

CLIENT ALERT

# DOJ Officially Credits Corporate Antitrust Compliance and Provides Detailed Compliance Guidance

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For the first time, the Antitrust Division of the Department of Justice (“DOJ”) has announced a formal policy of crediting robust antitrust compliance programs when making criminal enforcement decisions. While the DOJ’s announcement came in the criminal enforcement context, it will likely affect civil antitrust matters at the DOJ as well as matters at the Federal Trade Commission (“FTC”). The DOJ’s new policy offers a compelling reason for companies to maintain or introduce strong antitrust compliance programs.

Last month, Assistant Attorney General Makan Delrahim announced that prosecutors resolving criminal charges against a company now must consider the “adequacy and effectiveness” of the company’s antitrust compliance program, both “at the time of the offense” and “at the time of the charging decision.”<sup>1</sup> The DOJ also released a document providing detailed guidance for designing and implementing an antitrust compliance policy.<sup>2</sup>

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<sup>1</sup> Makan Delrahim, Assistant Attorney General, U.S. Dep’t of Justice, Remarks at the New York University School of Law Program on Corporate Compliance and Enforcement: Winds of Change: A New Model for Incentivizing Antitrust Compliance Programs (Jul. 11, 2019), [available here](#) [hereinafter “Delrahim Remarks”].

<sup>2</sup> See U.S. DEP’T OF JUSTICE, ANTITRUST DIV., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS IN CRIMINAL ANTITRUST INVESTIGATIONS (Jul. 2019), [here](#) [hereinafter “Compliance Programs Evaluation”].

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For more than 25 years, the DOJ's Corporate Leniency Policy has granted immunity from criminal prosecution only to the first company that self-reports an antitrust offense. Mr. Delrahim noted that, where a corporation did not win the "race for leniency," its only option was to plead guilty to a criminal charge, "with the opportunity to be an early-in cooperator."<sup>3</sup>

"The time has now come," Mr. Delrahim acknowledged, "to improve [the DOJ's] approach and recognize the efforts of companies that invest significantly in robust compliance programs."<sup>4</sup> The change in policy came from a "recognition that even a good corporate citizen with a comprehensive compliance program may nevertheless find itself implicated in a cartel investigation."<sup>5</sup>

The DOJ's new policy to credit compliance programs in criminal enforcement will likely be echoed in civil antitrust matters at both the DOJ and the FTC. The DOJ and the FTC traditionally have spoken with one voice on policy matters,<sup>6</sup> and FTC personnel have encouraged strong compliance policies.<sup>7</sup>

Whether to pursue an investigation, and if so, whether to proceed criminally or civilly, are often close decisions. DOJ personnel now have an institutional authorization to credit significant compliance efforts and a corporate commitment to respect the antitrust laws. Good-faith efforts by the relevant company to abide by the rules of the antitrust road could go a long way toward persuading the DOJ and the FTC to pursue the less severe course.

To receive credit from the DOJ and the FTC, companies would be served well by revisiting their antitrust compliance programs, updating them as necessary, and refreshing their implementation among all employees. To facilitate that effort, we summarize below the DOJ's detailed criteria for a sound compliance program. We use numerous quotations from the DOJ's guidance to allow the DOJ to speak for itself.<sup>8</sup>

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<sup>3</sup> Delrahim Remarks.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> That one-voice policy has been suspended, at least temporarily, during the Delrahim administration in connection with the application of the antitrust law to patents and a willingness to entertain behavioral merger remedies. See William H. Rooney, Eugene L. Chang, and Heather M. Schneider, *FTC v. Qualcomm: Groundbreaking Antitrust Ruling Bars Qualcomm's Key Licensing Practices, Requiring It to "Radically Restructure Its Business Relationships,"* WILLKIE.COM (Jun. 14, 2019), [here](#).

<sup>7</sup> See, e.g., Joe Murphy CCEP, *The FTC and Antitrust Compliance Programs*, COMPLIANCE & ETHICS PROF. 49-53 (2012) (interview with FTC Assistant Director for Compliance).

<sup>8</sup> Compliance Programs Evaluation at 3-14.

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## 1. The Design and Comprehensiveness of the Program

“[K]ey considerations are the adequacy of the program’s integration into the company’s business and the accessibility of antitrust compliance resources to employees and agents.”<sup>9</sup> Specifically, the DOJ will ask: “When was the company’s antitrust compliance program first implemented[;] . . . [h]ow often is it updated[;] . . . [w]hat is the format of the antitrust compliance program . . . [i]s it in writing[;] . . . [w]ho is responsible for integrating antitrust policies and procedures into the company’s business practices[;] . . . [i]n what specific ways are antitrust compliance policies and procedures reinforced through the company’s internal controls[;] . . . [w]hat guidance has been provided to employees who could flag potential antitrust violations[;] . . . [and w]hat guidance has been provided to employees about document destruction and obstruction of justice?”<sup>10</sup>

## 2. The Culture of Compliance Within the Company

Has “corporate management [ ] clearly articulated — and conducted themselves in accordance with — the company’s commitment to good corporate citizenship[?]”<sup>11</sup> “What is the company’s senior leadership doing to convey the importance of antitrust compliance to company employees? How have senior leaders, through their words and actions, encouraged . . . antitrust compliance?”<sup>12</sup>

## 3. Responsibility for, and Resources Dedicated to, Antitrust Compliance

Do “those with operational responsibility for the [antitrust] program [ ] have sufficient autonomy, authority, and seniority within the company’s governance structure, as well as adequate resources for training, monitoring, auditing and periodic evaluation of the program . . .[,] and [d]oes the company allocate sufficient compliance resources to educating employees on antitrust law?”<sup>13</sup>

## 4. Risk Assessment

Is “the company’s antitrust compliance program tailored to the company’s various industries/business lines and consistent with industry best practice[;] . . . [w]hat information or metrics has the company collected and used to help detect antitrust violations[;] . . . [and is] the company’s antitrust risk assessment current and subject to periodic review[?]”<sup>14</sup>

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<sup>9</sup> *Id.* at 4.

<sup>10</sup> *Id.* at 4-5.

<sup>11</sup> *Id.* at 5.

<sup>12</sup> *Id.* at 5.

<sup>13</sup> *Id.* at 6-7.

<sup>14</sup> *Id.* at 7-8.

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### 5. Compliance Training and Communication to Employees

Training should help employees understand the boundaries between permissible and anticompetitive conduct. “For example, training can teach relevant personnel that competitor communications could signal an antitrust violation if they are not part of a legitimate joint venture or other procompetitive or competitively neutral collaboration.”<sup>15</sup> “How has the company communicated its antitrust policies and procedures to all employees?”<sup>16</sup> “Does training include senior management/supervisors and the Board of Directors?”<sup>17</sup>

### 6. Monitoring and Auditing Techniques, Including Continued Review, Evaluation, and Revision of the Antitrust Compliance Program

“An effective compliance program includes monitoring and auditing functions to ensure that employees follow the compliance program.” Relevant factors include: “What methods does the company use to evaluate its antitrust compliance program;” “[w]hat monitoring or auditing mechanisms does the company have in place to detect antitrust violations;” [and “w]hat is the company’s process for designing and implementing revisions to its antitrust compliance policy?”<sup>18</sup>

### 7. Reporting Mechanisms

“An effective compliance program includes reporting mechanisms that employees can use to report potential antitrust violations anonymously or confidentially and without fear of retaliation.”<sup>19</sup> “Do supervisors or employees who become aware of a potential antitrust violation have a duty to report it to those with responsibility for compliance?”<sup>20</sup>

### 8. Incentives and Discipline

Does the company offer incentives for abiding by the compliance program, and what disciplinary measures are in place? For example: “Have . . . actions [been] taken (e.g., promotions or awards denied, or bonuses clawed back) because of compliance considerations . . . [;] [h]as the company disciplined anyone because of an antitrust violation?”<sup>21</sup>

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<sup>15</sup> *Id.* at 8.

<sup>16</sup> *Id.* at 8.

<sup>17</sup> *Id.* at 9.

<sup>18</sup> *Id.* at 10-11.

<sup>19</sup> *Id.* at 11.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 11-12.

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### 9. Remediation and Role of the Compliance Program in the Discovery of the Violation

“Although a compliance program may not detect every antitrust violation in the first instance, remedial efforts and improvements to the company’s compliance program may prevent recurrence of an antitrust violation. . . . The thoroughness of the company’s remedial efforts is relevant to whether the antitrust compliance program was effective at the time of the antitrust violation.”<sup>22</sup> “[E]arly detection and self-policing are hallmarks of an effective compliance program[.]”<sup>23</sup>

The DOJ’s new policy leaves to each company the responsibility to tailor its compliance programs to its particular business needs. To that end, companies should consider refreshing any existing programs or adopting new compliance measures in accordance with the DOJ’s new guidance.

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<sup>22</sup> *Id.* at 12.

<sup>23</sup> *Id.* at 13.