GOT AN ANTITRUST COMPLIANCE PROGRAM?

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The U.S. Department of Justice Antitrust Division ("Antitrust Division") recently announced that it will now consider a company's antitrust compliance program when deciding whether to bring criminal charges against a company for violations of the U.S. antitrust laws. [1] This is a momentous reversal of the Antitrust Division's long-standing policy of requiring corporate guilty pleas for companies that did not otherwise qualify for leniency under the Antitrust Division's Corporate Leniency Policy. In announcing its policy reversal, Assistant Attorney General Makan Delrahim explained that "the time has now come to . . . recognize the efforts of companies that invest significantly in robust compliance programs." [2] This announcement makes the decision to initiate or strengthen an existing antitrust compliance program more valuable than ever.

In conjunction with the policy announcement, the Antitrust Division released a detailed guidance document meant to assist prosecutors in their evaluation of antitrust compliance programs at the charging and sentencing stages of an investigation. [3] The guidance document serves the dual purpose of providing corporate counsel and compliance officers with a better understanding of the Antitrust Division's expectations in terms of antitrust compliance and can serve as a useful roadmap when drafting, implementing and/or enhancing a company's antitrust compliance program.

While the guidance document is clear that the Antitrust Division has no checklist or formulaic requirements for evaluating a compliance program's effectiveness, it requires prosecutors to begin their inquiry with three preliminary and overarching questions: (1) Does the company's compliance program address and prohibit criminal antitrust violations?; (2) Did the antirust compliance program detect and facilitate prompt reporting of the violation?; and (3) To what extent was a company's senior management involved in the violation? The guidance document also identifies nine factors that the Antitrust Division will consider 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."

The guidance document expounds on what specifically is meant by each one of these factors with a detailed list of questions relevant to each, but the takeaway is this: the Antitrust Division is looking for companies to have a serious preventative policy that is supported by senior leadership and widely disseminated to relevant employees, and which is continually updated and communicated throughout the company so that potential antitrust concerns can be identified and escalated early and effectively.

In our view, the guidance document should be considered a valuable tool that provides an opportunity for companies to get serious about their antitrust compliance programs with the goal of creating a truly effective

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program. In the past, companies may have questioned the cost and effort associated with designing and implementing, and continually updating and communicating, an antitrust compliance program. Now, however, companies have a roadmap that can be used to create an effective antitrust compliance program, as well as additional benefits that implementation of an effective antitrust compliance program could provide a company under the Antitrust Division's new policy – namely, prosecutors' consideration of the company's antitrust compliance policy prior to charging decisions and sentencing recommendations. In light of this new policy, the cost / benefit analysis that might previously have tipped in favor of doing the very least amount possible in terms of an antitrust compliance program has shifted. Of course, while the Antitrust Division's new policy may be a motivating factor for implementing a comprehensive compliance program, the true benefit and goal is to ensure that employees have the training to avoid antitrust violations in the first place and to detect any misconduct that does occur early.

The K&L Gates Antitrust & Competition Team has extensive experience designing and implementing antitrust compliance policies for companies of all sizes, across various regions and industries. We can provide guidance not only around crafting and updating antitrust compliance policies, but we can also provide critical recurrent management and employee training, as well as insight concerning how to appropriately address and escalate potential antitrust issues. If your antitrust compliance policy is out-of-date or non-existent, we can help you to efficiently and effectively take advantage of the potential benefits of complying with the new Antitrust Compliance Guide.

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[1] U.S. Dept. of Justice, Office of Public Affairs, Antitrust Division Announces New Policy to Incentivize Corporate Compliance, 11 July 2019, available at: https://www.justice.gov/opa/pr/antitrust-division-announces-new-policy-incentivize-corporate-compliance.

[2] "Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs," Remarks by Makan Delrahim, July 11, 2019, available at: https://www.justice.gov/opa/speech/file/1182006/download.

[3] U.S. Dept. of Justice, Antitrust Division, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations, July 2019, available at: https://www.justice.gov/atr/page/file/1182001/download.

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