

DOJ Antitrust Division Continues Its Evolution Re: Compliance Programs

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The United States Sentencing Commission has long incentivized effective corporate compliance and ethics programs. The Sentencing Guidelines allow companies to receive a lower fine for an effective compliance program in place at the time of an offense. The Antitrust Division, however, typically has not given companies credit for a preexisting compliance program. The Antitrust Division previously argued that if a company had an effective, preexisting compliance program, then the compliance program would have prevented the wrongdoing or detected the violation, which would allow the company to self-report the conduct and receive leniency under the Antitrust Division's Corporate Leniency Policy (under which a corporation receives non-prosecution protection). The Antitrust Division's view regarding crediting preexisting compliance programs, however, may soon change.

Four years ago, the Antitrust Division began to take compliance programs into consideration when determining corporate fines. At that time, the Antitrust Division announced that it would, under certain circumstances, credit companies that proactively adopted or strengthened compliance programs after coming under investigation. Earlier this year, the Antitrust Division hosted a public roundtable on criminal antitrust compliance. As a result of that Roundtable, Principal Deputy Assistant Attorney General, Andrew Finch, noted that the Antitrust Division was considering how best to recognize preexisting corporate compliance efforts, either at the charging stage or at sentencing.

Just last week, the new acting Deputy Assistant Attorney General for Criminal Enforcement, Richard Powers, reiterated this position, stating that the Antitrust Division is evaluating how to incentivize well-tailored compliance programs. He further stated that during the sentencing phase, the Antitrust Division is bound by the sentencing Guidelines and looking for ways to credit compliance.

The Antitrust Division's evolution to potentially credit preexisting compliance and ethics programs is important. In light of this transformation by senior members of the Antitrust Division, companies should refresh, review, and reinforce their current compliance program.

Some initial steps to update a current compliance program include:

1. creating a renewed risk and maturity assessment to ensure that the program is thoughtfully tailored to the business, including any recent product or personnel changes, acquisitions, or joint ventures;

2. updating compliance policies, procedures, training, and communications to reflect the results of the risk assessment;
3. ensuring that hotline and reporting mechanisms and internal investigation procedures are in place, and appropriately prioritized; and
4. conducting an audit to ensure effectiveness of the refreshed compliance program.

Following these steps will help your company sustain the requisite culture of compliance.

Any compliance program should be tailored to meet the needs of your specific company and have regular and systematic updates. Led by a recent Antitrust Division criminal supervisor, a former chief compliance officer of a global publicly traded Fortune 500 company, numerous former federal prosecutors, and dozens of experienced antitrust counselors, Winston & Strawn is uniquely situated to assist in implementing and updating compliance and ethics programs. Please contact us for specifically tailored guidance.

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