

DOJ Unveils New Incentives for Antitrust Compliance Programs

July 22, 2019

On July 11, 2019, while addressing an audience at NYU School of Law, Assistant Attorney General Makan Delrahim announced new United States Department of Justice policies intended to promote robust antitrust compliance programs.

It has been a longstanding policy of the DOJ's Antitrust Division that it will not consider the existence of a corporate antitrust compliance program when making charging decisions. Only companies that participated in the Antitrust Division's leniency program – by being the first participant in an illegal antitrust agreement to self-report its involvement – could avoid prosecution.

Going forward, however, the Antitrust Division will now consider a corporation's antitrust compliance program when making its charging decisions. After conducting a case-specific inquiry into a company's compliance program and other factors identified in DOJ's Principles of Federal Prosecution and Principles of Federal Prosecution of Business Organizations, the Antitrust Division may agree to enter a deferred prosecution agreement instead of seeking an indictment. As AAG Delrahim said, the Antitrust Division's new policy recognizes "even a good corporate citizen with a comprehensive compliance program may nevertheless find itself implicated in a cartel investigation."

AAG Delrahim also stressed the new policy "should not be misconstrued as an automatic pass for corporate misconduct." Only compliance programs that meet the Antitrust Division's standards for adequacy and effectiveness will support a discretionary decision not to seek an indictment.

In conjunction with AAG Delrahim's remarks, the Antitrust Division issued new guidance on how it evaluates corporate compliance programs in criminal antitrust investigations. It directs prosecutors to consider three fundamental questions in their evaluation:

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?

The guidance elaborates on these questions by identifying elements of an effective antitrust compliance program, including: (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. By analyzing these elements, the Antitrust Division will evaluate whether a company's antitrust compliance program is sufficient to prevent, detect and address antitrust violations through appropriate remedial efforts while fostering corporate and individual accountability.

Prudent companies should maintain antitrust compliance policies and regularly train employees about the need to comply with antitrust law. In addition to substantive information on complying with antitrust laws, including not fixing prices with competitors, those policies should give employees guidance on what to do if they suspect antitrust violations within the company, including where to report suspected violations and the potential penalties for destroying documents.

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