

One Minute Memo®



DOJ Antitrust Division Announces Landmark Policy Incentivizing Corporate Compliance

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On July 11, 2019, the Antitrust Division of the United States Department of Justice announced a key policy change that now permits the Division to consider the existence and efficacy of corporate compliance programs in its criminal enforcement investigations. The policy change, as explained by Makan Delrahim (Assistant Attorney General for the Antitrust Division), was designed to encourage proactive and concerted efforts in antitrust compliance. With this change, the Division may now consider, during the charging stage in a criminal antitrust investigation, a company's compliance program both at the time of offense and at the time charging. Further, a company typically not eligible for leniency under the Corporate Leniency Program (which requires a company to provide the government with critical information about the price-fixing conspiracy, i.e., whistleblowing) may now be able to obtain a deferred prosecution agreement, provided that it has in place a strong compliance program.

The previous iteration of the Division's longstanding policy, as published in the Department of Justice Manual, provided that: 1) "credit should not be given at the charging stage for a compliance program" and 2) "the nature of some crimes, e.g., antitrust violations, may be such that national law enforcement policies mandate prosecution of corporations notwithstanding the existence of a compliance program." In its revised version of the Department of Justice Manual, credit for compliance programs may now be granted during the charging stage. The Division has also stricken "antitrust violations" in the provision regarding mandated prosecution, thereby allowing for deferred prosecution agreements (a very beneficial resolution of matters if permitted).

The Antitrust Division published a [guidance document](#) designed to help prosecutors in evaluating compliance programs. Within the sentencing guidelines, the Division notes that antitrust compliance programs may: 1) allow for the Division to grant a three-point reduction in culpability if the program is "effective"; 2) help determine corporate fines; and 3) help determine the Division's probation recommendations.

While the Division acknowledged that there was no "formulaic" approach to evaluating corporate compliance programs, it nevertheless asked prosecutors to consider three questions:

1. Is the company's compliance program well designed?
2. Is the program being applied earnestly and in good faith?
3. Does the company's compliance program work?

Companies should consider these three basic questions in designing and rolling out their compliance programs. By implementing these types of policies, companies are better equipped at detecting and/or avoiding criminal antitrust violations, potentially garnering leniency under the Division's Corporate Leniency policy. Robust compliance policies may now, under these changes, further shield companies from liability and the very large cost of litigation of antitrust matters.

Seyfarth Shaw's Antitrust team is able to assist corporations with creating, administering, and reviewing antitrust compliance programs, as well as criminal investigations.

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Seyfarth Shaw LLP One Minute Memo® | July 23, 2019

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