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Antitrust Division to Consider Corporate Compliance During Charging Stage of Criminal Investigations

On July 11, 2019, Assistant Attorney General Makan Delrahim announced that the Antitrust Division of the U.S. Department of Justice has established new procedures to consider antitrust compliance efforts of criminal defendants. The new procedures permit prosecutors to consider a company's corporate compliance programs and efforts when criminal investigations are being resolved. This change represents a potentially dramatic shift in the Division's antitrust [leniency policy](#).

For a quarter century, the Division has provided substantial leniency to companies that are "first in the door" to discuss or otherwise cooperate regarding prohibited cartel activities. During that time, the Division developed a practice of requiring other company participants to enter guilty pleas to resolve criminal violations. AAG Delrahim explained that the "first in" process was effective in "assisting the Division's efforts to hold co-conspirators and culpable individuals accountable." *Assistant Attorney General Makan Delrahim Delivers Remarks at the New York University School of Law Program on Corporate Compliance and Enforcement*, U.S. DEP'T OF JUSTICE (July 11, 2019), available [here](#).

But noting this month's policy changes, Delrahim explained that "the time has now come to improve the Antitrust Division's approach and recognize the efforts of companies that invest significantly in robust compliance programs." *Id.* He then explained that Division prosecutors will now be permitted to consider

corporate antitrust compliance at the charging state of criminal investigations – a previously prohibited practice.

In a 17-page guidance document, the Division sets out factors for prosecutors to consider, including “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.” [JM § 9-28.800](#). The guidance focuses on three basic inquiries:

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?

Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations, U.S. DEP’T OF JUSTICE ANTITRUST DIVISION (July 2019), available [here](#).

Other factors to consider are adopted from [The International Chamber of Commerce Antitrust Compliance Toolkit](#) and include:

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.

To put these considerations into context, the guidance provides further inquiries under each factor. For example, to evaluate the second factor – Culture of Compliance – a criminal prosecutor will answer the following questions:

- What is the company’s senior leadership doing to convey the importance of antitrust compliance to company employees? How have senior leaders, through their words and actions, encouraged (or discouraged) antitrust compliance? What concrete actions have they taken to demonstrate leadership in the company’s antitrust compliance or remediation efforts, if relevant?
- Have senior managers tolerated antitrust violations in pursuit of new business, greater revenues, or maintaining customers? Were senior managers involved in the violation(s)?
- Has there been personal accountability by senior leadership for failures in the company’s antitrust compliance?

- What else is the company’s senior leadership doing to set the tone from the top or bring about culture change throughout the company?

The Division’s new consideration also has been updated in the [Justice Manual](#) by removing the directive “that credit should not be given at the charging stage for a compliance program.” And the Division has updated its own Manual.

These aren’t the only updates within DOJ this year. In April, the Criminal Division published its [guidance document](#) for evaluating corporate compliance programs. In the words of AAG Delrahim, the Division – and really the Department as a whole – has rewarded “good corporate citizenship” and has remained “dedicated to predictability and transparency.” *Antitrust Division Announces New Policy to Incentivize Corporate Compliance*, U.S. DEP’T OF JUSTICE (July 11, 2019), available [here](#).

As with any new guidance, it will take time to determine what effect the new guidance will have on prosecutors’ assessments, including what level of discount defendants can receive at the charging stage of criminal investigations. But for now, the guidance provides a corporate entity and its attorneys with metrics for evaluating its antitrust compliance program and perhaps developing stronger internal controls.

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