

# Client Alert

July 2019

## DOJ Issues New Policy on Role of Compliance Programs for Charging and Sentencing of Criminal Antitrust Violations

The Department of Justice Antitrust Division (Division) announced that it will, for the first time, consider a company's compliance efforts at the charging stage of a criminal antitrust investigation. This announcement represents a major shift in the Division's policy.

Previously, credit for compliance efforts was only given in connection with the Division's leniency program, which granted amnesty to the first company to self-report an antitrust violation. Some additional credit was granted to other early cooperators in the form of penalty reductions; however, in those cases, a guilty plea to a criminal violation was still required.

Under new guidance by the Division, titled Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations ("Evaluation of Corporate Compliance Programs Guidance"), the Division will now consider at the charging phase, among other factors,<sup>1</sup> the existence of a corporation's compliance efforts both at the time of the offense and at the time of charging. In evaluating the compliance program, prosecutors will consider:

- Whether the corporation's compliance program is well-designed;
- Whether the corporation's compliance program is being applied "earnestly and in good faith;" and
- Whether the corporation's compliance program works.

If a prosecutor concludes that a robust compliance program was in effect and that other factors weigh in favor of declining to charge, the prosecutor may enter into a Deferred Prosecution Agreement with the corporation.

The Evaluation of Corporate Compliance Programs Guidance also outlines when a robust compliance program may be considered at the sentencing stage. The United States Sentencing Guidelines—and now the Evaluation of Corporate Compliance Programs Guidance—allow for consideration of a corporation's compliance program in three ways:

- **Reduction in Culpability Score:** The Sentencing Guidelines provide for a three-point reduction of a corporation's culpability score if the corporation has an effective compliance program as defined by the Sentencing Guidelines. The Division has never recommended that a defendant be credited for this reduction. The new guidance now provides that Division prosecutors should consider application of this reduction.

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<sup>1</sup> In making a charging decision, a prosecutor will consider the Principles of Federal Prosecution, the Principles of Federal Prosecution of Business Organizations and the Division's Leniency Policy.

- **Probation:** The Sentencing Guidelines also provide that the existence of a compliance program may be relevant in determining whether a corporation is sentenced to probation. The Evaluation of Corporate Compliance Programs Guidance provides that the Division may seek probation if, following a violation, a corporation has not established an effective compliance program.
- **Fine Reduction:** The Sentencing Guidelines also allow for consideration of a compliance program in determining the appropriate fine. The Evaluation of Corporate Compliance Programs Guidance provides that in making its recommendation for corporate fines, Division prosecutors should consider whether the corporation created or improved its compliance program following the violation, the level of support for future compliance from the top levels of corporate management and the disciplinary procedure applied to those individuals who engaged in the violation.

Given this new guidance, developing and implementing an effective antitrust compliance program is now more important than ever. Though not exhaustive, features of this program should include:

- Support from the company's top management and a genuine commitment to a culture of compliance;
- A written antitrust compliance policy that is appropriately tailored to the corporation's industry and regularly updated to account for developments in the law;
- Regular training and guidance for appropriate employees on the antitrust policy and how it applies to their daily business activities;
- Mechanisms for monitoring compliance with the program, including a system to allow employees to report potential violations; and
- Resources to allow for investigation and remediation of any violations.

Hunton Andrews Kurth LLP's competition and consumer protection team is prepared to help global organizations navigate the ever-changing antitrust landscape, including developing and implementing appropriate compliance programs.

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