

# CLIENT ALERT

August 6, 2019

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## ANTITRUST

### UPDATE: RECENT DEPARTMENT OF JUSTICE GUIDANCE ON ANTITRUST COMPLIANCE PROGRAMS

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On July 11, 2019, the Department of Justice Antitrust Division (DOJ) issued guidance with respect to significant changes to its incentive policies for antitrust compliance in the context of criminal antitrust investigations. For the first time, the DOJ will consider compliance programs at the charging stage in criminal antitrust investigations and may provide incentives to companies who have effective compliance programs in place. This modification involves revisions to the DOJ's Justice Manual as well the issuance of new guidance documents.

#### Out with the Old and In with the New

The Justice Manual previously referenced the DOJ's policy "that credit should not be given at the charging stage for a compliance program." Thus, the DOJ previously directed its attorneys not to consider compliance programs in criminal antitrust cases with respect to sentencing. Instead, the DOJ thought its leniency program incentivized companies to self-report any antitrust activity. Under the leniency program, the first to report would be immune from prosecution (a.k.a. amnesty), however, the later-reporting companies would not be given any special treatment for having an effective compliance program in place.

For the first time, the DOJ published guidance detailing several factors that the DOJ will consider with respect to compliance programs. On July 11, Assistant Attorney General Makan Delrahim made comments indicating that DOJ attorneys may proceed by Deferred Prosecution Agreements (DPAs) against cooperating entities that have effective compliance programs in place.

#### New DOJ Guidance on Compliance Programs

The DOJ guidance sets forth three "fundamental" questions that should guide the prosecutor's determination with respect to the compliance program in question:

1. Is the corporation's compliance program well designed?
2. Is the program being applied earnestly and in good faith?
3. Does the corporation's compliance program work?

In addition, the DOJ's guidance also provides more focused direction in the form of several factors to be considered, along with three preliminary questions designed to help focus their analysis on the factors most relevant to the specific circumstances under review. The three preliminary questions are:

1. Does the company's compliance program address and prohibit criminal antitrust violations?
2. Did the antitrust compliance program direct and facilitate prompt reporting of the violation?
3. To what extent was a company's senior management involved in the violation?

The DOJ guidance then sets forth nine factors for the prosecutor to consider throughout the investigation:

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.

The DOJ's guidance then sets forth specific questions to be asked with respect to each factor. This provides a model for designing and implementing successful compliance programs since it is the type of assessment that DOJ attorneys would conduct in a criminal antitrust investigation.

The guidance then indicates how a compliance assessment should figure into the DOJ's sentencing considerations. First, an effective compliance program may provide a reduction in a corporate defendant's culpability score under the DOJ's Sentencing Guidelines. If a corporation has an effective compliance program in place, this could result in placement on a less stringent category of the Sentencing Guidelines. Second, an effective compliance program can be considered with respect to whether the prosecutor chooses to offer probation or a Deferred Prosecution Agreement (DPA). Finally, the DOJ may consider an effective compliance program as a factor in determining whether to reduce a statutory fine.

#### Recommendations

This new move by the DOJ expresses its intent to reward companies with effective compliance programs. The DOJ has identified several factors, as well as specific issues within each factor, that DOJ attorneys should consider when conducting evaluations of compliance programs. An effective compliance program could provide numerous benefits to a company subject to an antitrust investigation, particularly at the sentencing stage. It would benefit any company to evaluate and model their own compliance programs according to the factors and questions set forth in the DOJ guidance.

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