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Comparing the Antitrust Division's New Compliance Policy with the Criminal Division's Updated Policy

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Most companies understand that compliance programs are essential to ensure liability prevention, detection, and protection, yet they often favor anti-corruption measures over antitrust compliance due to cost restraints.

The Department of Justice's Criminal Division has long emphasized the importance of corporate compliance programs and their benefits when facing a corruption or bribery investigation, assuming those programs meet DOJ standards. On the other hand, the Antitrust Division, while also part of DOJ, has taken a different approach to compliance.

In fact, the Justice Manual, the guidebook for all DOJ prosecutors, previously carved out antitrust violations (i.e., price fixing, bid rigging, and market allocation) as a category of violations that allowed for the prosecution of a company despite having a substantial compliance program. With the Antitrust Division's lack of interest for incentivizing compliance came a big stick of enforcement, as criminal antitrust violations resulted in hundreds of millions of dollars in fines, long prison terms for executives, and civil follow-on litigation with the potential for treble damages. However, the compliance incentive gap narrowed considerably when the Antitrust Division recently revealed its new stance on whether an effective corporate compliance program factors into a prosecutor's decision to reduce the applicable penalties or avoid criminal prosecution altogether.

On July 11, 2019, the Antitrust Division announced its new policy titled "Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations." The policy directs antitrust prosecutors to consider "the adequacy and effectiveness of the corporation's compliance program" during sentencing and when deciding whether and how to charge a company with a criminal antitrust violation.

At first glance, the Antitrust Division and the Criminal Division appear to mirror each other closely, and the Antitrust Division even acknowledged that its new policy is partially based on the Criminal Division's "Evaluation of Corporate Compliance Programs," updated on April 30, 2019. But this was not a simple cut-and-paste operation. Just as antitrust crimes have their own distinct characteristics, the Antitrust Division policy has its own nuances. We explain below key similarities and differences between the two compliance policies.

Key Similarities

Three Fundamental Questions

Despite listing approximately 150 questions in the policies, at the core, prosecutors from both Divisions ask three fundamental questions when evaluating a corporate compliance program:

- Is the program well-designed?
- Is it being applied earnestly and in good faith?
- Does the program work?

The underlying objective of these questions is to encourage corporations to "self-police" through the implementation of genuinely effective compliance programs. Consequently, legal violations will be prevented before they happen and the violations that do occur will be voluntarily disclosed, thereby reducing criminal activity and preserving DOJ's resources. These policy goals are shared by all of DOJ and are thus reflected in the Justice Manual itself, as well as in both the Antitrust Division and the Criminal Division compliance policies.

Not a Checklist

Both Divisions emphasize that the factors listed in their corporate compliance policies are not checklists of requirements that are necessary and sufficient for an effective compliance program. In other words, both policies recognize that companies come in different shapes and sizes, and thus their compliance needs may differ. Antitrust prosecutors are

required to take the company's size and risk profile into account as some of the other considerations listed in the Antitrust Division compliance policy may be irrelevant based on the characteristics of a particular company. In general, antitrust prosecutors will assess the following aspects of corporate antitrust compliance programs:

- Design and comprehensiveness
- Compliance culture within the company
- Compliance organization and its funding/resourcing
- Antitrust risk assessment techniques
- Compliance training and communication to employees
- Monitoring and auditing techniques, including continued review of the antitrust compliance program
- Reporting mechanisms
- Compliance incentives and discipline
- Remediation methods

The level of the compliance program's sophistication in each of these aspects may vary depending on the company's size, resources, and risk exposure, but the Antitrust Division expects that companies implement mechanisms sufficient to address the applicable risks. The Criminal Division policy covers the same elements, with the addition of internal investigations, the potential significance of which we explain below, and two other elements more relevant in the anti-bribery context: third-party management and mergers and acquisitions.

Implementation to Show Effectiveness

A central question both Divisions ask is whether the corporate compliance program is being applied earnestly, or in other words, as the Criminal Division compliance program guidance helpfully clarifies, whether the compliance program is being implemented effectively. The Criminal Division views compliance program implementation as a combination of three hallmarks: commitment by senior and middle management, sufficient autonomy and resourcing of the compliance function, and establishment of incentives for compliance and disincentives for non-compliance. The Antitrust Division policy covers the same issues, albeit in a less structured way. Similarly, the Antitrust Division emphasizes that "paper programs" are not sufficient and will not help companies avoid prosecution or obtain reduced penalties. Specifically, the Antitrust Division states that one of its key considerations in analyzing the design and comprehensiveness of a compliance program is its integration into the company's business. One example of such integration is a mechanism for tracking the employees' business contacts with competitors, including attendance at trade association meetings, trade shows, and other meetings. This detail is not surprising as antitrust violators have often used the cover of a trade association to reach and monitor illegal agreements. Similarly, both Divisions consider whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts.

Remediate

Like the Criminal Division, the Antitrust Division states that it will assess "whether and how the company conducted a comprehensive review of its compliance training, monitoring, auditing, and risk control functions following the antitrust violation" and what modifications were implemented as a result of such review to help prevent future violations. In other words, a company may still have an opportunity for credit based on its remediation efforts even if its compliance program failed to prevent the initial misconduct.

In addition to the ultimate remediation outcome, the Antitrust Division will take into account the remediation process. Specifically, antitrust prosecutors consider how the company decided to address its compliance program failures and whether outside counsel was consulted. Similarly, Criminal Division prosecutors take into account "any remedial actions taken by the corporation, including, for example, disciplinary action against past violators uncovered by the prior compliance program."

Living, Breathing Programs

In evaluating corporate compliance programs, both Divisions consider whether a company engaged in meaningful efforts to update its compliance program to ensure that it effectively responds to the company's evolving business risks and the changing regulatory environment. To that end, the Antitrust Division takes into account how the company evaluates the effectiveness of its compliance program, how it updates its compliance policies, and what monitoring or auditing mechanisms it has in place to detect violations. Although antitrust prosecutors are not required to assess whether and how the company measures its compliance culture, similar to the Criminal Division policy, companies are expected to demonstrate a meaningful culture of compliance.

Key Distinctions

Benefits

The Antitrust Division policy states that it will consider compliance programs during both the charging and the sentencing stage, which is an about-face from the Division's long-standing position that at the time of the charging decision, the only reward is for self-disclosure through its Leniency Program. Criminal Division prosecutors take compliance programs into account at the time of charging and sentencing, as well when deciding whether to impose a compliance monitor. The Criminal Division policy however is less explicit as to the way compliance programs are considered by deferring instead to the guidance in the Justice Manual and the US Sentencing Guidelines.

Charging Decision. During the charging stage, prosecutors have the following options to take against a company under investigation: decline to bring a case, resolve the case via a non-prosecution agreement, deferred prosecution agreement, or plea agreement, or indict the company. Based on the new policy, antitrust prosecutors will now consider the company's compliance program when choosing between these options. The Antitrust Division, however, clarified that it will continue to disfavor resolving cases through NPAs as not to infringe on its Leniency Program. However, contrary to past practice by the Antitrust Division, the new policy explicitly offers a company that missed being the first to self-report an antitrust violation the opportunity to resolve its case through a DPA, as opposed to a plea agreement.

Sentencing Consideration. If the Antitrust Division decides to charge a company, the new policy provides that "prosecutors should evaluate whether to recommend a sentencing reduction based on a company's effective antitrust compliance program." Unlike the Criminal Division policy, the Antitrust Division policy details the various ways a compliance program may be taken into account during sentencing. For example, a company may receive a fine below the recommended fine range, receive a reduction in its culpability score under the U.S. Sentencing Guidelines, or avoid a term of probation. Although simply having a compliance program by no means guarantees any of these benefits, a well-developed compliance program can place the company in a stronger position when negotiating an appropriate sentence with both Divisions.

Detection to Disclosure

The Antitrust Division policy states that if the compliance program effectively detected the misconduct, including allowing for timely self-disclosure, prosecutors will view this as a "strong indicator" that the compliance program was effective. Although the Criminal Division policy mentions this as well, the Antitrust Division appears to be more focused on self-detection. Specifically, the Antitrust Division policy expressly directs prosecutors to consider the role that the antitrust compliance program played in uncovering the misconduct and assess whether it assisted the company in promptly reporting to the authorities.

According to the policy, antitrust prosecutors should also evaluate whether the compliance program provides guidance on how to respond to a government investigation and whether it educates employees on the ramifications of document destruction and obstruction of justice. The Criminal Division policy does not specifically cover disclosure and obstruction related issues, although the Criminal Division prosecutors certainly consider them in the broader context of prosecutorial decision-making.

Deliver the Goods

The Antitrust Division policy appears to focus more on the actual compliance training and its delivery to employees as compared to the Criminal Division policy. For example, in addition to considering the accessibility of the training and its intended audience, antitrust prosecutors take into account whether compliance policies are communicated effectively and whether employees are required to certify that they read the policies. Moreover, the Antitrust Division suggests that a company is expected to integrate its antitrust compliance policies into its Code of Conduct. Additionally, antitrust prosecutors assess the quality of the company's antitrust compliance training, including whether it addresses lessons learned from prior violations, the frequency of updates reflecting recent marketplace and legal developments, and the tailoring of the training to its intended audience.

Investigation Expectations

Unlike the Criminal Division, the Antitrust Division is largely silent about its expectations of a company's internal compliance investigation process. Whereas the Criminal Division policy has an entire section dedicated to internal investigation expectations, the Antitrust Division policy does not include any questions about investigations, thereby seemingly leaving it up to the company to decide how to structure its investigative process. However, the Antitrust Division's expectations make it clear that whatever the mechanics of a company's internal investigation, investigations are expected to be thorough and timely to allow for self-disclosure of the misconduct and effective remediation.

Risk Assessment: Process versus Results

Despite having a section titled "Risk Assessment," the Antitrust Division policy does not provide specific guidance on its expectations with respect to the company's risk assessment process. Instead, the Risk Assessment section is mainly focused on determining whether a company's compliance program effectively addresses the relevant antitrust risks. By contrast, the Criminal Division policy instructs its prosecutors to consider a company's process to identify, analyze, and address the risks relevant to a specific company's operations. This difference in the policies' language does not mean that the Antitrust Division does not expect companies to conduct any kind of risk assessments, but it may reflect a more results-oriented, as opposed to process-oriented, outlook by the Antitrust Division.

Conclusion

Although the Antitrust Division and Criminal Division compliance policies share the same set of values, distinctions in the language of the policies indicate potential divergence of focus in some areas. As the Antitrust Division has yet to apply the new policy in practice, whether it will assess corporate compliance policies in a different manner than the Criminal Division remains to be seen. One thing is clear, antitrust compliance programs are now front and center. The new policy encourages companies to bring their programs in line with the Antitrust Division's expectations or risk turning this carrot into a stick.