July 2019

DOJ announces new antitrust compliance guidance and review of the tech sector

Continued attention on effective compliance programs.

Key points

— The Antitrust Division of the U.S. Department of Justice has published a new policy and guidance for antitrust prosecutors that directs them to evaluate companies’ corporate compliance programs at both the charging and sentencing stage, in order to evaluate potential credits pursuant to the U.S. Sentencing Guidelines.

— The Antitrust Division guidance reinforces the key elements of a corporate compliance program—including ethics and culture, tone at the top/governance, reporting, training and communication, staffing resources, and risk assessments, among other factors. The new guidance also emphasizes the need for further integration of compliance efforts across companies.

— The corporate compliance program evaluation factors outlined in the guidance issued by the Antitrust Division closely mirror those set forth in the revised guidance that the Criminal Division published on April 30, 2019.

— On July 23, 2019, the Department of Justice announced that the Antitrust Division is reviewing whether “market-leading online platforms” are engaging in practices that may have “reduced competition, stifled innovation, and otherwise harmed consumers.”

On July 11, 2019, Assistant Attorney General Makan Delrahim, who oversees the Antitrust Division, announced the Antitrust Division’s new policy for incentivizing antitrust compliance. For the first time, the Antitrust Division will consider an organization’s corporate compliance efforts at the charging stage in its criminal antitrust investigations, including investigations of price fixing, bid rigging, and market allocations, pursuant to the Sherman Act.

The Division also revised the Justice Manual to reflect the change and published a guidance document for antitrust prosecutors in evaluating corporate compliance programs at both the charging and sentencing stages. The new guidance provides compliance officers and the public greater transparency into the Division’s compliance analysis, and closely mirrors the guidance released by the Criminal Division earlier this year for evaluating corporate compliance programs. Together, the guidance documents create greater alignment across regulatory focus areas, as well as greater consistency for companies.

Preliminary Questions
The Antitrust Division guidance establishes preliminary questions for Division prosecutors to utilize at the outset of an inquiry into the efficacy of an antitrust compliance program. These questions include:
— Does the company’s compliance program address and prohibit criminal anti-trust violations?
— Did the antitrust compliance program detect and facilitate prompt reporting of the violation?
— To what extent was a company’s senior management involved in the violation?

Corporate Compliance Program Evaluations

The Antitrust Division’s guidance directs prosecutors to consider three (3) fundamental questions:

— Is the corporation’s compliance program well designed?
— Is the program being applied earnestly and in good faith?
— Does the corporation’s compliance program work?

Importantly, the Antitrust Division seeks to evaluate whether a corporate compliance program is merely a “paper program” or if it was “designed, implemented, reviewed, and revised, as appropriate, in an effective manner.”

The Antitrust guidance also identifies certain general attributes for successful antitrust compliance programs, including: efficiency, leadership, training, education, information, and due diligence. In addition, it sets forth critical factors prosecutors should utilize in evaluating a corporate compliance program, while noting that these factors are not intended to be a checklist or formula. The factors include: the design and comprehensiveness of the program; the culture of compliance within the organization; responsibility for and resources dedicated to antitrust compliance; antitrust risk assessment techniques; compliance training and communication to employees; monitoring and auditing techniques; reporting mechanisms; compliance incentives and discipline; and remediation methods.

The Antitrust Division guidance also echoes the concept that a compliance program must be firmly **integrated** into the company’s business, and that the compliance resources be accessible. It is also noteworthy that the Antitrust Division gives attention to whether document destruction has occurred, and spotlights the need for a culture of compliance that encourages “ethical conduct” and “a commitment to compliance with the law” in a separate section.

Guideline Credit for an Effective Compliance Program

The Antitrust Division guidance documents certain ways in which companies may receive credit for implementing an effective compliance program. Specifically, a program can affect whether a company is sentenced to probation, as well as the amount of a recommended corporate fine.

According to the Antitrust Division guidance, the U.S. Sentencing Guidelines clearly establish that a sentencing reduction is not to be applied in cases in which there is an unreasonable delay in reporting the illegal activity to the government, and that 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.” This would include individuals in charge of sales units, plant managers, sales managers, and those who have authority to negotiate or approve significant contracts. As part of this evaluation and whether the presumption can be rebutted, the Antitrust Division states that it will consider whether and when the company applied for a leniency marker under the Division’s Corporate Leniency Policy.

In addition, the Antitrust Division specifies the compliance considerations relevant to recommending probation (including whether a compliance program has since been put in place, if not previously in existence), and also allows for statutory fine reductions when prevention efforts are implemented to reduce recurrence (e.g., tone at the top, improvements to the pre-existing compliance program/creation of a program, disciplinary procedures).

**KPMG perspective**

The DOJ’s Antitrust Division guidance aligns the incentives for companies facing antitrust investigations or potential violations with the guidelines the DOJ previously has articulated for other types of matters—specifically incentivizing an effective corporate compliance program. In so doing, the DOJ has created greater consistency in its enforcement approach and reinforced key elements of a DOJ compliance program, including culture, transparent reporting of misconduct, strong governance and tone at the top, accountability, and risk assessments.

Although some may argue that the Antitrust Division’s guidance has weakened or softened incentives to report misconduct, it actually appears that the DOJ is acting to realign its incentives. Ultimately, the DOJ’s guidance should encourage organizations to further integrate their compliance efforts, bringing antitrust compliance efforts into the fold more closely, and thereby yielding greater consistency, effectiveness, and efficiency in the future.
The release of the Antitrust Division’s guidance follows closely on the DOJ Criminal Division’s release of guidance on evaluating the effectiveness of corporate compliance programs as well as the Department of the Treasury’s Office of Foreign Assets Control framework for sanctions compliance. KPMG’s Regulatory Alerts on each of these releases can be accessed here and here, respectively.

It is notable that the Department of Justice has formally announced that the Antitrust Division is reviewing how “market-leading online platforms,” which include technology companies that dominate internet search, social media, and some retail services, have achieved market power and whether they are engaging in practices that may have “reduced competition, stifled innovation, and otherwise harmed consumers.” Assistant Attorney General Makan Delrahim stated, “Without the discipline of meaningful market-based competition, digital platforms may act in ways that are not responsive to consumer demands.”

For additional information on the Antitrust Division guidance, please contact Eric Gorman or Amy Matsuo.

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