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Antitrust Division Supplements Leniency Program with Credit for Good Compliance

August 12, 2019

For years the Antitrust Division of the Department of Justice resisted, in contrast to the Criminal Division, considering and awarding credit for companies' "robust" compliance programs. The mantra has been that the first-in no-prosecution incentive of the amnesty program, and more modest credit under "leniency plus", are sufficient and they constitute "ultimate credit for effective antitrust compliance programs". As of July 11, 2019, in a speech at NYU and related press release, Assistant Attorney General Makan Delrahim changed that dynamic and announced a new credit incentive for corporate compliance programs in both charging decisions and sentencing recommendations. "Good corporate citizenship" will now be rewarded.

Prosecutors in the Antitrust Division now operate under detailed changes in the Justice Manual requiring considerations in nine areas to evaluate how much to credit compliance programs. Three key overriding questions emerge:

- Does the company utilize a "well designed" compliance program?
- Does the company apply its compliance program "earnestly and in good faith"?
- Does the company's compliance program actually work?

Such a program should address and prohibit criminal conduct, detect such conduct and facilitate prompt reporting, and discover involvement of senior management.

The nine underlying factors to evaluate the effectiveness of a compliance program are as follows:

- the design and comprehensiveness of the compliance program;
- the "culture of compliance" within the company;
- the sufficiency of responsibility and resources for antitrust compliance;
- the use of antitrust risk assessment procedures;
- the antitrust compliance training provided to employees;
- the use of appropriate monitoring and auditing procedures;
- the sufficiency of processes for reporting antitrust noncompliance;
- the compliance incentives and discipline used by the company; and
- the remediation process for antitrust noncompliance.

How these questions and areas of inquiry are answered may sway the Antitrust Division to prosecute, enter a deferred prosecution agreement (DPA) or possibly even offer a rare non-prosecution agreement (NPA). DPAs would forego prosecution in exchange for monetary penalties and conditions going forward.

With few preexisting examples of DPAs (and NPAs), it is hard to assess whether their possible terms will encourage or discourage companies from spending the costs and efforts to develop gold standard compliance programs. Has the company in addition proactively self-reported, cooperated, and taken remedial action? If the company does not meet one of the key factors, is it out totally? What do the terms "detect", "facilitate", and "prompt" mean? What effect on possible prosecution of employees – current and former – may result?

The sentencing factors to be considered, should a prosecution result, include a possible three point reduction in the culpability score used to calculate fines under the Sentencing Guidelines. These factors also raise questions. Whereas fine reduction under the Sentencing Guidelines for the truly effective compliance program may be encouraging, again how does this benefit a charged corporate defendant above and beyond the monetary discounts offered by the leniency program? ACPERA legislation limits the first leniency recipient to single damage exposure; what will be the effect on civil litigation for companies with new DPAs requiring admissions or undisputed factual representations? Does the change decrease the possibility of corporate probation or monitorship? In short, while having integrated DOJ guidance and policies in one place increases transparency, corporations still have tough calls and uncertain outcomes to face.