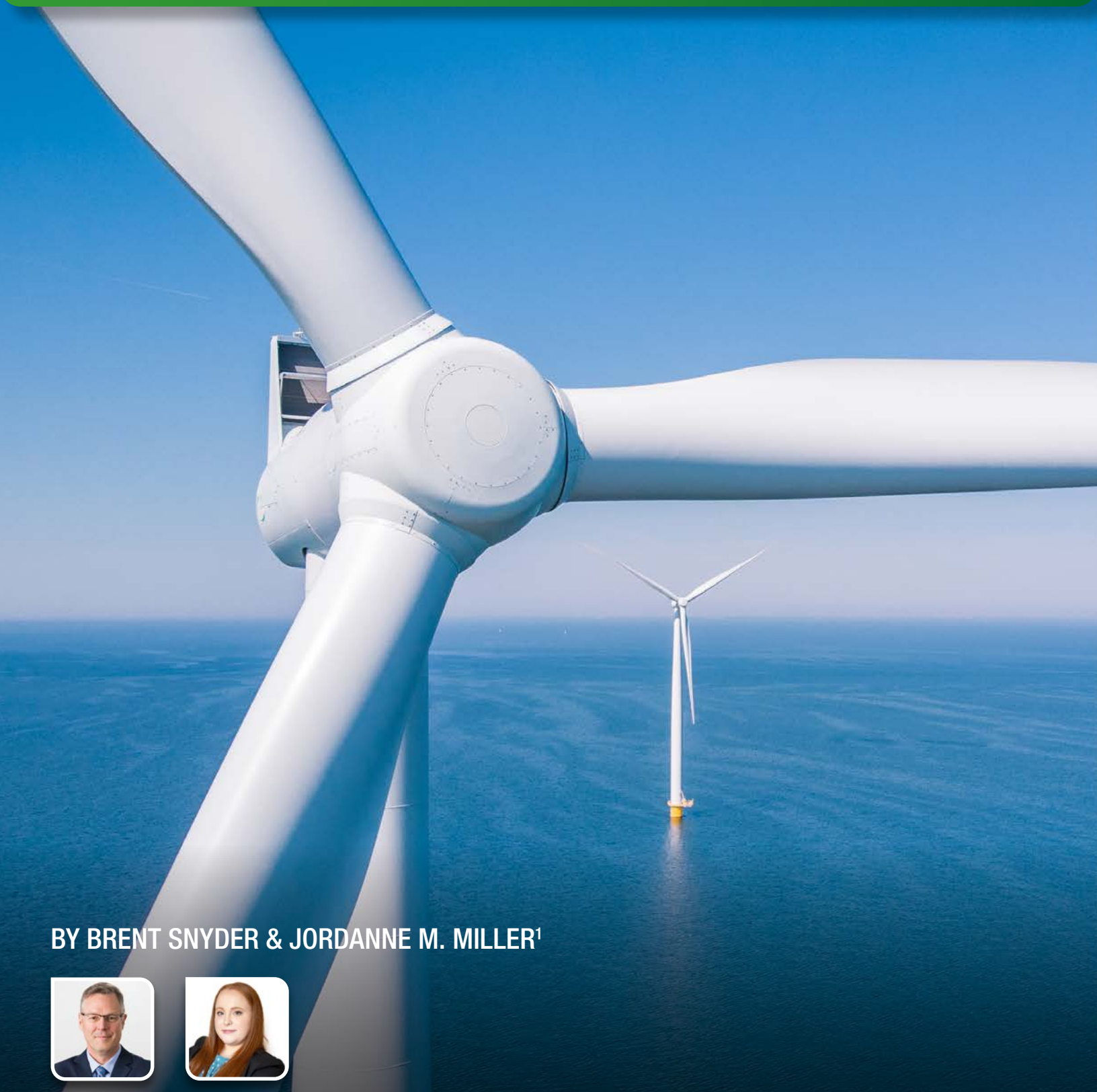
CREDITING CORPORATE COMPLIANCE PROGRAMS IN CRIMINAL ANTITRUST CASES: HOW STRONG A WIND OF CHANGE?



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Crediting Corporate Compliance Programs in Criminal Antitrust Cases: How Strong a Wind of Change?

By Brent Snyder & Jordanne M. Miller

This article examines the U.S. DOJ's 2019 revision to the Principles of Federal Prosecution of Business Organizations related to antitrust compliance programs, concerns about the revision's possible effects on the U.S. DOJ's corporate leniency policy, and the likelihood that the revision will lead to meaningfully different enforcement and sentencing outcomes for companies with antitrust compliance programs. The authors argue that concerns that the revision will negatively impact corporate leniency incentives and hopes that it will lead to significantly improved outcomes for companies with antitrust compliance programs are probably misplaced. Leniency remains far more attractive than any charging or sentencing credit that a company is likely to receive for having an antitrust compliance program, and, in any event, the nature of most cartels will probably preclude such credit in the near term.

The Principles of Federal Prosecution of Business Organizations[2] (Principles) provide a list of standardized factors that federal prosecutors consider in deciding whether to recommend criminal charges against a company. The existence and effectiveness of a company's compliance program is among the factors to be considered.[3] Application of the Principles, including assessment of a company's compliance program, may result in a prosecutorial decision to decline charges against the company altogether or to enter into a non-prosecution agreement ("NPA") or deferred prosecution agreement ("DPA") in lieu of criminal charges in appropriate cases.[4]

Notwithstanding the above, the Principles historically have not required any consideration of *antitrust compliance programs* in deciding whether to charge a company for a criminal violation of the Sherman Act, 15 U.S.C. § 1. The Principles distinguished the nature of antitrust crimes from other types of corporate criminal violations,[5] and the U.S. Department of Justice, Antitrust Division (the "Division") had steadfastly refused to credit antitrust compliance programs either in its charging decisions or even at sentencing.

This refusal to credit antitrust compliance programs was motivated significantly by the Division's desire to protect the efficacy of its Corporate Leniency Policy. The Division was concerned that corporate incentives to self-report criminal antitrust violations through its leniency program would be undermined if a company with an antitrust compliance program potentially could avoid criminal charges even if it did not receive corporate leniency.

Despite this longstanding concern, the Division announced in July 2019 that the Principles had been revised and that, thereafter, antitrust compliance programs would be taken into consideration in making both criminal antitrust charging decisions and sentencing recommendations. This announcement was viewed as a sea change in the treatment of antitrust compliance programs and raised both fears and hopes among antitrust practitioners.

The fear is that the Division's historic concerns will come to fruition and that its leniency program will be undermined, leading to less effective enforcement against hardcore cartels. By contrast, the hope is that the prospect of improved enforcement outcomes for companies with antitrust compliance programs will incentivize greater corporate investment in such programs, enhancing prevention or early detection and self-reporting, thereby strengthening leniency and enforcement.

Two years after the Division's policy shift, it is possible to begin making some assessments. The reality is that both the fears and hopes were likely overstated and that most enforcement outcomes in the near term will continue to be similar to what they would have been prior to the Division's 2019 policy revision. Nonetheless, there are clear benefits of strong antitrust compliance programs and companies should be willing to invest in them.

I. PRE-2019 APPROACH TO ANTITRUST COMPLIANCE PROGRAMS: PROTECT CORPORATE LENIENCY

The Division has had a highly successful corporate leniency policy since 1993.[6] The leniency policy provides complete immunity from criminal prosecution and related fines for the first entity – and only the first – to self-report a criminal antitrust violation and, thereafter, fully cooperate in the Division's investigation. The leniency policy has been a central pillar of the Division's cartel enforcement work and has long been lauded

2 U.S. Department of Justice, Justice Manual §§ 9-28.000 *et seq.* (hereinafter "Justice Manual").

3 See *id.* at §§ 9-28.300(A)(5); § 9-28.800 (discussing evaluation of compliance programs).

4 An NPA results in the government filing no criminal charge against the company in return for the company's agreement, among other things, to admit its conduct, pay a monetary penalty, and fully cooperate with the government's investigation. A DPA, on the other hand, results in the government filing a criminal charge, the prosecution of which is deferred and ultimately dismissed if the company complies with all aspects of its agreement, including payment of a monetary penalty and full cooperation with the government's investigation.

5 For instance, prior to revision in 2019, Justice Manual § 9-28.800 stated 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."

6 The Division first adopted a corporate leniency policy in 1978, but it was not meaningfully utilized by companies until after revisions were made in 1993 in order to limit the Division's discretion in its application and to extend the company's immunity to its current directors, officers, and employees.

as the most effective tool in the detection and prosecution of hard-core antitrust violations.[7]

The threat of severe sanctions for a criminal antitrust violation is a prerequisite for a successful leniency program.[8] This threat combined with the "winner takes all" nature of the U.S. program incentivizes a race for leniency.[9] The greater the disparity in treatment between receiving leniency and not receiving leniency, the greater the incentive a company has to race in for leniency immediately upon learning of a potential criminal antitrust violation.

For that reason, only a single company involved in a cartel can obtain leniency and, with it, immunity in the United States. All other companies involved in the same cartel have, in the past, borne the full brunt of enforcement and been required either to plead guilty to a criminal antitrust charge or be indicted.[10]

Not surprisingly, the Division has taken care over the years not to undermine this fundamental incentive structure of its leniency program. As a result, the Division historically has refused to credit antitrust compliance programs, especially at the charging stage. For the same reason, the Division has been reluctant to resolve criminal investigations with NPAs or DPAs that do not result in a criminal charge and liability.[11]

Simply put, the Division was concerned that these non-plea outcomes would narrow the treatment delta between receiving and not receiving leniency and thereby undermine the incentive to seek leniency. While a company would be highly motivated to seek leniency if a guilty plea was the only alternative, it might take a "wait and see" approach, rather than seek leniency, if having a compliance program could lead to a declination of prosecution, NPA, or DPA if the Division later detected the conduct.

Accordingly, the Division's message regarding antitrust compliance programs was simple: a compliance program that did not prevent the criminal antitrust violation or lead to early detection and leniency was ineffective and deserving of no credit.[12] As such, the compliance program would not be considered by the Division in deciding whether to criminally charge a company or in deciding the recommended sentence (i.e. criminal fine).[13] This unforgiving approach to antitrust compliance programs-- especially the Division's refusal to seek sentencing credit for compliance programs under the United States Sentencing Guidelines[14]-- was criticized as a perceived disincentive to invest in antitrust compliance.[15]

7 See, e.g. Richard Powers, Acting Assistant Att'y Gen., U.S. Dept. of Justice, Antitrust Division, Remarks at Organisation for Economic Co-operation and Development (OECD) (June 5, 2018), https://www.justice.gov/opa/speech/acting-deputy-assistant-attorney-general-richard-powers-delivers-remarks-organisation (describing leniency as the Division's "most effective investigative tool against cartels") https://www.justice.gov/opa/speech/acting-deputy-assistant-attorney-general-richard-powers-delivers-remarks-organisation; Scott Hammond, Dir. of Crim. Enf., U.S. Dep't of Justice, Antitrust Division, Detecting and Deterring Cartel Activity Through an Effective Leniency Program (Nov. 21, 2000), https://www.justice.gov/atr/speech/detecting-and-deterring-cartel-activity-through-effective-leniency-program (stating that leniency is "the single greatest investigative tool available to anti-cartel enforcers"). The tremendous and enduring success of the Division's leniency policy has led to the widespread adoption of similar leniency policies by competition enforcement agencies around the world. See Organisation for Economic Co-operation and Development (OECD), Challenges and Co-ordination of Leniency Programmes – Background Note by the Secretariat (June 5, 2018) (stating that more than 60 jurisdictions, including all OECD member countries, have leniency programs).

8 See, e.g. Scott Hammond, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Division, Cornerstones of an Effective Leniency Program (Nov. 22, 2004), https://www.justice.gov/atr/speech/cornerstones-effective-leniency-program; Scott Hammond, Dir. of Crim. Enf., U.S. Dep't of Justice, Antitrust Division, Detecting and Deterring Cartel Activity Through an Effective Leniency Program (Nov. 21, 2000), https://www.justice.gov/atr/speech/detecting-and-deterring-cartel-activity-through-effective-leniency-program; Organisation for Economic Co-operation and Development (OECD), Fighting Hard-core Cartels: Harm, Effective Sanctions and Leniency Programmes (2002) at 9.

9 Brent Snyder, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Division, Individual Accountability for Antitrust Crimes (Feb. 19, 2016), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-yale-global-antitrust.

10 See Scott Hammond, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Global Competition Roundtable (Feb. 2012), https://globalcompetitionreview.com/the-gcr-cartel-roundtable-0 (stating that the Division has a policy that disfavors NPAs and DPAs for antitrust crimes).
It is worth noting that numerous jurisdictions, including the European Union and Japan, have adopted leniency programs that allow multiple leniency applicants. Although only the first leniency applicant will receive complete immunity from monetary penalties, subsequent applicants who satisfy the conditions of the program are entitled to defined reductions (whether by set percentage (i.e. 50 percent) or within range bands (i.e. 30-50 percent)) in their monetary penalty.

11 See Richard Powers, Acting Assistant Att'y Gen., U.S. Dept. of Justice, Antitrust Division, Criminal Antitrust Enforcement: Individualized Justice in Theory and Practice (July 21, 2021), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-richard-powers-delivers-remarks-symposium-corporate (explaining the Division's past view that it "risked weakening [the incentive to seek leniency] if we credited compliance programs when deciding what charges were appropriate for companies that did not qualify for leniency").

12 Richard Powers, Criminal Antitrust Enforcement, supra note 11; Brent Snyder, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Compliance is a Culture, Not Just a Policy (September 9, 2014), https://www.justice.gov/atr/speech/compliance-culture-not-just-policy.

13 Brent Snyder, Compliance is a Culture, *supra* note 12.

14 United States Sentencing Guidelines § 8C2.5(f) allows for a reduction in a company's culpability score, which results in a reduction of the applicable Guidelines fine range, if it has an effective compliance program.

15 See, e.g. Washington Legal Foundation, Letter to United States Sentencing Commission re Commission Priorities for the Upcoming Year (June 1, 2012), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20120815/WLF_priorities_comment.pdf (stating that the Division's refusal to credit antitrust compliance programs "function[s] as a disincentive to companies who would otherwise invest precious resources in developing a strong compliance program").

In 2015, the Division took initial steps toward crediting antitrust compliance programs in its sentencing recommendations. Specifically, the Division announced its willingness to consider "forward looking" compliance efforts in "reaching a fine recommendation [to the court] in cases where a company makes extraordinary efforts not just to put a compliance program in place but to change the corporate culture that allowed a cartel offense [to] occur."[16]

Notably, however, the Division did not change its position that preexisting compliance efforts that failed to prevent or detect a cartel would not be eligible for charging or sentencing credit. As such, this slight shift in the treatment of antitrust compliance programs at sentencing did nothing to undermine the incentive of a company with a preexisting compliance program to seek leniency upon detection of a cartel. The leniency promise of immunity for the company and its executives was strongly preferable to mere reduction of a criminal fine in connection with a corporate guilty plea for post hoc improvements to an antitrust compliance program. Nonetheless, this policy change by the Division cracked the door for the first time to crediting antitrust compliance programs.

With its subsequent 2019 policy revision, the Division pushed the door wide open. Going forward, the Division committed to take pre-existing compliance programs into account in making both charging and sentencing decisions.[17] In doing so, it acknowledged that the prior "all-or-nothing philosophy was born of our efforts to highlight the value of winning the race for leniency at a time when the modern leniency program was establishing itself as the Division's most important investigative tool."[18]

The Division's 2019 policy shift on crediting compliance programs may represent a sea change in approach, but it remains to be seen whether it will lead to significantly different outcomes, either for leniency or for companies with compliance programs. Chances are, it will not -- at least in the short-term.

II. POST-2019 APPROACH TO ANTITRUST COMPLIANCE PROGRAMS: LENIENCY INCENTIVES REMAIN

Contrary to the Division's historic thinking, the prospect of receiving either charging or sentencing credit for an antitrust compliance program should not change the incentive of a company to seek leniency. This is so for at least two reasons. First, the benefits of leniency remain far superior to any charging or sentencing credit that a company is likely to receive for its antitrust compliance program. Second, and more importantly, a company will likely be disqualified from receiving any charging or sentencing credit for its compliance program if it makes a knowing decision not to self-report a criminal antitrust violation that it detects.

III. LENIENCY REMAINS THE SUPERIOR OUTCOME

Even if the Division's 2019 policy change potentially allows a company with an antitrust compliance program to obtain an NPA or a DPA if it does not obtain leniency, that potential should not undermine the incentive to seek leniency. Neither an NPA nor a DPA is sufficiently likely or attractive to forgo leniency.

A company will almost certainly be sorely disappointed if it forgoes the opportunity for leniency in the hope that it will later receive an NPA if the Division detects the conduct. In announcing its policy change on compliance programs, the Division made clear that only a leniency applicant will be able to avoid all prosecutorial consequences from its conduct:

We will, however, 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.[19]

16 Brent Snyder, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Leniency in Multi-Jurisdictional Investigations: Too Much of a Good Thing? (June 8, 2015), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-sixth-annual-chicago.

17 Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs (July 11, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0.

18 *Id.*

19 *Id.* If an NPA – which carries considerable monetary and oversight consequences for a company – remains disfavored, then it is safe to assume that a company that is not a leniency applicant has little chance of receiving a complete declination of prosecution due to its antitrust compliance program.

Instead, the Division made clear that a DPA "would occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation."[20] As a "middle ground," however, the consequences of a DPA (and even an NPA) are "much closer to a guilty plea than leniency" and should not undermine a company's incentive to seek leniency if it is available.[21] In fact, NPAs and DPAs may not be a preferable outcome *even to a guilty plea* in many cases, let alone an attractive alternative to leniency.

NPAs and DPAs include virtually the same punitive features as a corporate plea agreement: significant monetary penalties and exposure of the company's directors, officers, and employees to individual criminal prosecution. In other respects, such as the imposition of reporting obligations,[22] the heightened likelihood of appointment of a corporate compliance monitor,[23] and the requirement of a significantly more detailed statement of supporting facts than is found in most plea agreements (with attendant civil liability implications), those enforcement outcomes may be considerably more onerous than a corporate guilty plea in important respects. Additionally, if the United States decides in its "sole discretion" that the company has breached its obligations, it can pursue a prosecution against the company based on the information provided by the company.[24] They certainly are not a "slap on the wrist" outcome for a company.

That is not to say that NPAs and DPAs do not have some significant advantages over a guilty plea. NPAs and DPAs can potentially allow some companies – such as regulated companies that could lose licenses or companies that would be excluded from participating in government programs – to avoid the severe collateral consequences of a guilty plea. Additionally, NPAs and DPAs are perceived by many as resulting in less reputational harm than a guilty plea.

Nonetheless, it will be a difficult decision for a well-counseled company to pass up an opportunity to obtain leniency in favor of taking a "wait and see" approach in the hope of obtaining an NPA or DPA if the conduct is subsequently detected by the Division. Only leniency would allow a company to avoid altogether a monetary penalty, the criminal prosecution of its employees, reputational harm, a publicly-available factual admission, the risk of probation, a reporting obligation, or the appointment of a compliance monitor that accompanies any guilty plea, NPA or DPA. Moreover, as noted above, a corporate leniency applicant receives a benefit in civil litigation (detrebling) that is not available to companies that enter into plea agreements, NPAs, and DPAs.

For all of these reasons, the likelihood that traditional leniency incentives will be meaningfully altered or undermined by the Division's 2019 policy change is low.[25]

IV. NOT SEEKING LENIENCY IS A LIKELY DISQUALIFIER FOR COMPLIANCE CREDIT

A company would be well-advised against holding out for a "middle ground" enforcement outcome in lieu of leniency not only because those options are far less attractive, but also because they are very unlikely to be available to a company that makes a knowing decision to forgo leniency. That is because a company that makes a knowing decision to forgo leniency (i.e. to self-report) will likely disqualify itself from obtaining any credit at all – at charging or at sentencing – for its preexisting antitrust compliance. Indeed, the Division explicitly links

20 *Id.* (quoting Justice Manual). See also Richard Powers, Criminal Antitrust Enforcement, *supra* note 10 (stating that a company "with a robust compliance program" "might still qualify for a deferred prosecution agreement rather than a guilty plea" even if it does not obtain leniency).

21 See Richard Powers, Criminal Antitrust Enforcement, *supra* note 11. Even in the unlikely event that a company could obtain an outright declination of criminal charges for having a robust compliance program, the resulting benefit would still fall short of obtaining leniency in important respects. In particular, a declination of charges would protect only the company and, unlike leniency, would leave a company's directors, officers, and employees subject to prosecution. A declination also would provide no protection against joint and several liability and treble damages in civil lawsuits, while the leniency applicant is not subject to contribution claims and is exposed only to single damages liability. See Antitrust Criminal Penalty Enhancement & Reform Act of 2004, Pub. L. No. 108-237, tit. II, 118 Stat. 661 at § 213 (2004).

22 Although the Division does not ordinarily seek terms of probation for companies that plead guilty, it has usually put companies receiving either an NPA or DPA on a form of probation to the Division by including a requirement that the company "promptly report" "credible evidence or allegations of criminal violations of United States." See, e.g. *United States v. Heritage Pharmaceuticals*, Deferred Prosecution Agreement at ¶ 8, https://www.justice.gov/opa/press-release/file/1174111/download; *United States v. Florida Cancer Specialists & Research Institute LLC*, Deferred Prosecution Agreement at ¶ 7, https://www.justice.gov/atr/case-document/file/1281681/download; *United States v. Apotex Corp.*, Deferred Prosecution Agreement at ¶ 8, https://www.justice.gov/opa/press-release/file/1274706/download.

23 To date, the Division has not sought the appointment of a corporate compliance monitor in connection with a corporate guilty plea, but it has required their appointment in connection with some DPAs. See e.g. *United States v. Deutsche Bank A.G.*, Deferred Prosecution Agreement at ¶¶ 11-13, https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/23/db_dpa.pdf.

24 See, e.g. *United States v. Heritage Pharmaceuticals*, Deferred Prosecution Agreement at ¶ 17, https://www.justice.gov/opa/press-release/file/1174111/download; *United States v. Florida Cancer Specialists & Research Institute LLC*, Deferred Prosecution Agreement at ¶ 17, https://www.justice.gov/atr/case-document/file/1281681/download.

25 It goes almost without saying that if the prospect of "charging credit" in the form of an NPA or DPA is unlikely to change a company's leniency analysis, then the prospect of "sentencing credit" in the form of a reduced criminal fine in connection with a guilty plea to a criminal charge also is not likely to undermine the incentive to seek leniency.

the efficacy of a compliance program with self-reporting in assessing whether a company is entitled to credit at either the charging or the sentencing stage:

> Good corporate citizens: (1) implement robust and effective compliance programs, and when wrongdoing occurs, they (2) promptly self-report, (3) cooperate in the Division's investigation, and (4) take remedial action. These factors go hand in hand. . . . The Principles of Federal Prosecution of Business Organizations counsel against crediting compliance programs when the other three hallmarks of good corporate citizenship are absent.[26]

Moreover, simultaneous with the announcement of its new policy on compliance program, the Division issued public guidance regarding how it will evaluate antitrust compliance programs in deciding both whether to credit them and whether there is a need for corporate probation. Whether a company's antitrust compliance program facilitated prompt self-reporting is a preliminary question prosecutors are to ask "[a]t the outset of any inquiry into the efficacy of an antitrust compliance program" as well as in connection with specifically considering appropriate charging and sentencing credit.[27]

Given the focus on detection and self-reporting in evaluating compliance programs, companies should expect the Division to pay heightened scrutiny to the timing and circumstances of discovery and self-reporting of the conduct. The Division has made clear that a decision not to seek leniency will likely foreclose a company from receiving charging or sentencing credit for a preexisting compliance program, no matter how effective it is at deterring or detecting such conduct:

> Companies should understand that there's no tactical advantage in deciding not to apply for leniency and instead holding out for a DPA; a company that makes that choice will almost certainly not be eligible for anything short of a criminal conviction.[28]

If a company with a rigorous antitrust compliance program detects, but consciously decides not to self-report potential criminal conduct, it may even place itself in jeopardy that the Division will seek an *enhanced* sentence against it.[29]

For these reasons, a company takes a significant risk by forgoing the opportunity for leniency in the hope that its preexisting compliance program would result in charging or sentencing credit if the conduct is subsequently detected by the Division. In such circumstances, its compliance efforts would not only come to naught but potentially place it in as bad or a worse position than having no compliance program at all.

V. LOOKING FORWARD

Having concluded that the Division's policy shift is unlikely to negatively impact its leniency program, it remains to be considered whether the policy shift will lead to significantly better or different outcomes for companies with compliance programs that do not obtain leniency. For the following reasons, it probably will not, at least in the short-term.

Most cartels prosecuted by the Division are measured in years, rather than days, weeks, or months, and include what the Division considers to be senior management personnel.[30] Under such circumstances, it is unlikely that the Division would conclude that an antitrust compliance program was sufficiently effective to warrant charging credit.

Indeed, it does not appear that any company has yet received charging credit for its antitrust compliance program. Although the Division has entered into several DPAs to resolve criminal Title 15 charges since 2019, almost all of them were due expressly to severe collateral con-

26 Makan Delrahim, Wind of Change, *supra* note 17.

27 U.S. Dept. of Justice, Antitrust Div., Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (July 2019) at 3, 14, https://www.justice.gov/atr/page/file/1182001/download.

28 Richard Powers, Criminal Antitrust Enforcement, *supra* note 11.

29 U.S.S.G. § 8C2.7(a)(11) specifies that whether a company failed to have an effective compliance program at the time of the offense is a factor to be considered in deciding the appropriate fine within the Guidelines range.

30 For instance, since January 1, 2020, thirty-four entities have been charged with or pleaded guilty to a criminal Title 15 violation. Of those thirty-four cases, more than ninety-one percent (thirty-one out of thirty-four cases) involved cartels lasting longer than a year. Moreover, many of the charging documents, on their face, indicated the participation of senior-level personnel for those entities.

sequences that would have resulted from a criminal charge.[31] Had any company received charging credit for its compliance program, the DPA, which is publicly filed, likely would have expressly said so.[32] To date, none have.

It is thus perhaps premature to predict that any form of charging credit for antitrust compliance programs will become commonplace in criminal Title 15 matters. Over time, however, the 2019 policy change should incentivize investment in antitrust compliance efforts that, even if not entirely successful in preventing cartels, hopefully will result in fewer long-term cartels involving senior level management. In such circumstances, charging credit for an antitrust compliance program will perhaps become more likely.

For companies with antitrust compliance programs that do not receive charging credit, there is still the possibility of receiving sentencing credit. The primary sentencing credit for an antitrust compliance program would result in a reduction in the company's criminal fine, but an antitrust compliance program may also affect the need for corporate probation.[33]

Realistically, however, sentencing credit for antitrust compliance programs is not likely to be more frequent than in the past because the 2019 policy change does nothing to enhance its availability. Two forms of sentencing credit for a compliance program – a three-point culpability score reduction and credit for "forward looking" improvements – were available prior to the 2019 policy revision and remain the same after the policy revision.

As mentioned above, the Division has historically refused to credit compliance programs with a three-point culpability score reduction under U.S.S.G § 8C2.5(f). In announcing its 2019 policy change, the Division did not raise false hopes that its position on culpability score reductions would change:

> The Division has yet to recommend credit for a defendant's "pre-existing" antitrust compliance program under the Guidelines' three-point reduction provision. Delay in reporting and the involvement of "high-level" or "substantial authority" personnel, as defined by the Guidelines, often weigh against application of this provision.[34]

Although the Division stated that it has "credited a company's extraordinary 'prospective' compliance efforts in certain cases" and advocated for a reduction in its criminal fine on that basis[35], the fact remains that even this form of sentencing credit has only been awarded on a handful of occasions to date.[36] In sum, the path to sentencing credit for an antitrust compliance program remains the same; it is a path that few companies have successfully navigated in the past and that may continue to elude many in the future.

VI. CONCLUSIONS

The Division's 2019 policy shift was a bold departure from its prior unwillingness to credit compliance programs. Although it seems unlikely that the Division's new approach on antitrust compliance programs will undermine its corporate leniency policy, it also does not seem likely to lead to meaningfully better charging and sentencing outcomes for companies moving forward, at least in the near term. Over time, however, it is certainly possible that companies will be incentivized to adopt and/or improve antitrust compliance programs, thereby altering the scenarios (such as long-term cartels involving senior management) that have usually prevented any sentencing credit in the past.

More importantly, the middling near-term predictions for compliance credit are not intended to suggest that the Division's policy shift

31 While the Division has entered into several DPAs since 2019, most were in healthcare-related investigations in which the companies likely faced mandatory exclusion from federal health care programs in the event of a guilty plea. See e.g. *United States v. Heritage Pharmaceuticals*, Deferred Prosecution Agreement, https://www.justice.gov/opa/press-release/file/1174111/download; *United States v. Florida Cancer Specialists & Research Institute LLC*, Deferred Prosecution Agreement, https://www.justice.gov/atr/case-document/file/1281681/download; *United States v. Sandoz, Inc.*, Deferred Prosecution Agreement, https://www.justice.gov/atr/case-document/file/1256306/download; *United States v. Apotex Corp.*, Deferred Prosecution Agreement, https://www.justice.gov/opa/press-release/file/1274706/download.

32 The Division has stated that "[a]s part of our commitment to transparency, when the Principles lead us to resolve a charge by DPA, the publicly filed agreement includes a section identifying the factors that weighed most heavily in our decision, given the individual facts and circumstances of that particular case." Richard Powers, Criminal Antitrust Enforcement, *supra* note11.

33 Makan Delrahim, Wind of Change, *supra* note 16.

34 *Id.*

35 *Id.*

36 To date, only two companies have been acknowledged to have received "forward looking" compliance credit since 2015, when the Division announced its willingness to give antitrust compliance sentencing credit on that basis.

was hollow or that investments in antitrust compliance are not worthwhile. A company's primary incentive for implementing a robust compliance program should, first and foremost, be prevention. Compared to any alternatives – including leniency – this should be incentive enough to adopt an effective antitrust compliance program.

While it may be difficult to empirically measure prevention that will occur from the Division's heightened emphasis on compliance programs, it is not unreasonable to assume it will occur and companies, their employees, and consumers will all benefit from it. In the event prevention is not perfect, the next best outcome is early detection, which allows a leniency application. Effective antitrust compliance programs facilitate both outcomes and should warrant investment in them, even without further incentives and likely near-term benefits.

Finally, it will be in the Division's interest to look for opportunities to publicly acknowledge and credit compliance programs. Even if it is not reasonable to expect that the Division's new approach to compliance programs is "an automatic pass for corporate misconduct,"[37] it is reasonable to expect that the Division will want to look for opportunities to reinforce its policy, demonstrate positive outcomes for companies with antitrust compliance programs, and incentivize continued investment in such programs.

37 Makan Delrahim, Wind of Change, *supra* note 17.

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