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DOJ Antitrust Division Announces Changes to Corporate Leniency Program

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July 17, 2019 - On July 11, 2019, Assistant Attorney General for the Antitrust Division, Makan Delrahim, announced in a speech at New York University Law School that the Division would, effective immediately, change its existing Leniency Program. The policy will now allow corporations to avoid prosecution even if they are not the first to report antitrust violations to the Justice Department. Mr. Delrahim also announced that Justice Department prosecutors, when deciding how to resolve criminal charges against a corporation, will consider the adequacy and effectiveness of the corporation's antitrust compliance programs in place at the time of the offense and at the time of the charging decision. In addition, for the first time, the Division has published guidance on how prosecutors are to evaluate antitrust compliance programs.

These changes represent a major shift in the Antitrust Division's Leniency Program, which previously offered leniency only to "first-in" applicants and did not take into account compliance programs when making charging and sentencing recommendations. Mr. Delrahim said the changes are designed to incentivize further antitrust compliance.

Companies who are not "first-in" will now be eligible for deferred prosecution agreements when they implement vigorous compliance programs, self-report antitrust violations, cooperate with Justice Department investigators, and take remedial action. However, the Justice Department will continue to disfavor non-prosecution agreements, as complete protection from prosecution for antitrust crimes will still only be available to the first company to self-report and meet the Leniency Program requirements. Mr. Delrahim stated that one of the rationales for the change was to encourage early detection and prevention of antitrust violations, explaining that "[a] company with a robust compliance program actually can prevent crime or detect it early, thus reducing the need for enforcement activity; minimizing the harm to consumers earlier and saving precious taxpayer resources." The new policy can also be seen as another step taken by the DOJ to emphasize enforcement against culpable employees rather than their corporate employers, a trend in enforcement priorities that began under Deputy Attorney General Sally Yates in 2015.

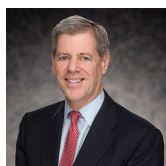
The new guidance on evaluating compliance programs provides specific criteria that prosecutors should consider in evaluating a company's compliance program. The guidance also identifies elements of an effective antitrust compliance program, including (1) the design and comprehensiveness of the program; (2) the culture of compliance within the company; (3) responsibility for, and resources dedicated to, antitrust compliance; (4) antitrust risk assessment techniques; (5) compliance training and communication to employees; (6) monitoring and auditing techniques, including continued review, evaluation, and revision of the antitrust compliance program; (7) reporting mechanisms; (8) compliance incentives and discipline; and (9) remediation methods. The DOJ's guidance is available at <https://www.justice.gov/atr/page/file/1182001/download>.

Mr. Delrahim also indicated that a corporation's antitrust compliance program will be relevant to sentencing in at least three ways: (1) in providing for a three-point reduction in a corporate defendant's culpability score if the company has an "effective" compliance program, (2) in determining the appropriate corporate fine to recommend, and (3) in determining the Division's probation recommendation. On the other hand, a company may now face probation under the Sentencing Guidelines if it does not have an effective compliance program. Despite these new guidelines, "[p]recisely how much weight and credit to give a compliance program will depend on the facts of the case," Mr. Delrahim said.

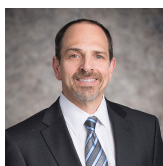
In 1993, the Antitrust Division's Leniency Program was revised to offer the full benefits of leniency to the first company to report antitrust violations to the Division, including protection from civil fines, protection for employees, and protection from civil treble damages and joint and several liability. Over ninety percent of fines that the Division has collected for Sherman Act violations since 1996 have derived from investigations involving leniency applicants. In recent years, the fines imposed by the Division have fallen precipitously. The drop in fines may be due to changes to the Leniency Program in 2014 that created greater uncertainty for leniency applicants, and therefore may have reduced the total number of leniency applications. Mr. Delrahim's announcement suggests that the Division is now actively seeking to improve the effectiveness and perception of the Leniency Program.

In response, we recommend that all of our clients review and, if necessary, update their antitrust compliance programs to ensure that they incorporate all of the elements that in the Division's view are essential for a program to be effective. Hughes Hubbard has extensive experience in counseling clients on antitrust compliance issues and leniency applications, and our lawyers have developed antitrust corporate compliance programs and materials for numerous Fortune 500 companies. We would be happy to assist in your review of your current antitrust compliance programs.

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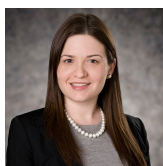
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