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# Effective risk assessments in the evolving antitrust compliance landscape

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Last year, the United States Department of Justice (DOJ) Antitrust Division announced a significant change in its policy regarding the treatment of corporate antitrust compliance programs in its enforcement decisions. Along with that policy change, the division offered insight into how companies should approach the design and implementation of compliance programs. A key element of any compliance program is that it should be effective in deterring and detecting anticompetitive conduct, and an effective risk assessment to determine where, when, and how antitrust issues are most likely to arise is key. When companies are able to target areas of heightened antitrust risk, they are better able to tailor compliance programs, including training and reporting protocols, to be effective in serving their intended purpose. In turn, a company's ability to demonstrate that it took conscientious steps to tailor its compliance program may lead to significant benefits should the company ever find itself in the unfortunate situation of a criminal antitrust investigation. Even short of this, a well-tailored antitrust compliance program will have important benefits by helping a company avoid pitfalls that could lead to civil liability. And of course, a robust compliance program is part of an overall approach to good corporate citizenship.

With an effective risk assessment in hand, companies will be able to make the most of the DOJ's guidance on the *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations*, issued in July 2019, in order to review their existing compliance program.[1]

## The move to 'incentivize good corporate citizenship'

When making prosecutorial decisions in the past, the Antitrust Division of the DOJ did not explicitly reward companies with strong compliance programs at the time of a criminal violation. The division's rationale was that the existence of an antitrust violation suggested that the company's compliance program was not fit for purpose. Therefore, in the past, in order for the division to agree to mitigate a company's criminal antitrust penalty, a company needed to qualify for the division's leniency program. If available, the company would be able to avoid criminal charges and, in certain circumstances, limit liability to single damages in civil litigation. Absent that option (which would be available to only the first company to report a violation), a company could try to make a case for a penalty reduction by engaging in early and significant cooperation in the government's investigation.

Last year, the division's approach to the role of compliance programs in prosecutorial decisions changed significantly. In a speech last May, the head of the division said that it "will move away from its previous refrain that leniency is the *only* potential reward for companies with an effective and robust compliance program. In line with the DOJ and its other components, we can and must do more to reward and incentivize good corporate

citizenship."[2]

Following that speech, in July 2019, the division announced that going forward, corporate antitrust compliance programs will factor into prosecutors' charging and sentencing decisions and may allow companies to qualify for deferred prosecution agreements or otherwise mitigate exposure, even when they are not the first to self-report criminal conduct. Under the new policy, prosecutors will take into account a company's compliance program along with other factors. They may then in certain circumstances agree to enter into a deferred prosecution agreement (DPA) rather than charging a company with a criminal antitrust violation and entering into a plea agreement. The head of the division stressed that "a compliance program does not guarantee a DPA."[3] Nevertheless, DPAs "'occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation,'" and, under the division's new approach, the effectiveness of a corporate compliance program may weigh in favor of a DPA.

Importantly, along with the announcement of this policy change, the division issued new and detailed guidance outlining the factors that prosecutors are to consider in evaluating the effectiveness of compliance programs.

We have yet to see many public indications of how the policy is being put into practice. Nevertheless, the new policy underscores the importance and benefits of effective antitrust compliance programs and, in particular, presents an opportunity for companies to reevaluate their existing programs or establish new ones by engaging in risk assessments to deploy resources to areas where they will have the greatest benefit.