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Assessing antitrust compliance programs

By Jeffrey Kaplan

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In July, Assistant Attorney General Makan Delrahim announced major changes in how the Antitrust Division of the U.S. Department of Justice will make charging decisions in criminal antitrust cases. For decades, the Division used an all-or-nothing approach, bestowing corporate leniency on the first company to self-report a violation but giving no compliance program credit to others, even if they had exemplary programs. Under the new policy, companies with strong compliance programs may be eligible for deferred prosecution agreements even where they were not the first to self-report. This policy change creates a significant new incentive for companies to implement strong antitrust compliance programs.

Under a newly published guidance document, the Division will consider nine factors in determining whether a corporate compliance program is effective: "(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."[1] Questions regarding each of these topics are set forth in the guidance.

For many years, members of the compliance and ethics community—led by Joseph Murphy, an early and strong supporter of the SCCE—had urged the Antitrust Division to adopt the approach to rewarding compliance programs used by the Criminal Division since the advent of the Federal Sentencing Guidelines in 1991. The fact that it has finally done so is a landmark achievement.

However, the achievement will endure only if companies rise to the occasion and implement strong antitrust compliance programs. For some companies, this will require no small degree of effort. Indeed, given the level of detail in the guidance, the prospect of doing "from zero to sixty" quickly may seem quite daunting. Where to begin?

At least from my perspective, a good place to start is with risk assessment. Because antitrust risks are quite distinct from others, getting a handle on this foundational aspect of the program should be done early in the process. On the other hand, some extant program elements can be used for antitrust purposes, so scoping that out should be done early too.

1Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations, U.S. Department of Justice, Antitrust Division, July 2019, http://bit.ly/33l1gDS.