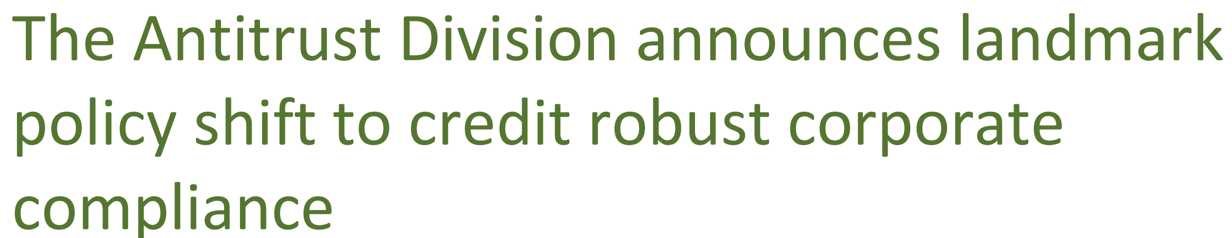

The Antitrust Division announces landmark policy shift to credit robust corporate compliance

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"An ounce of prevention is worth a pound of cure." Assistant Attorney General Makan Delrahim (Delrahim) for the Antitrust Division of the U.S. Department of Justice (the Division or DOJ) called on the words of Benjamin Franklin as he detailed a historic change to the DOJ leniency program. While the Division has traditionally encouraged companies to report cartel activity by awarding the first company to report a violation with leniency, it has given minimal credit to defendants at either the charging or sentencing stage for corporate compliance programs.

That changed 11 July when Delrahim announced sweeping changes to the Division's approach to incentivizing compliance, including awarding credit at charging for compliance programs and permitting prosecutors to proceed by Deferred Prosecution Agreements (DPAs) against early cooperators that have effective compliance programs. In conjunction with these changes, the Division published for the first time ever a guidance document for companies detailing how antitrust compliance programs will be evaluated in criminal antitrust investigations.

The Division's new policy: reward and incentivize corporate compliance

In the past, the Division has relied on its leniency program to incentivize companies to self-report cartel activity. Under its leniency program, the first company to self-report antitrust violations was immune from prosecution, while other members of the cartel would at minimum be required to plead guilty and pay fines. While early cooperators could receive a penalty reduction, only the first whistleblower received the benefit of immunity from prosecution. The Division's belief that effective compliance programs are those that allow the company to claim leniency underscored its winner-takes-all approach. Under this policy, DPAs for effective compliance programs were essentially unattainable. Delrahim announced that companies may now be credited at both the charging and sentencing stage for robust compliance programs. This fundamental shift provides avenues for credit and deferred prosecution even if a company was not first to disclose cartel activity under the leniency program.

The Division also published guidance for companies in support of this new policy. This document and Delrahim's remarks demonstrate an effort by the Department of Justice to update their outlook on compliance and reward companies for investments in effective compliance policies

that can prevent antitrust violations before they occur. Prior to this release, guidelines had never been available for companies to consult when creating or evaluating antitrust compliance programs. The guidance contains two sections detailing how compliance efforts will be assessed by the Division. The first section explains how prosecutors should evaluate compliance programs at the charging stage and provides a list of factors used to determine the effectiveness of the program. The second section outlines how companies may receive credit at the sentencing stage for effective compliance programs through Sentencing Guidelines.

The Division may defer prosecution of companies with qualifying programs

DPAs allow for charges to be deferred and eventually dismissed by prosecutors provided that companies comply with the conditions of the DPA. Unlike the rest of the Department of Justice, the Division has been hesitant to use tools such as DPAs for fear that it would dilute the strength of its immunity program. However, in May 2019 the Division entered into a DPA with Heritage Pharmaceuticals in recognition of its cooperation with its investigation. The Heritage case appears to be a precursor of the Division's recently announced policy.

Under the new policy, companies can be rewarded for preexisting compliance programs at the charging stage. This new approach will allow prosecutors to proceed by DPA when relevant factors, including the adequacy and effectiveness of a company's compliance program, weigh in favor of doing so. In an evolution from its previous rationale that anticompetitive conduct is indicative of a larger problem at a company, the Division now views incentivizing compliance as a way to reduce enforcement activity and minimize harm to consumers and shareholders.

The guidance asks three fundamental questions in regards to compliance programs: "(1) Is the program well designed?; (2) Is it being applied earnestly and in good faith?; and (3) Does it actually work?" These questions get at several factors highlighted in the guidance document for prosecutors to consider when analyzing antitrust corporate compliance programs, including the design and comprehensiveness of the program, the culture of compliance within the company, and reporting mechanisms, among others.

While an excellent starting point for companies, Delrahim emphasized that the factors are not a checklist and will not automatically safeguard a company from liability. At the outset, prosecutors will question the effectiveness of the program, how promptly the violation was reported, and the extent to which company leaders were involved.

Three ways compliance programs receive credit during sentencing

If a DPA is deemed inappropriate, compliance efforts may still be credited at the sentencing stage. In his remarks, Delrahim detailed three ways in which antitrust compliance could affect companies during sentencing. First, an "effective" corporate compliance program could lead to a three-point score reduction under the Sentencing Guidelines. Second, a compliance program may help determine the appropriate fine to recommend under the Sentencing Guidelines. Last, a compliance program may affect whether the Division recommends probation and the appointment of an external monitor. Prosecutors will evaluate compliance programs on a case-by-case basis according to the new guidance issued by the Division. Prosecutors will consider not only the compliance program as it existed at the time of the offense, but will also consider what changes were implemented to address the antitrust violation.

Companies that prioritize catching antitrust violations through effective compliance programs, and working closely with authorities should they occur, may take advantage of the benefits of the Division's new policy. Companies will be incentivized to work with the Division and implement effective compliance programs, and in turn the Division will strengthen this incentive by recognizing and rewarding these efforts.

A tense balance: incentivizing leniency applicants while rewarding compliance programs

In the past, the Division was concerned with providing incentives beyond leniency for corporate compliance programs. The Division feared that companies would rebuff leniency in favor of waiting for the government to initiate an investigation and then attempt to reap the benefits of its corporate compliance program. When announcing its new policy, the Division was adamant that the changes in the Division's policy do not spell an end to the leniency program. While taking questions, Delrahim reaffirmed the Division's commitment to the leniency program and said that it will continue to award the "ultimate credit" of a non-prosecution agreement under its leniency program to only the first company to report. Despite this rhetoric, there is tension between providing incentives beyond leniency for corporate compliance and encouraging self-reporting. In developing its guidance, the Division has not completely separated its assessment of a company's compliance program from the Division's leniency program. Its guidance specifically notes that "early detection and self-policing are hallmarks of an effective compliance program and frequently will enable a company to be the first applicant for leniency under the Division's Corporate Leniency Policy." The Division will consider both whether the compliance program uncovered the underlying violation and whether the company quickly self-reported the conduct when making a charging decision. The new policy also notes that the "Sentencing Guidelines are clear that a sentencing reduction for an effective compliance program does not apply in cases in which there has been an unreasonable delay in reporting the illegal conduct to the government." The Division will consider whether and when the company applied for a leniency marker under the Division's Leniency Policy when making its sentencing recommendation.

If a company is the first to self-report its reward is obvious: immunity from prosecution. For the second and third company to self-report – or the company that reports only after the government initiated an investigation – the reward is still less clear. The Division appears to be saying that as long as the company quickly self-reported due to its compliance program that a DPA or sentencing reduction may be an option. What is not clear is how quick is quick enough. If the Division holds leniency as the benchmark for expeditious reporting, this "new" policy may provide minimal additional benefit. If the Division is more lax in its interpretation, then companies may indeed receive benefits for adequate compliance even if they did not report in time to receive leniency.

Companies should consider re-evaluation of compliance efforts with an eye to the guidelines

These latest changes in the Division's approach to antitrust enforcement highlight a shift toward rewarding companies that are serious about their compliance programs. While the Division has reaffirmed that the leniency program remains the "ultimate credit" for immunity, companies involved in a criminal antitrust investigation may now have the opportunity to be credited for robust compliance programs that are well designed and effective in catching cartel activity. In light of these new changes companies should consider re-evaluating their compliance programs and, if necessary, consulting experienced outside counsel to align their program with the updated guidelines from the Department of Justice.

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