior individuals in training sessions (e.g. in an introductory role or, if appropriate, to deliver the training) to emphasize the importance of antitrust compliance and to promote further a culture of compliance.

- Companies can make their antitrust policy and guidance materials available in a centralized location that is easily accessible to employees, such as a company-wide intranet.

- Companies can institute a procedure requiring employees to certify in writing that they received, reviewed, and understand the antitrust compliance policy.

Other Considerations. On the basis of a thoughtful risk assessment, proactive companies can begin to address other factors assessed under the Guidance.

The Guidance emphasizes the mechanisms for monitoring antitrust compliance and reporting potential violations. Depending on the circumstances, it may be appropriate to institute a whistleblower hotline, where employees can anonymously report suspected violations, or an antitrust helpdesk, where employees can seek approval or specific legal guidance for proposed activities. For some companies, periodic, unannounced audits may be the most appropriate way to monitor compliance. For others, the risk assessment may indicate that real-time employee surveillance tools are warranted. In any case, the employees charged with monitoring antitrust compliance and handling reports of suspected violations should be trained to spot potential antitrust issues.

The Guidance also states that companies should assess the ways in which they incentivize antitrust compliance. It may be appropriate for companies to incorporate compliance metrics into their key performance indicators for calculating bonuses. Companies should also consider how antitrust violations are disciplined.

Finally, the risk assessment should inform how the company thinks about the organization and governance of its compliance function. The nature and frequency of antitrust risks encountered in the ordinary course of the company's business may have implications for the size of the compliance team, the seniority of its leaders, and the amount of time and effort budgeted specifically for antitrust compliance issues.

V. CONCLUSION

While this shift in approach at the Antitrust Division creates a new path to a DPA, it does not obviate the importance of the Corporate Leniency Policy. Leniency remains the only way to achieve immunity.[21] But the best way to maximize the chances of winning the "race to leniency"—and the prospect of avoiding prosecution if not—is to implement an effective compliance program that encourages and facilitates prompt reporting of misconduct. The Guidance should assist companies in achieving that goal.

Companies should carefully review the Guidance, particularly with respect to the new detail provided by the DOJ regarding its areas of interest in assessing compliance programs, and should consider the Guidance a useful resource for understanding the Antitrust Division's expectations for both the design and implementation of antitrust compliance programs.

21 Delrahim Remarks, *supra* note 2.

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