After many months of speculation and following the Department of Justice (DOJ) Criminal Division's recent announcement that it was revamping its corporate compliance program guidance, the DOJ's Antitrust Division has finally announced major changes to how it plans to view and assess antitrust compliance programs.

In a speech on July 11, Assistant Attorney General Makan Delrahim announced that for the first time the Antitrust Division would consider a company's pre-existing compliance efforts in the charging stage of investigations and would also strengthen its use of compliance programs in the sentencing phase. Prior to this time, and unlike the Criminal Division, the Antitrust Division only credited compliance programs at the sentencing phase. The Antitrust Division had been hinting that these changes were coming for many months, and has now made good on its promise.

Previous Antitrust Division guidance had made clear that companies would not receive credit at the charging stage for compliance programs. Although the Antitrust Division had encouraged companies to install robust compliance programs, it reasoned that these strong compliance programs would allow companies to find potential criminal activity quickly so that they could take advantage of the Antitrust Division's leniency program and that other incentives were unnecessary. The Antitrust Division now acknowledges that compliance efforts should be rewarded more strongly.

The Antitrust Division's changed guidance is an effort to provide incentives for companies to invest in compliance efforts before the onset of an investigation or receipt of a DOJ subpoena. However, Delrahim made clear, as others in the Antitrust Division have done in the past, that a strong compliance program on its own would not be enough for a company to avoid charges or penalties. As stated by Delrahim, the Antitrust Division also expects companies to take other actions including notifying law enforcement regarding wrongdoing, cooperating with government officials during investigations, and remedying of past misconduct. Even with this change, the Antitrust Division continues to emphasize that it remains committed to its leniency program and considers the program to be "the ultimate credit for an effective compliance program that detects antitrust crimes and allows prompt self-reporting."
Along with the announcement, for the first time the Antitrust Division released official guidance regarding how it would evaluate compliance programs. The Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations is based on the Criminal Division's newly released Evaluation of Corporate Compliance Programs' guidance, the US Sentencing Commission Guidelines regarding compliance programs, and other DOJ resources. Although the Antitrust Division's guidance stresses that there is no official checklist to evaluate a compliance program, the key questions that prosecutors will focus on when evaluating a compliance program for purposes of charging and sentencing decisions are: "(1) Is the corporation's compliance program well designed? (2) Is the program being applied earnestly and in good faith? and (3) Does the corporation's compliance program work?" These questions are drawn from the Department of Justice's Justice Manual regarding compliance programs generally.

In addition, the Antitrust Division's new guidance also includes framework questions for prosecutors to use that are specifically related to antitrust violations: "(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?" The Guidance focuses on nine factors to determine the effectiveness of a company's compliance program:

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
9. Remediation methods

The guidance also includes specific questions relevant to evaluating each of these nine factors.

Most critically, as part of these new changes, the Antitrust Division also announced that companies that have effective compliance programs in place could receive a deferred prosecution agreement (DPA). This is another significant step for the Antitrust Division, which had previously disfavored the use of DPAs. Under the new guidance, the Antitrust Division will continue to disallow the use of non-prosecution agreements (NPAs), a prosecutorial tool used by other parts of the Department of Justice, because it wants to continue its previous policy of only allowing leniency applicants to receive full protections from prosecution.

The Antitrust Division also clarified and expanded its use of compliance programs at the sentencing phase. In the past, the Antitrust Division had not recommended credit for pre-existing compliance programs. The Antitrust Division will now review compliance programs to determine whether a company should get a reduction under the Sentencing Guidelines, the amount of the fine that should be recommended, and whether probation is warranted.

This announcement sends a strong signal to companies that they should review and strengthen their compliance programs to make sure they are in line with the Antitrust Division's new guidance.

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