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Robust Company Compliance Programs Now Factored into DOJ Criminal Antitrust Charges for the First Time

The U.S. Department of Justice (DOJ) announced yesterday that it will now consider crediting companies for "robust" compliance programs at the charging stage of criminal antitrust investigations. This signals a reversal of the DOJ's longstanding policy of allowing substantial penalty reductions only for "early-in" whistleblowers. While "complete protection from prosecution from antitrust crimes" remains limited to the first company to invoke the Division's leniency program and to provide complete cooperation, effective pre-existing compliance programs will now significantly impact charging recommendations and may allow companies to negotiate deferred prosecution agreements (DPAs).

In announcing the change at a corporate compliance and enforcement event at the New York University School of Law, Makan Delrahim, the Assistant Attorney General for the DOJ Antitrust Division, clarified that the Division would, effective immediately: (1) change its approach to crediting compliance at the charging stage; (2) clarify its approach to evaluating the effectiveness of compliance programs at the sentencing stage; and (3) for the first time, make public a guidance document for evaluating compliance programs in criminal antitrust investigations.

Delrahim described compliance programs as the "first line of defense" to white collar crime, allowing companies to "prevent crime or detect it early, thus reducing the need for enforcement activity, minimizing the harm to consumers earlier, and saving precious taxpayer resources." In incentivizing strong compliance programs, the Division aims to "maximize deterrence and detection."

"In an ideal world, corporate compliance programs prevent wrongdoing altogether," Delrahim explained. "If violations do occur, robust compliance programs should lead to prompt detection, which not only nips the conduct in the bud earlier, minimizing the harm to consumers, but also gives companies the greatest chance of winning the race for leniency under the Antitrust Division's Corporate Leniency Policy."

While the new guidance does not contain a "checklist or formulaic requirements" for evaluating the efficacy of corporate compliance programs, it does give broad definitional guidance as to what constitutes "effectiveness." Prosecutors should consider three "fundamental" questions in their evaluation: whether the program is "well designed," whether it is applied "earnestly and in good faith," and whether it "work[s]." In making a charging recommendation, Division prosecutors will assess "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," and "holistically consider [the compliance program] together with all the other relevant [f]actors."

Under this new approach, prosecutors may "proceed by way of a [DPA,]" an "important middle ground between declining prosecution and obtaining the conviction of a corporation," though the mere existence of a compliance program does not guarantee a DPA. Under a DPA, prosecutors agree to dismiss criminal charges after a period of time if a company makes certain changes. Such agreements are

often seen as a way to punish companies for committing crimes without harming shareholders and employees with no relation to the conduct at issue.

Delrahim cautioned that this new approach to compliance programs "should not be misconstrued as an automatic pass for corporate misconduct." Indeed, the Division will continue to disfavor non-prosecution agreements, except for the first company to invoke the DOJ's leniency program—which the Division continues to consider an important tool in identifying antitrust conspiracies.

Cohen & Gresser advises companies to work with knowledgeable legal professionals to draft, implement, and maintain robust compliance programs in line with the DOJ guidelines. Not only would such programs reduce the likelihood of an antitrust violation, but also, in the event that any violation does occur, it can be caught early enough for the company to avail itself of the DOJ's more favorable consideration of compliance programs.

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