Antitrust Division Announces New Policy to Spur Corporate Compliance

AntitrustConnect Blog
July 19, 2019

Thomas Wolfe (Wolters Kluwer Legal & Regulatory, U.S.)

Please refer to this post as: Thomas Wolfe, 'Antitrust Division Announces New Policy to Spur Corporate Compliance', AntitrustConnect Blog, July 19 2019, http://antitrustconnect.com/2019/07/19/antitrust-division-announces-new-policy-to-spur-corporate-compliance/

Those familiar with this blog have seen a number of posts questioning the Department of Justice Antitrust Division's long-standing position that a company shouldn't be rewarded for having a corporate compliance program that fails it. Last week, the Antitrust Division announced that it will now consider corporate compliance at the charging stage of criminal antitrust investigations.

In a speech at New York University School of Law's program on "Corporate Compliance and Enforcement" held in New York City on July 11, Makan Delrahim, Assistant Attorney General in charge of the Department of Justice Antitrust Division, underscored that, for the first time, the Antitrust Division will consider compliance at the charging stage in its criminal antitrust investigations. The Antitrust Division not only has updated its "Justice Manual" to reflect the change, but also has published and made available to the public a new guidance document to help prosecutors evaluate corporate compliance programs at the charging and sentencing phases of criminal investigations. While commenting that the federal agency is still committed to its "Corporate Leniency Policy," Delrahim stated, "I believe the time has now come to improve the Antitrust Division's approach and recognize the efforts of companies that invest significantly in robust compliance programs." At the same time, the Antitrust Division's "new approach to compliance programs should not be misconstrued as an automatic pass for corporate misconduct," Delrahim asserted.

In his prepared remarks, titled “Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs,” Delrahim remarked that the feedback the Antitrust Division has received from public workshops, roundtables, internal meetings, and discussions “with cartel enforcement authorities outside the United States” during the past year has assisted the agency with assessing “improvements we could make to our policies and practices to further incentivize antitrust compliance and good corporate citizenship.”

Delrahim observed that, under the Department’s past approach, if a company did not “win the race for leniency” under the Antitrust Division’s Corporate Leniency Policy, then the agency would “insist that it plead guilty to a criminal charge with the opportunity to be an early-in cooperator, and potentially receive a substantial penalty reduction for timely, significant, and useful cooperation assisting the Division’s efforts to hold co-conspirators and culpable individuals accountable.” According to Delrahim, this “all-or-nothing philosophy was born of our efforts to highlight the value of winning the race for leniency at a time when the modern leniency program was establishing itself as the Division’s most important investigative tool.”

Against this backdrop, Delrahim communicated that he and the current Deputy Attorney General share former Deputy Attorney General Rod Rosenstein’s view that even though some corporate misconduct may occur, showing that a compliance program “was not foolproof … does not necessarily mean that it was worthless. We can make objective assessments about whether programs were implemented in good faith.” With this in mind, the Antitrust Division is transitioning to a more nuanced approach regarding corporate compliance considerations.

Indicating that “the time has now come to improve the Antitrust Division’s approach,” Delrahim communicated, “effective immediately, the Antitrust Division will: (1) change its approach to crediting compliance at the charging stage; (2) clarify its approach to evaluating the effectiveness of compliance programs at the sentencing stage; and (3) for the first time, make public a guidance document for the evaluation of compliance programs in criminal antitrust investigations.”

Along these lines, Delrahim elaborated: “Going forward, when deciding how to resolve criminal charges against a corporation, Division prosecutors must consider the Division’s Corporate Leniency Policy, the Principles of Federal Prosecution and the Principles of Federal Prosecutions of Business Organizations, including the

adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of the charging decision." Later in his speech, he added, "Precisely how much weight and credit to give a compliance program will depend on the facts of the case."

According to Delrahim, the Antitrust Division's new approach "allows prosecutors to proceed by way of a deferred prosecution agreement (DPA) when the relevant Factors, including the adequacy and effectiveness of the corporation's compliance program, weigh in favor of doing so. DPAs, as the Justice Manual recognizes, 'occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation." Still, he pointed out that the Antitrust Division will "continue to disfavor non-prosecution agreements with companies that do not receive leniency," and that "a compliance program does not guarantee a DPA." Moreover, "[n]othing about … [the] compliance announcement changes the Antitrust Division's commitment to leniency, which remains available only to the first corporation to make full disclosure to the government," he remarked.

Delrahim explained that antitrust compliance could be relevant to a corporation's sentencing in at least three ways: (1) the Sentencing Guidelines provide for a three-point reduction in a corporate defendant's culpability score if the company has an "effective" compliance program under the Guidelines; (2) a corporate compliance program may be relevant in the agency's evaluation of an appropriate corporate fine to recommend within the Guidelines range, or, in extraordinary circumstances, whether to recommend a fine below the Guidelines range; and (3) the existence and effectiveness of a corporate compliance program is relevant to the Division's probation recommendation.

New Guidance Document

Next, Delrahim noted that the agency has heeded the input received from a roundtable discussion on the topic, revealing that the "consensus in-house counsel view appeared to be that clear written guidance from the Division could be a useful tool in lobbying internally for increased antitrust compliance resources." Accordingly, Delrahim stated, "For the first time in the criminal program's history, we are issuing public written guidance to assist Division prosecutors in their evaluation of compliance programs at the charging and sentencing stages of investigations."

Among other things, the Justice Department's July 2019 written guidance, "Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations," identifies 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. For each of these elements, the guidance document "provides additional questions prosecutors may consider depending on the facts that go to the effectiveness of the antitrust compliance program in deterring and detecting criminal antitrust conduct."