AntitrustConnect Blog

Some Early Thoughts On the Division's New Policy On Corporate Compliance Programs (From a Guy Who Was Admittedly Against This When He Was With the Division)

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There has been a great deal of publicity surrounding the Antitrust Division's recent announcement that a corporation involved in a criminal antitrust violation may get credit for an antitrust compliance program if certain conditions are met. The credit may include a DPA (Deferred Prosecution Agreement: the government reaches a plea agreement with the defendant; files criminal charges in an Information; and defers the entry of the guilty plea for a period of time. If the defendant fulfills its obligations (typically cooperation and a fine), the charges are dismissed without entry of a guilty plea]. Also under the new policy, if a DPA agreement is not merited, the corporate defendant may still get compliance credit in the form of a reduction in the criminal fine imposed. Conversely, an absent or toothless compliance program may result in probation being a condition of sentence in order to compel a serious compliance program.

This is a [seemingly] dramatic change in Division policy. [More about the "seemingly" in a moment]. From the time I joined the Antitrust Division in 1980, and no doubt even before, a plea to the Division for credit for an antitrust compliance program was unsuccessful 100% of the time. Many an Antitrust Division attorney quoted this statement of law from a criminal antitrust case against Hilton Hotels. At the trial the district court gave this jury instruction:

> *"A corporation is responsible for acts and statements of its agents, done or made within the scope of their employment, even though their conduct may be contrary to their actual instructions or contrary to the corporation's stated policies."*

United States v. Hilton Hotels Corporation, 467 F.2d 1000, 1004 (9th Cir. 1973). The Court of Appeals upheld the conviction:

> *For these reasons we conclude that as a general rule a corporation is liable under the Sherman Act for the acts of its agents in the scope of their employment, even though contrary to general corporate policy and express instructions to the agent. Id.*at 1007.

The Antitrust Division's policy, and the law, in essence mirrored the words Seinfeld's infamous Soup Nazi: "No credit for you!"

But, in the last few years there have been cracks in this uniformity with credit given for "forward looking compliance programs" and also in limited circumstances, a DPA and even an NPA (non-prosecution agreement). Also, with the development of a large organizations of compliance professionals such as the Society of Corporate Compliance and Ethics, commentators in the compliance world have argued that the credit for compliance programs was needed to incentivize companies to institute meaningful antitrust compliance programs. These efforts, and the Antitrust Division's willingness to listen, have resulted in a major new policy change.

In case you missed it, here are the key documents relating to the Antitrust Division's reversal and new compliance program policy:

1) July 11, 2019 Press release: **Antitrust Division Announces New Policy to Incentivize Corporate Compliance,** available at https://www.justice.gov/opa/pr/antitrust-division-announces-new-policy-incentivize-corporate-compliance.

2) Makan Delrahim's July 11, 2019 Remarks Announcing the New Policy, **Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs**, available at https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0.

3) Most importantly, the Antitrust Division issued a policy statement describing the new policy: **U.S. Department of Justice Antitrust Division: Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations**, available at https://www.justice.gov/atr/page/file/1182001/download.

4) For extra credit, you can also review the Criminal Division's April 2019 statement on Evaluation of Corporate Compliance Programs, available at https://www.justice.gov/criminal-fraud/page/file/937501/download.

Some Initial Thoughts on the New Policy

1. **To the Extent the Policy Was Meant to Incentive Antitrust Compliance, It's Off to A Good Start.**

I don't believe that anyone keeps track of the number of "Client Alerts" that law firms send out to their clients about developments in the antitrust field. But if there is ever a question on "Family Feud" about the number one development in terms of launching Client Alerts, the survey will say this policy was the Number 1 answer. The reason is simple—law firms are always trying to market robust compliance programs to their corporate clients. It is good business: Good for the law firms to help implement strong compliance programs and good for the client to have them. This new policy incentivizing antitrust compliance programs is marketing gold.

Every corporation, of course, already has plenty of incentive to have a good antitrust compliance program. Possible criminal penalties, jail sentences for culpable individuals, painful civil litigation and bad publicity are all dire consequences of participation in collusion with competitors. I've likened a criminal antitrust investigation to the Hundred Years War—seemingly endless pain. Corporations also have a moral obligation to warn executives of what hell can await them if they think that collusion with competitors is the answer to any market condition problem. I've dealt with executives who were going to be spending time in jail who thought they were helping their company, with very little comprehension of the risks they were taking. Yes, they had a notion that fixing prices was not too smart (thus the "delete after reading" emails that often were not deleted). But a forceful antitrust compliance program would not only make it clearer what the consequences are, it would make it harder to collude since price fixing is rarely done by just one individual in a company and a "culture of compliance" would make it difficult for the potential "one bad apple" to recruit others.

That being said, law firms face substantial headwinds in trying to implement serious antitrust compliance programs. They boil down to two issues: 1) Compliance programs are expensive in terms of both time and money [and there is a lot of competition for compliance dollars] and 2) The Antitrust Division, up to now, would not give any credit for all the time and money spent if a violation occurred [unlike the Criminal Division and other DOJ components]. Law firms can now "sell" the possibility of "credit for a compliance program" since the Antitrust Division is in substantial harmony with the program of the Criminal Division.

2. **A Question: Is the New Policy Very Different From the Old Policy?**

The Antitrust Division previously did not give credit for compliance programs in large part because the culpable executives were high level executives. How could the program be deemed "effective" if senior executives (and often several) were involved

in the illegal conduct? When confronted with the possibility that a lower level "rogue employee" could bind the company Antitrust Division management sometimes quipped "a true rogue employee in an antitrust case is akin to Bigfoot – 'often rumored but seldom seen.'"

But, if it is true that criminal antitrust violations are only carried out by senior executives, it would seem the answer to the request for credit under the new policy will continue to be "No Credit for you!" The new Evaluation of Compliance Program Guidance directs prosecutors to ask: "To what extent was a company's senior management involved in the violation?" p. 3. The Guidance further states:

> *Culture of Compliance*
>
> *The Division has recognized that "[i]f senior management does not actively support and cultivate a culture of compliance, a company will have a paper compliance program, not an effective one."8 Indeed, employees should be "convinced of the corporation's commitment to [the compliance program]." JM § 9-28.800. Guidance p. 5.* A relevant question is: "*Have senior managers tolerated antitrust violations in pursuit of new business, greater revenues, or maintaining customers? Were senior managers involved in the violation(s)?"* Id. *at 6.*

So, it would appear that to the extent senior managers are always involved in price fixing and bid rigging, a company's policy will still fail to produce a benefit regardless of how much money was spent or how stern the warnings were.

A company can also get credit for an "effective" compliance program under the sentencing guidelines. But, will the involvement of senior management also preclude this break?. As the Evaluation of Compliance Program Guidance states:

> *Sentencing Considerations.*
>
> *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. See U.S.S.G. § 8C2.5(f)(2). In addition, there is a rebuttable presumption that a compliance program is not effective when certain "high-*

> *level personnel" or "substantial authority personnel" "participated in, condoned, or [were] willfully ignorant of the offense." U.S.S.G. § 8C2.5(f)(3)(A)–(C).* Guidance at 14.

The Evaluation of Compliance Program Guidance goes on to say: "*Under the Sentencing Guidelines, 'high- level personnel" and "substantial authority personnel" include individuals in charge of sales units, plant managers, sales managers, or those who have the authority to negotiate or set prices or negotiate or approve significant contracts. U.S.S.G. § 8A1.2, application note 3(B)–(C).'"* Id. Like Bigfoot, it would be hard to find a criminal antitrust violation that doesn't involved somebody in the company meeting one of these descriptions.

The Guidance does point out that the role of senior management is a question staff should address, but it does not draw a per se rule against giving credit for an effective compliance program on that basis alone. The Guidance lays out many other factors to be considered. Another key factor is how quickly the corporation reports the violation upon discovery. It could be that in practice a DPA might be considered in those situations where a company quickly reports the violation (and otherwise has strong antitrust compliance program) but just barely losses the race for leniency.

It is worth noting that the DPA recently given to Heritage Pharmaceuticals in the generic drug price fixing investigation seemingly would not been given under the new Evaluation of Compliance Program Guidance. While the company got a DPA, the Antitrust Division charged two former Heritage executives with price fixing and the Press Release headline read:

Former Top Generic Pharmaceutical Executives Charged with Price-Fixing, Bid-Rigging and Customer Allocation Conspiracies The executives were the former CEO and former President—clearly high level executives. In fact, the Heritage DPA, not surprisingly, says nothing about getting credit for an "effective compliance program." Instead the DPA was justified in part by:

> Heritage Deferred Prosecution agreement.
>
> (g) a conviction (including a guilty plea) would likely result in Heritage's mandatory exclusion from all federal health care programs under 42 U.S.C. $1320a-7 for a period of at least five years, which would result in substantial consequences to the corporation's employees and customers outside the federal health care programs; and (h) this Agreement can ensure that integrity has been restored to Heritage's

operations and preserve its financial viability while preserving the United States' ability to prosecute it should material breaches occur.

3. A Concern About the New Policy to Incentivize Antitrust Compliance Programs

As mentioned, when I was with the Antitrust Division (1980-2013) I was against giving formal credit for an antitrust compliance program. I believe most prosecutors in the Division were. There were a couple of reasons. One has already been mentioned. In every case we had, the culpable individuals were very senior executives so any compliance program was, to us, a paper compliance program disregarded by the very people who were supposed to create the "culture of compliance." But another reason why I worried about giving credit for compliance programs was because it seemed to be a hard policy to enforce fairly. Corporate counsel sometimes came in and pleaded that Mr. Boss was an antitrust "hawk" continually warning his subordinates that it was illegal to fix prices, it wouldn't be tolerated and they'd be fired if they did so. Mr. Boss was shocked to learn the VP of Sales, Mr. Right Below the Boss, colluded with competitors against company policy. But, I (and others) often suspected Mr. Boss was well aware of the price fixing and just did a good job setting things up so an underling would take the fall. It often is difficult to hold accountable the most senior member in an organization who insulates himself from contact with other conspirators but authorizes or knows of the conduct going on within his company. Mr. Right Below the Boss who is taking a plea may be motivated to protect Mr. Boss, but even if he says "Hey, Mr. Boss knew what I was doing", it's a convicted felon's word against Mr. Boss. My concern is that if the company can get a DPA and save perhaps hundreds of millions of dollars by drawing the culpability line at Mr. Right Below the Boss, it may make it even harder to hold accountable the most culpable member of an organization.

Maybe my concern is the product of an overly cynical view of who ends up often taking the fall for wrongdoing. But I can also see how, even if my concern is valid, it may not outweigh the benefits of incentivizing corporate antitrust compliance programs by offering the *possibility* of credit *if certain conditions are met*.

There's so many more issues to think through about the new policy such as "What effect, if any will it have on the Leniency Program; already perceived to be less of a bargain than it used to be?" The Division once sold Leniency as the way to get credit for an effective compliance program. If the company's compliance program detected the wrongdoing, they could apply for Leniency. Another big question: "What protection does a company have for quickly reporting the illegal conduct?" The leniency program has a well-established "marker" system. Will there be a similar system in place to try to qualify for a DPA? Time will tell.

Thanks for reading.

PS. Please send me an email if you have any thoughts you'd like to share (either privately or to be posted). Thanks.

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