DOJ Antitrust Division to Credit Antitrust Compliance Programs at Charging & Sentencing Stages of Criminal Investigations

In an effort to incentivize investment in robust antitrust compliance programs, the Antitrust Division of the U.S. Department of Justice ("DOJ") announced on July 11, 2019 that companies may now receive credit at charging and sentencing for effective antitrust compliance programs – a change from DOJ's former policy.[1] The DOJ has historically not rewarded existing antitrust compliance programs at the charging stage of a criminal investigation, instead giving immunity only to qualifying first reporters under its leniency program.[2] While the DOJ plans to continue to limit the use of non-prosecution agreements to the first company to invoke leniency successfully, deferred prosecution agreements will be available for qualifying companies with robust antitrust compliance policies.[3] The DOJ published guidance for prosecutors evaluating corporate compliance programs at the charging and sentencing stages that we discuss more fully below.[4]

I. Principles for evaluating antitrust compliance programs at the charging stage

The DOJ established key principles for evaluating an antitrust compliance program at the charging stage: First, whether the compliance program is well-designed. Second, whether the program is being applied earnestly and in good faith. And third, whether the program works. The DOJ looks to three preliminary questions and nine elements or factors for an effective compliance program.

Preliminary Questions: 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? And 3) To what extent was a company's senior management involved in the violation?

Next, the following nine elements or factors should be considered when evaluating the effectiveness of an antitrust compliance program:

Design and comprehensiveness: The DOJ seeks to know whether a compliance program is appropriately tailored, reviewed, and implemented. This factor looks to the format of the program, whether it was formalized in writing, whether it underwent periodic review, and its level of accessibility to employees to report potential

[1] Makan Delrahim, Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs, Remarks at the New York University School of Law (July 11, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0.

[2] DOJ deleted text in its Justice Manual that previously stated the Antitrust Division's policy "that credit should not be given at the charging stage for a compliance program." U.S. Dep't of Justice, Antitrust Division Announces New Policy to Incentivize Corporate Compliance (July 11, 2019), https://www.justice.gov/opa/pr/antitrust-division-announces-new-policy-incentivize-corporate-compliance.

[3] Makan Delrahim, Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs, Remarks at the New York University School of Law (July 11, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0.

[4] U.S. Dep't Justice, Antitrust Div., Evaluation of Corporate Compliance Programs (July 2019), https://www.justice.gov/atr/page/file/1182001/download ("Guidance Document").

violations. This factor examines whether the antitrust training was given to employees and the document retention process.

Culture of compliance: The DOJ looks for an organization that actively fosters an environment that encourages ethical behavior in compliance with antitrust law. This factor evaluates how senior leaders have conveyed the importance of compliance through their words and actions. The direct involvement of senior managers and accountability contribute to the analysis of this factor.

Responsibility for the compliance program: This examines who has the autonomous responsibility to ensure compliance, such as a chief compliance officer, to whom and how they report, whether they also have non-compliance duties, and whether they have the proper training and experience to effectively observe antitrust issues.

Risk assessment: Risk assessment means whether the program is tailored to detect the forms of misconduct most likely in the company's industry. This should be subject to periodic review, and it should have the resources allocated to it that the industry would demand to detect violations.

Training and communication: Whether employees are trained in antitrust compliance obligations to know more clearly what actions are prohibited and how to resist pressure to act unlawfully. Relevant triggers, such as communication with a competitor, should be taught, and an employee should be able recognize legitimate business practices. This factor will take into account the code of ethics, the promulgation of antitrust policies, who receives compliance training and how often, and whether the training includes an evaluation.

Periodic review, monitoring, and auditing: A program should not be static, as changes in an industry affect the requirements of the compliance. This looks to the methods used to evaluate effectiveness and how changes are made.

Reporting: This factor examines whether there is a publicized process to report or seek guidance on potential flags of antitrust violations and if it is periodically reviewed, including the company's commitment to investigating reports and whether employees feel free to report without fear of negative consequences.

Incentives and discipline: A program should use carrot and stick techniques. Promotions, awards, bonuses, formal discipline, and reconsideration of employment are tools that a company has to ensure compliance.

Remediation and role of compliance program in the discovery of a violation: Prosecutors are directed to consider the remedial efforts undertaken by the company. This looks to the thoroughness and commitment to addressing violations. Prompt action in investigating the violation, why it occurred, and changing policies to prevent its reoccurrence are important to the DOJ. Whether the company reported the violation and the time it took to do so are further considerations.

II. Evaluating compliance programs at the sentencing stage

The new Guidance Document provides that Division prosecutors should now evaluate whether to recommend a sentencing reduction for a company's effective antitrust compliance program in three ways. Firstly,

a company may receive a reduction in a culpability score when it is determined that the company has an effective compliance program (provided the company did not unreasonably delay reporting the alleged violation). Second, an existing and effective compliance program may also influence whether a company receives probation. Finally, the effectiveness of the compliance program may be relevant to evaluate the appropriate fine.[5]

III. Conclusion

The advantages and potential benefits of a strong compliance program have increased significantly as a result of this announcement. A company with a robust and effective compliance program may be able to negotiate a deferred prosecution agreement, even if it is not the first to report a violation, and it may obtain a reduced sentence as well. Companies may take the new guidance as an opportunity to revisit or establish comprehensive antitrust compliance programs.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Helene R. Banks at 212.701.3439 or hbanks@cahill.com; Bradley J. Bondi at 202.862.8910 or bbondi@cahill.com; Brock Bosson at 212.701.3136 or bbosson@cahill.com; Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Elai Katz at 212.701.3039 or ekatz@cahill.com; Geoffrey E. Liebmann at 212.701.3313 or gliebmann@cahill.com; Ross Sturman at 212.701.3831 or rsturman@cahill.com; Lauren Rackow at 212.701.3725 or lrackow@cahill.com.

[5] *Id*. at 14-17.