

CLIENT ALERT

DOJ Puts Antitrust Compliance Programs in the Spotlight

Jul.16.2019

In a significant policy shift, the Antitrust Division announced last week that it will now consider corporate antitrust compliance programs in charging decisions in criminal antitrust investigations. Prior to this change, long-standing Division policy was to ignore compliance programs when making charging decisions, and instead offer credit only to leniency applicants. This new policy shift gives prosecutors increased flexibility to pursue deferred prosecution agreements against corporations that are not the first to report cartel activity but nonetheless have robust compliance programs.

In a [speech](#) on July 11, 2019, Assistant Attorney General Makan Delrahim announced the policy shift, among several other new Division guidelines targeted at incentivizing corporate antitrust compliance programs. Under the new policy, the Division will now be “recognizing and rewarding these compliance efforts as early as the charging stage.” Prosecutors are directed to consider the adequacy and effectiveness of the compliance program at both the time of the offense and the time of the charging decision.

AAG Delrahim contemplates broader use of the Deferred Prosecution Agreement (DPA), a tool widely used in other white collar investigations but rarely by the Antitrust Division. This, he said, represents an important “middle ground” between full leniency and pursuing a conviction. AAG Delrahim was quick to note that a compliance program will not absolve a company of liability or guarantee a DPA. Rather, prosecutors will analyze whether the compliance program is “adequately designed for maximum effectiveness.” In doing this, prosecutors will ask whether (1) the program addresses and prohibits criminal antitrust violations; (2) the program detected and facilitated prompt reporting of the violation; and (3) senior management was involved.

Historically, DPAs have been sparsely used by the Division. Where they have been used, it is not based on the merits of the investigation, but rather to avoid unrelated collateral consequences of a criminal indictment, such as for Royal Bank of Scotland in the LIBOR investigation, and, more recently, for Heritage Pharmaceuticals in the generic pharmaceuticals investigation. In the latter case, the Division expressly stated that a DPA was warranted because a guilty plea would result in a mandatory exclusion from all federal health care programs for at least five years, which would have wide-ranging and harmful ripple effects for the company’s customers and employees.

With this policy shift, we would expect the DPA avenue to be available to many more companies than just those that find themselves in these narrow circumstances – that is, *if* they take the required proactive steps now to ensure effective compliance programs are in place, before any problematic conduct occurs.

The policy shift applies only to DPAs. Non-prosecution agreements continue to be disfavored by the Division, under the theory that complete protection from prosecution should only be available to the first-to-report.

The Division is also providing guidance as to how compliance programs will be considered at sentencing, in particular to recommendations for probation or an external monitor. Additionally, the Division has issued [public written guidance](#) to assist Division prosecutors in evaluating a company’s compliance program at the charging and sentencing stages of investigations.

The Division's policy shift puts it in line with competition agencies from many other jurisdictions around the world that give credit for compliance programs, including Canada, Australia, the U.K., India, Chile, Italy, France, Israel, Hong Kong, and Singapore.

With this new policy, DOJ has put companies on notice that compliance programs matter. An effective compliance program can act as somewhat of an insurance policy if the company is swept up in a cartel investigation, and could make the difference between an indictment and a DPA. Companies are well-advised to invest now in making their compliance programs tailored, effective, and robust, and to create a culture of compliance from the top-down.

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