TURN THE PAGE: THE ANTITRUST DIVISION'S NEW APPROACH TO INCENTIVIZING ANTITRUST COMPLIANCE PROGRAMS

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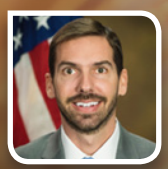

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I. INTRODUCTION: A NEW MODEL FOR INCENTIVIZING ANTITRUST COMPLIANCE PROGRAMS

Corporate compliance programs are the first line of defense in preventing costly antitrust crimes before they corrupt our free markets and harm American consumers. As the enforcer of the federal criminal antitrust laws, the Antitrust Division is responsible for using its authority to deter, detect, and prosecute these violations. While as prosecutors we are often focused on detection and prosecution, the Division also wants to do all it can to deter and prevent criminal antitrust conduct before it occurs. With that in mind, on July 11, 2019, the Division announced multiple changes aimed at incentivizing companies to prioritize antitrust compliance.[2] The Division will now consider compliance at the charging stage in criminal antitrust investigations. The Division also announced revisions to the Justice Manual reflecting this policy change, along with updates to the Antitrust Division Manual. And for the first time, the Division issued public guidance on the Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations. This announcement reflects the culmination of recent changes to how the Division views compliance programs and the important role they play in deterring antitrust violations and promoting good corporate citizenship.

II. THE ANTITRUST DIVISION'S HISTORICAL VIEWS ON CREDITING CORPORATE COMPLIANCE

Before the recent announcement, it was widely known that the Division did not give credit at the charging stage for corporate compliance programs. Indeed, the Justice Manual stated that "the 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."[3] Instead, since the early 1990s, the Division's view was that the benefits of an antitrust compliance program were twofold: the ability to prevent antitrust crimes in the first instance, or, if that failed, detecting them early enough to qualify for leniency under the Corporate Leniency Policy.[4] This approach helped underscore the importance of winning the race for leniency at a time when that policy was establishing itself.

2 Makan Delrahim, Assistant Att'y Gen., Antitrust Division, U.S. Dep't of Justice, Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs, Remarks as Prepared for Delivery at New York University School of Law Program on Corporate Compliance and Enforcement, at 3 (Jul. 11, 2019), https://www.justice.gov/opa/speech/file/1182006/download.

3 Justice Manual § 9-28.400 (new Aug. 2008).

4 See Gary R. Spratling, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, The Experience and Views of the Antitrust Division, Remarks as Prepared for Corporate Crime in America: Strengthening the "Good Citizen" Corporation, a National Symposium Sponsored by the U.S. Sentencing Commission (Sept. 8, 1995), https://www.justice.gov/atr/file/519136/download.

At sentencing, the Division has never recommended a reduction under the Sentencing Guidelines for a pre-existing compliance program. The Division has always followed the Sentencing Guidelines when deciding whether to recommend a potential reduction in a company's fine for an effective compliance and ethics program.[5] Under the Sentencing Guidelines, however, the involvement of high-level or substantial authority personnel — almost always found in an antitrust violation — disqualifies a company from receiving credit. The Division's record here is not anomalous. According to Sentencing Commission data, the Sentencing Guidelines' compliance reduction is rarely given.[6] While the Division did not historically credit compliance programs at charging and has yet to encounter a situation at sentencing that meets the Guidelines' requirements, the Division's leniency policy has long provided the ultimate credit for good corporate citizens who detect and promptly self-report violations.

III. ENCOURAGING GOOD CORPORATE CITIZENSHIP

The Division's leniency policy, one of the most noteworthy developments in white collar enforcement in the last 25 years, has pushed companies to consider the risks associated with committing antitrust crimes and created a strong incentive for companies to report these crimes to the Division. The Division's vigorous enforcement efforts have raised antitrust awareness and encouraged companies to invest in antitrust compliance. The leniency policy has been the Division's most important investigative tool. Only the first-in reporting company can obtain leniency and incentivizing compliance for those companies who do not win the race for leniency is also important. By changing how it evaluates compliance, the Division is taking another step in its criminal enforcement efforts toward incentivizing, recognizing, and, where appropriate, rewarding corporations who share four common traits of good corporate citizenship. Good corporate citizens: (i) commit themselves to a culture of compliance, but if misconduct occurs, they (ii) promptly self-report, (iii) provide full and timely cooperation, and (iv) undertake timely and thorough remediation.

Moreover, years of experience have taught us that a well-designed compliance program will not catch all wrongdoing and that one lapse, albeit a significant one, does not conclusively make the program a failure.[7] Instead, the better course is to evaluate the failure and place it in the broader context of other factors. Division prosecutors can and will do a fact-based assessment of a company's compliance program to determine its effectiveness and provide credit where, consistent with the Principles of Federal Prosecution of Business Organizations, a good corporate citizen with an effective compliance program nevertheless finds itself implicated in a cartel investigation. The potential credit at the charging stage is resolution by deferred prosecution agreement ("DPA"), instead of guilty plea.

5 See U.S.S.G. § 8C2.5(f); U.S.S.G. app. C §§ 673 (2004), 744 (2010).

6 See Kathleen Grilli, General Counsel for the U.S. Sentencing Commission, Remarks Delivered at the Public Roundtable on Antitrust Criminal Compliance, at 7 (Apr. 9, 2018), https://www.justice.gov/atr/page/file/1064291/download (Only 10 organizations have received Guidelines reduction for having an effective ethics and compliance program out of the 4,558 organizational sentencings tracked by the U.S. Sentencing Commission since 1993).

7 Justice Manual § 9-28.800 ("While the Department recognizes that no compliance program can ever prevent all criminal activity by a corporation's employees, the critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives.").

IV. FIRST CHANGES TO THE DIVISION'S VIEWS ON CREDITING CORPORATE COMPLIANCE

The Division's approach to evaluating and crediting effective compliance programs began to change several years ago.[8] In 2014, the Division announced that it was actively considering ways to credit companies that proactively adopt or strengthen compliance programs after coming under investigation.[9] Shortly thereafter, the Division credited "forward looking" compliance efforts at sentencing by advocating for a fine reduction pursuant to 18 U.S.C. § 3572(a)(8) for extraordinary efforts to improve compliance and prevent the recurrence of a violation undertaken after the Division opened an investigation.[10]

The Division also continued to study compliance. On April 9, 2018, the Division held a public roundtable discussion of corporate antitrust compliance and its implications for criminal antitrust enforcement policy.[11] The roundtable provided a forum for the Division to engage with in-house and outside corporate counsel, foreign antitrust enforcers, international organization representatives, and other interested parties on the topic of antitrust compliance. Participants discussed the role that antitrust compliance programs play in preventing and detecting criminal antitrust violations, and ways to further promote corporate antitrust compliance. The Division considered what it heard at the Compliance Roundtable and began internally evaluating what could be done to further promote corporate antitrust compliance programs.[12] As part of this review, the Division considered the approaches followed by other components within the Department of Justice and other jurisdictions around the world. At the end of this internal assessment, the Division announced comprehensive changes to the way it evaluates and credits corporate compliance programs.

V. CHANGES TO JUSTICE MANUAL AND ANTITRUST DIVISION MANUAL

The Justice Manual previously recognized the Division's longstanding policy "that credit should not be given at the charging stage for a compliance program" in a Division investigation.[13] The Justice Manual further recognized that the nature of "antitrust violations" may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program.[14] After Assistant Attorney General Delrahim's July 11, 2019 announcement, these two provisions were deleted from the Justice Manual, at the Division's request, to reflect the new policy and make clear that the Division will now consider compliance at the charging stage in criminal antitrust investigations. In practical terms, this means that a company has the opportunity to earn a DPA and avoid criminal conviction. Under the DPA, the company will be charged via criminal information, but the prosecution of the case is deferred for the pendency of the agreement, usually three years. If the company abides by the agreement then the Division will move to dismiss the information with prejudice and the company avoids criminal conviction.

In addition to removing the specific antitrust considerations regarding compliance from the Justice Manual, the Antitrust Division Manual has also been updated to make clear that Division prosecutors are to evaluate all of the factors contained in the Principles of Federal Prosecution of Business Organizations, including pre-existing compliance programs, in corporate charging recommendations.[15] The Division Manual was also revised to provide guidance on evaluating compliance programs at sentencing and the selection of compliance monitors. Consistent with our longstanding belief in predictability and transparency, the Division Manual is publicly available.

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8 See Brent Snyder, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Compliance Is A Culture, Not Just A Policy, Remarks as Prepared for the International Chamber of Commerce/United States Council of International Business Joint Antitrust Compliance Workshop (Sept. 9, 2014), https://www.justice.gov/atr/file/517796/download [hereinafter Snyder, Compliance Is A Culture]; Brent Snyder, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Leniency in Multi-Jurisdictional Investigations: Too Much of a Good Thing?, Remarks as Prepared for the Sixth Annual Chicago Forum on International Antitrust (Jun. 8, 2015), https://www.justice.gov/sites/default/files/atr/legacy/2015/06/30/315474.pdf [Leniency in Multi-Jurisdictional Investigations]; Andrew Finch, Principal Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Antitrust in the Financial Sector, Remarks as Prepared for Antitrust in the Financial Sector: Hot Issues and Global Perspectives (May 2, 2018), https://www.justice.gov/opa/speech/file/1060981/download.

9 Snyder, Compliance Is A Culture, *supra* note 8, at 9.

10 See 18 U.S.C. § 3572(a)(8); *United States v. Kayaba Indus. Co.,* No. 1:15-cr-00098 (S.D. Ohio 2015); *United States v. Barclays PLC*, No. 3:15-cr-00077 (D. Conn. 2015); *United States v. Inoac Corp.*, No. 2:15-cr-00052 (E.D. Ky. 2017); see also Snyder, Leniency in Multi-Jurisdictional Investigations: Too Much of a Good Thing?, *supra* note 8, at 4.

11 Public Roundtable on Criminal Antitrust Compliance materials are available at https://www.justice.gov/atr/public-roundtable-antitrust-criminal-compliance.

12 Finch, *supra* note 8, at 8.

13 Justice Manual § 9-28.400 (new Aug. 2008).

14 *Id.* § 9-28.800 (revised Nov. 2015).

15 U.S. Dep't of Justice, Antitrust Division Manual, ch. 3, pt. G.2(c) (updated Jul. 2019), https://www.justice.gov/atr/division-manual.

VI. GUIDANCE ON EVALUATION OF CORPORATE COMPLIANCE PROGRAMS

At the Compliance Roundtable, the Division heard from both in-house and outside counsel that public guidance from the Division regarding antitrust-specific compliance programs would be helpful to both incentivize corporate expenditure on antitrust compliance and to provide transparency to support counseling corporate clients on the development and enhancement of antitrust-specific compliance programs. Also in July, the Division responded to these comments and for the first time issued public guidance on the Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations.[16] The guidance draws on a variety of sources, including the Justice Manual, the Division's prior experience in evaluating antitrust compliance programs, other resources within the Department concerning the evaluation of corporate compliance programs, including the Criminal Division Guidance on the Evaluation of Corporate Compliance Programs,[17] and the Sentencing Guidelines. This detailed, antitrust-specific guidance attempts to assist Division prosecutors in their evaluation of compliance programs at both the charging and sentencing stages, and to provide greater transparency regarding the Division's compliance analysis.

Like other Department guidance, the charging section is framed around the three fundamental compliance questions found in the Justice Manual: Is the program well-designed? Is it being applied earnestly and in good faith? Does it actually work?[18]

The guidance elaborates on these questions by identifying factors the Division will consider when evaluating an effective antitrust compliance program, including: (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.[19] For each of these elements, the guidance also provides additional antitrust-specific questions for prosecutors to consider depending on the facts. For example, in assessing the compliance program's design and risk assessment the guidance suggests asking, "as employees utilize new methods of electronic communication, what is the company doing to evaluate and manage the antitrust risk associated with these new forms of communication?"[20] Similarly, is the compliance program appropriately tailored to antitrust risk, such as risks associated with "human resources personnel and executives responsible for overseeing recruitment and hiring?"[21]

The guidance also addresses how Division prosecutors should evaluate compliance programs for sentencing purposes, including whether to recommend corporate probation. For example, among other factors that may counsel in favor of probation, whether the company's compliance program does not meet the Sentencing Guidelines' requirements[22] and whether the company leaves culpable executives in positions of authority.[23]

The guidance is a detailed document that should be read in its entirety. However, the guidance is not a checklist, and the Division's compliance analysis will not be formulaic. Not all factors will be relevant in every case, and the Division recognizes that a company's size may affect the resources allocated to its compliance program.

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

17 U.S. Dep't of Justice, Criminal Div., Evaluation of Corporate Compliance Programs (Apr. 2019), https://www.justice.gov/criminal-fraud/page/file/937501/download.

18 Justice Manual § 9-28.800 (revised Jul. 2019).

19 Guidance, *supra* note 16, at 3-4.

20 *Id.* at 7.

21 *Id.*; see also U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals (Oct. 2016), https://www.justice.gov/atr/file/903511/download.

22 U.S.S.G. § 8B2.1.

23 Guidance, *supra* note 16, at 12.

VII. COMPLIANCE GOING FORWARD

Counsel should familiarize themselves with the guidance and expect that Division prosecutors will ask the applicable questions as part of their evaluation of a company's antitrust compliance program. Division prosecutors will ask these questions throughout their investigation, including when questioning witnesses. Witnesses can be key to assessing many of the questions in the guidance, especially the company's commitment to compliance.[24] Indeed, the Division has long recognized that "[i]f senior management does not actively support and cultivate a culture of compliance, a company will have a paper compliance program, not an effective one."[25]

At the outset of any investigation, counsel should be prepared to address the following three preliminary antitrust-specific questions about a company's compliance efforts:

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?

These questions will focus our analysis of a company's compliance program for purposes of charging decisions or sentencing recommendations.

VIII. EARNING A DEFERRED PROSECUTION AGREEMENT

The existence of a compliance program does not guarantee a DPA. As the Justice Manual specifically states, "the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal misconduct undertaken by its officers, directors, employees, or agents."[26] Instead, Department prosecutors are directed to conduct a fact-specific inquiry into "whether the program [at issue] is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees."[27] An effective compliance program is one of ten Justice Manual factors prosecutors consider when assessing corporate wrongdoing. In making a charging recommendation, Division prosecutors will evaluate the compliance program's effectiveness, or lack thereof, and consider it together with all of the other relevant factors. Compliance goes hand in hand with the three other hallmarks of good corporate citizenship: prompt self-reporting, cooperation in the Division's investigation, and remediation.[28] The Justice Manual "counsel[s] against crediting compliance programs when the other three hallmarks of good corporate citizenship are absent."[29]

IX. NON-PROSECUTION AGREEMENTS

The Division will continue to *disfavor* non-prosecution agreements ("NPAs") with companies that do not receive leniency because complete protection from prosecution for antitrust crimes is available *only* to the first company to self-report and meet the Corporate Leniency Policy's requirements.[30]

24 *Id.* at 5 (quoting Justice Manual § 9-28.800 (revised Jul. 2019)) ("[E]mployees should be 'convinced of the corporation's commitment to [the compliance program].'").

25 *Id.* (quoting Snyder, Compliance Is A Culture, *supra* note 8, at 4-5).

26 Justice Manual § 9-28.800 (revised Jul. 2019).

27 *Id.*

28 Delrahim, *supra* note 2, at 5.

29 *Id.*

30 Justice Manual § 9-28.400 (updated Jul. 2019); Antitrust Division Manual, ch. 3, pt. G.2(c) (updated Jul. 2019).

X. STATUS OF INDIVIDUALS

The Division will address the non-prosecution protections for individuals in DPAs in the same manner it has done in its plea agreements. Certain individuals will be included in the non-prosecution protections contained in the DPA while other culpable individuals may be carved-out of those non-prosecution protections and identified in a sealed addendum to the agreement.

XI. THE ASSESSMENT AND IMPORTANCE OF TIMELINESS IN CRIMINAL INVESTIGATIONS

Under the Principles of Federal Prosecution of Business Organizations, prosecutors consider the "corporation's timely and voluntary disclosure of wrongdoing" when making corporate charging decisions.[31] Timely self-reporting and an effective compliance program go hand in hand. The Justice Manual directs prosecutors to "consider the promptness of any disclosure of wrongdoing to the government," when evaluating the compliance program itself.[32]

While the Principles do not define timely or prompt, the Division's assessment of "prompt" self-reporting[33] will be informed by our guidance and Department Policy. For instance, the guidance includes questions such as, "How long after becoming aware of the conduct did the company report it to the government?" and "Did the company report the antitrust violation before learning of a government investigation?"[34]

The Principles make clear that time is generally of the essence in criminal investigations. Just as timely self-reporting and effective compliance go hand in hand, timely self-reporting is also linked to our assessment of cooperation. Prosecutors may consider a corporation's "timely and voluntary disclosure, both as an independent factor and in evaluating the company's overall cooperation."[35] Time is also of the essence when it comes to remediation.[36] Finally, the Division shares the view of other components that the "burden" is on the company "to demonstrate timeliness."[37]

Timing has always been critical in criminal antitrust investigations because receiving leniency requires winning the race to our doorstep. Under the new policy, if a company loses the race for leniency, despite having an otherwise effective compliance program, it still has an opportunity to avoid criminal conviction through prompt self-reporting. Both the Principles and our guidance direct prosecutors to assess whether the company's response to the misconduct, whether in the form of action or inaction, was consistent with good corporate citizenship. Companies that demonstrate a commitment to a culture of compliance, as evidenced in part by prompt self-reporting, can earn a DPA.

While all situations are fact-specific, a company that promptly self-reported and sought a marker will be better situated than one that sat on its hands after becoming aware of wrongdoing.[38] Indeed, a company that receives a subpoena and does not promptly begin cooperation is going to be hard-pressed to argue that its existing compliance program had any part in detecting and facilitating prompt reporting of the violation that the Division is already investigating. Likewise, the company would not qualify for a 2-point Guidelines culpability score reduction for "*fully*" cooperating in the Division's investigation, which requires thorough and timely cooperation that "begin[s] essentially at the same time as the organization is officially notified of a criminal investigation."[39]

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31 Justice Manual § 9-28.300 (updated Nov. 2018).

32 *Id.* § 9-28.800 (revised Jul. 2019).

33 Guidance, *supra* note 16, at 3, 14.

34 *Id.* at 14.

35 Justice Manual § 9-28.900 (new Nov. 2015); see also *id.* § 9-28.700 (updated Nov. 2018) ("[T]he timeliness of the cooperation" can also impact its value).

36 See *id.* § 9-28.1000 (renumbered Nov. 2015) (The "corporation's quick recognition of the flaws in [its compliance] program and its efforts to improve the program are also factors to consider as to the appropriate disposition of a case.").

37 *Id.* § 9-47.120(3)(a) (updated Mar. 2019).

38 Under the Corporate Leniency Policy, the Division has developed a marker system to allow a company that uncovers wrongdoing to seek a marker to hold its place as first in line while it conducts an internal investigation. The Division similarly recognizes that a company that fails to win the race for leniency, but promptly self-reports and begins cooperating, will need time to conduct an internal investigation. See Antitrust Division Manual, ch. 3, pt. F.9(c)(i) (updated Jul. 2019).

39 U.S.S.G. § 8C2.5(g)(2) & cmt. 13.

XII. SENTENCING

The Division's new guidance delineates what Division prosecutors should evaluate when determining whether to recommend a Guidelines-based sentencing reduction for a company's effective antitrust compliance program.[40] "The Sentencing Guidelines' criteria are minimum requirements."[41] Nevertheless, the criteria are rarely met because the reduction does not apply if the company "unreasonably delayed reporting the offense."[42]

In addition, there is a rebuttable presumption in the Sentencing Guidelines that a compliance program is not effective when certain "high-level personnel" or "substantial authority personnel" "participated in, condoned, or [were] willfully ignorant of the offense."[43] Under the Sentencing Guidelines, high-level personnel and substantial authority personnel include individuals in charge of sales units, plant managers, sales managers, or those who have the authority to negotiate or set prices or negotiate or approve significant contracts.[44] High-level or substantial authority personnel are often involved in antitrust offenses. The guidance directs Division prosecutors to assess the applicability of the rebuttable presumption on a case-by-case basis. While it may be difficult for a second or subsequent cooperator to satisfy the Sentencing Guidelines' requirements to obtain credit for a pre-existing compliance program, the new guidance provides direction to prosecutors and transparency to the bar on the relevant analysis when applying the compliance Sentencing Guideline to criminal antitrust matters.

The guidance also discusses compliance considerations relevant to recommending probation[45] and statutory-based fine reduction,[46] both of which are consistent with the Division's recent speeches and positions on these matters. A company that is charged and does not receive a Sentencing Guidelines reduction for an effective compliance program, but makes extraordinary remediation and improved compliance efforts after the Division opens an investigation, may still be eligible to obtain "*forward looking*" credit for those efforts pursuant to 18 U.S.C. § 3572(a)(8).

XIII. CONCLUSION

For years, many have urged the Division to move beyond its leniency-or-nothing view of pre-existing compliance programs and to provide written, transparent guidance on its views of an effective compliance program. The Division's policy change, along with revisions to the Manuals and the publication of a guidance document, are intended to make our assessment of compliance predictable and transparent. The Division's hope is that potential charging credit will deter antitrust violations by incentivizing the antitrust compliance efforts of good corporate citizens.

40 Guidance, *supra* note 16, at 14-15.

41 *Id.* at 14.

42 U.S.S.G. § 8C2.5(f)(2); see Guidance, *supra* note 16, at 14.

43 U.S.S.G. § 8C2.5(f)(3)(A)–(C).

44 See U.S.S.G. § 8A1.2 n.3(B)–(C).

45 See Guidance, *supra* note 16, at 15-16.

46 See *id.* at 16-17.

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