

DOJ Expands Opportunities for Cooperation Credit in Criminal Antitrust Investigations

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In a speech on July 11, 2019, Assistant Attorney General Makan Delrahim of the Antitrust Division of the Department of Justice (“DOJ”) announced that, for the first time, DOJ will consider the effectiveness of corporate compliance programs at the charging stage of criminal antitrust investigations. Previously, under the Antitrust Division’s leniency program, only the first participant in the illegal activity to self-report could avoid a guilty plea; other cooperators received credit at sentencing. Companies with effective compliance programs may now receive deferred prosecution agreements, even if they are not the first to self-report.

DOJ memorialized this change in the Justice Manual, deleting language that stated that the Antitrust Division (the “Division”) will not give credit for a compliance program at the charging stage.¹ Going forward, prosecutors making a charging decision must consider the Division’s **leniency policy**, the **Principles of Federal Prosecution**, and the **Principles of Federal Prosecution of Business Organizations**, which includes the “adequacy and effectiveness of the corporation’s compliance program” at the time of conduct and at charging.²

The Division’s newly-created guidance document, titled “**Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations**,” identifies three “fundamental” questions that its prosecutors must ask when assessing compliance programs:

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 document further instructs prosecutors to focus on other questions, including the extent to which senior management was involved in the criminal antitrust violation,³ and lays out a number of factors—including reporting mechanisms, compliance incentives, and discipline—that should be part of the evaluation. These factors parallel those articulated in the recently-updated **Evaluation of Corporate Compliance Programs guidance document** released by DOJ’s Criminal Division, which are centered around the same three fundamental questions. As with the Criminal Division’s guidance, the Antitrust Division emphasized that its guidance is not a checklist or list of formulaic requirements.

¹ Justice Manual §§ 9-28.400, 9-28.800.

² *Id.* § 9-28.300.

³ Prosecutors must also consider whether the company’s compliance program addresses and prohibits criminal antitrust violations and whether the program detected and facilitated prompt reporting of the violation.

Under the Antitrust Division's revised approach, its prosecutors may offer a deferred prosecution agreement when the relevant factors—including the adequacy and effectiveness of the corporation's compliance program—weigh in favor of doing so. As the Justice Manual points out, the existence of a compliance program is not sufficient, in and of itself, to merit a deferred prosecution agreement.⁴

The Division made clear that this change does not affect its leniency policy, which AAG Delrahim referred to as “the ultimate credit for an effective compliance program.” Leniency provides immunity from criminal antitrust charges and penalties for the company, non-prosecution protections for covered employees, and other benefits, but is only available to the first participant in the illegal activity that makes full disclosure to the government.⁵ For this reason, the Division explained, it will continue to disfavor non-prosecution agreements for companies that do not receive leniency, in order to preserve those benefits for the first company that self-reports and meets the leniency program's requirements.

The newly-announced guidance also clarifies how companies may be rewarded for cooperation at sentencing. These include through the Sentencing Guidelines' three-point reduction for an effective corporate compliance program; the determination of the appropriate fine within the Guidelines range; and the Division's recommendation of whether to require probation as part of the resolution.

While the Division's leniency program remains the only way to avoid charges in the event of a criminal antitrust violation, an effective compliance program could mean the difference between an offer of a deferred prosecution agreement and a guilty plea. Based on the considerations outlined in the guidance, corporations should take the following non-exhaustive list of factors into account when assessing the effectiveness of their compliance programs:

- The extent to which the compliance program is integrated into the company's business and how accessible antitrust compliance resources are to employees;
- The degree to which senior management has conveyed the importance of the compliance program through concrete actions;
- The adequacy of resources committed to monitoring, investigating, auditing, and training;
- The availability and effectiveness of confidential reporting mechanisms;
- The effect that compliance has on employees' compensation and incentives, and whether the company can identify specific examples of disciplinary actions taken as a result of compliance violations; and
- The ways that a company evaluates, modifies, and revises its compliance program after the program fails to detect a violation.

⁴ Justice Manual § 9-28.800.

⁵ Id. § 9-28.400.

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