



News & Types: Litigation Update

Department of Justice, Antitrust Division Issues New Guidance Promoting Effective Corporate Antitrust Compliance Programs

8/22/2019

Practices: Commercial, Competition & Trade, Litigation

On July 11, 2019, the Antitrust Division of the U.S. Department of Justice (the “Division”) announced sweeping changes to its approach to criminal antitrust investigations, stating that it will now consider a company’s antitrust compliance program at the charging stage of an investigation. This constitutes a reversal of the Division’s long-standing policy under its corporate leniency program, which previously denied credit to companies at the charging stage for having a compliance program, and only reduced antitrust penalties for those defendants who were “first in the door” to report antitrust violations. Now, companies that fail to qualify for leniency but have implemented effective antitrust compliance programs may qualify for a deferred prosecution agreement, in which a prosecutor can agree to dismiss the charges after a period of time if the company makes certain changes. Other incentives for companies to implement qualifying compliance programs include the potential to receive credit at the sentencing stage of an investigation, thereby reducing criminal penalties, including fines, for violations.

Under the new guidance, Division prosecutors should consider three fundamental questions when evaluating a company’s antitrust compliance program at the charging stage:

1. Is the program well designed?
2. Is the program applied earnestly and in good faith?
3. Does the program work?

The guidance further urges prosecutors to consider three preliminary questions when evaluating the effectiveness of an antitrust program:

1. Does the company’s compliance program address and prohibit criminal antitrust violations?
2. Does the company’s compliance program detect and facilitate prompt reporting of violations?
3. To what extent was the company’s senior management involved in the violation?

In addition, when determining the effectiveness of a program, prosecutors should consider nine factors: (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.

In summary, the Division is placing an emphasis on those compliance programs that constitute serious, robust and effective preventative policies, which have sincere and ample support from senior management, are widely distributed and made available to employees with adequate training, and which are continually reviewed and updated. In other words, merely having an antitrust compliance policy on paper, without more, will not be adequate for receiving credit under the new policy.

This significant change in Department of Justice, Antitrust Division policy presents an ideal opportunity for companies to reevaluate their own antitrust compliance programs. Taking appropriate steps now to ensure your company's compliance program meets these heightened standards will not only help protect your company and employees in the event of an antitrust investigation, it will also increase your company's ability to detect and prevent potential antitrust violations before they occur in the first place, thereby decreasing the risk of costly and disruptive antitrust investigations and claims.