Pepper Hamilton LLP
Attorneys at Law

New DOJ Policy on Corporate Antitrust Compliance Programs Provides Guidance for In-House Counsel and Compliance Officers

ALERT | July 17, 2019

Michael J. Hartman | hartmanm@pepperlaw.com
Jan P. Levine | levinej@pepperlaw.com
Megan Morley | morleym@pepperlaw.com
Robin P. Sumner | sumnerr@pepperlaw.com

On July 11, the U.S. Department of Justice rolled out a new policy to encourage stronger corporate antitrust compliance efforts. Announced by DOJ Antitrust Division head Makan Delrahim in remarks at the New York University School of Law, the new policy provides that DOJ prosecutors may weigh the strength of a corporate compliance program at both the charging and sentencing recommendation stages. As Assistant Attorney General Delrahim explained, "the time has now come to improve the Antitrust Division's approach and recognize the efforts of companies that invest significantly in robust compliance programs."

The DOJ has formalizd this approach through revisions to its Justice Manual and its Antitrust Division Manual, and with the release of a new guidance document outlining considerations for DOJ staff in their evaluation of a corporate compliance program in the context of a criminal antitrust investigation (available at: https://www.justice.gov/atr/page/file/1182001/download). The changes provide companies and executives with new, stronger incentives to implement robust antitrust compliance programs as they lessen the rigid approach the DOJ has taken to leniency in antitrust investigations. Although the policy applies only to the Antitrust Division's criminal enforcement efforts, the guidance document can serve as a broader roadmap for companies to structure effective antitrust compliance programs. Given the shift in the DOJ's approach, corporate management and in-house counsel should assess their compliance programs and internal controls to ensure that robust and effective systems are in place.

Changes to the DOJ Justice Manual and the Antitrust Division Manual

The DOJ implemented its policy shift through changes to its more general Justice Manual as well as to its Antitrust Division Manual. With respect to the former, the DOJ removed language in section 9-28.400 of the Justice Manual that previously provided that "credit should not be given at the charging stage for a compliance program." The DOJ also removed "antitrust violations" from section 9-28.800 as an example of an offense that, by its nature, may require prosecution "notwithstanding the existence of a compliance program."

In the Antitrust Division Manual, the DOJ made two key changes. First, it added new language to section III.G.2.c. covering the recommendation of criminal charges. The manual now provides that, when considering charges, the staff may consider all of the factors set out in section 9-28.400 of the Justice Manual, including compliance, and expressly states that "staff should consider the Division's guidance document on specific factors such as compliance." The DOJ also added new language providing that staff should consider compliance efforts as a factor in evaluating whether to recommend entering into a deferred prosecution agreement with a company that is not a leniency recipient. Under a deferred prosecution agreement, the DOJ brings charges against the company, but agrees not to prosecute if the company satisfies certain requirements or conditions. This change regarding deferred prosecution agreements departs from the DOJ's previous all-or-nothing approach to leniency.

The second change includes a new provision and language added to section IV.F.6 of the Antitrust Division Manual, which addresses sentencing recommendations. The new provision at section IV.F.6.c. squarely addresses consideration of a corporate compliance program at sentencing, instructing staff to "consider whether to recommend a sentencing reduction based on a corporation's effective antitrust compliance program, or whether to recommend probation for an ineffective compliance program." Notably, a sentencing reduction is not available in a case where there has been an "unreasonable delay" in the company's reporting of the illegal conduct to the government. There is also a rebuttable presumption that a compliance program is ineffective if certain "high-level personnel" or "substantial authority personnel" participated in, condoned, or were willfully ignorant of the offense. New language in section IV.F.6.e. allows for a percentage reduction in the fine levied on the company "for extraordinary compliance efforts after the charged antitrust offense occurred." This change seeks to discourage recurrence of the illegal conduct.

Designing and Implementing an Effective Antitrust Compliance Program

The DOJ's policy shift raises important questions about what will constitute an "effective" antitrust compliance program in the Antitrust Division's view going forward. The Antitrust Division Manual recognizes that compliance programs will be evaluated on a case-by-case basis. While the manual makes clear that DOJ staff's consideration of these programs is not intended to be formulaic, the manual's new sentencing provisions and the new DOJ guidance document set out myriad factors that DOJ staff should consider in their analysis.

There is a lot for a general counsel or compliance officer to consider; the guidance document itself contains 17 pages of detailed instruction. Nevertheless, a few key themes run through the guidance and should inform any antitrust compliance program.

Buy-In at the Top Levels Is Key

Both the Antitrust Division Manual and the DOJ guidance document demonstrate that participation in compliance efforts at the executive level (or higher) will be viewed as critical to the effectiveness of an antitrust compliance program. The guidance document suggests that those with responsibility for the compliance program must have "sufficient autonomy, authority, and seniority within the company's governance structure." Reporting

mechanisms are also key; even if there is an executive-level employee responsible for the program, there must be a sufficient process to involve the board of directors, audit committee or other governing body in the design, implementation and assessment of the program.

Beyond ensuring participation in program design at the highest levels, the Division Manual and guidance document equally emphasize that an antitrust compliance program is only as effective as the culture of compliance created by senior management. The guidance instructs DOJ staff to ask what the company's senior leadership has done or is doing to "convey the importance of antitrust compliance to company employees." Simply having an antitrust policy circulated by general counsel or a compliance officer likely is not enough. Rather, senior leaders through their words and actions must encourage antitrust compliance among the lower ranks.

If an antitrust offense occurs, top management must be involved directly in improving the company's compliance programs. The new fine reduction provision in the Division Manual emphasizes that "top management" must show "extraordinary commitment to improving the company's compliance program after the charged antitrust offense occurred." Senior management must participate in the revision and implementation of a more robust compliance program, and must demonstrate that they have incentivized lawful behavior at lower levels within the company. In short, the "tone at the top" is of the utmost importance.

Compliance Programs Must Target Specific Conduct

The guidance document suggests that antitrust compliance programs must be designed to prevent and address specific types of conduct and potential violations, as well as be tailored to the unique characteristics of the company. A general antitrust policy that broadly instructs employees not to reach illicit agreements with competitors or not to exchange sensitive information with competitors may be deemed ineffective because it does not target more specific conduct that could run afoul of the antitrust laws. This is especially true if the program does not address the specific conduct for which the company is being investigated.

The guidance document's instruction on no-poach agreements — an Antitrust Division hot-button issue for the last few years — exemplifies this approach. In a section covering risk assessment, the guidance document instructs DOJ staff to assess whether a com-

pany's compliance program provides specialized training for human resources personnel and executives responsible for overseeing recruitment and hiring. Elsewhere, the guidance document suggests that employees with authority for human resources decisions should receive specific instruction on how to flag potential antitrust violations. Because DOJ staff will look for antitrust policies and training programs that target issues that may arise in specific parts or divisions of a company, a single general policy or company-wide annual antitrust training will fall short.

The guidance document also notes that a company's antitrust policies and procedures must be integrated into the company's specific business practices. For example, the guidance document suggests that a company should have a mechanism to track business contracts with competitors or attendance at trade association meetings if these are part of the company's regular business conduct. In-house counsel designing an antitrust compliance program should begin by assessing the company's operations and regular business conduct to determine any sensitive areas that may require specialized training or compliance mechanisms.

An Effective Compliance Program Must Be Dynamic and Fluid

The guidance document makes clear that an antitrust compliance program cannot be static. Although there is no one-size-fits-all effective compliance program, the guidance document reinforces that companies should strive to implement industry best practices when it comes to antitrust compliance. This requires regularly reassessing antitrust policies, training programs and reporting mechanisms.

As an example, the guidance document instructs DOJ staff to consider whether a company's compliance program has a system to evaluate and manage the antitrust risk associated with new forms of communications. As text messages, social media and internet platform communications become a more regular (and contentious) part of antitrust investigations and litigation, companies should put systems in place to evaluate and address the antitrust risk associated with these media. Similarly, as companies increasingly rely on algorithms and artificial intelligence to make business decisions — and perhaps to set prices — compliance programs must be adjusted to account for new potential antitrust risks.

Further, the acquisition of, or other transactional affiliation with, a foreign entity could require a change to existing compliance systems. Because cultural, linguistic or other differences may present barriers to implementing a company's antitrust compliance policies across the entire organization, a company always should review and adjust, if necessary, its antitrust compliance programs in connection with any transaction involving a foreign entity.

Conclusion

While companies surely will welcome the shift in the DOJ's policy regarding the consideration of antitrust compliance programs, the complexities of the DOJ's compliance guidance may be overwhelming at first glance. Although the DOJ will now consider compliance programs as part of its charging and sentencing decisions, it will undoubtedly view those programs with an extremely critical eye. Companies should be ready.

The Justice Manual instructs DOJ staff to consider three general questions when evaluating the efficacy of a compliance program:

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?

These questions provide a good starting point for companies designing or revising an antitrust compliance program, but any such program must take into account the unique nature of the company's business and the industry in which it operates. In-house counsel and compliance officers should review the DOJ compliance guidance document and seek out external resources, as needed, to identify areas of antitrust risk, ensure that best practices are being implemented, and address both legal and operational developments.