ALL THAT GLITTERS – A LOOK BACK AT THE ANTITRUST DIVISION'S EVALUATION OF CORPORATE COMPLIANCE PROGRAMS AND WHAT TO EXPECT

BY CRAIG LEE & ALEXANDRA GLAZER [1]

1 Craig Lee is a partner at Hunton Andrews Kurth and leads the firm's cartel and antitrust investigations practice. Alexandra Glazer is an associate at Hunton Andrews Kurth and is a member of the firm's antitrust and consumer protection group and the cartel and antitrust investigations practice.

CPI ANTITRUST CHRONICLE NOVEMBER 2021

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All That Glitters – A Look Back at the Antitrust Division's Evaluation of Corporate Compliance Programs

By Craig Lee & Alexandra Glazer

In July 2019, the Antitrust Division issued the first written guidance for the evaluation of corporate antitrust compliance programs. Also, for the first time, the Division noted that a robust compliance program would be considered at the charging stage meaning a company could receive favorable treatment based on its compliance program. The Division's new policy took inspiration from the Criminal Division's existing guidelines. In June 2020, the Criminal Division updated its compliance guidelines, providing insight into potential future changes the Antitrust Division may make to its own guidelines under the Biden Administration. However, even with an emphasis on strong compliance programs and the rise in deferred prosecution agreements that were posed to reward such programs, the Antitrust Division has yet to publicly highlight a company's corporate compliance program for the business community to emulate.

In July 2019, the Antitrust Division of the Department of Justice issued its first guidelines for the evaluation of corporate compliance programs.[2] The guidelines were groundbreaking as the Division's first written policy advising on the importance and benefits of a robust internal compliance program in criminal antitrust investigations. In a major change of course, the Division noted that it would begin to "consider compliance at the charging stage," meaning a company could potentially avoid being charged for a crime or receive a reduced sentence based on demonstration of a comprehensive compliance program.

The new guidelines and the Division's subsequent showcase of robust compliance programs to mitigate criminal consequences signify a clear change from the previous attitude of the Division. Up until 2019, the Division traditionally viewed an antitrust violation as evidence of an *ineffective* or deficient compliance program that warranted no positive consideration.[3] In announcing the Division's new view of compliance programs, former Assistant Attorney General, and head of the Antitrust Division Makan Delrahim insinuated that the previous philosophy reflected an impractical and outdated view of compliance programs in the real world.[4]

The Division's published position to reward companies with strong compliance programs is a welcome change and indicates efforts to do away with the "all-or-nothing" calculus that companies face through the Division's Corporate Leniency Program.[5] The Division rebutted the notion that crediting a compliance program at the charging stage would disincentive companies from seeking leniency in the first place.[6] In theory, if a company loses the race to leniency, it may still mitigate criminal liability through the existence of a strong internal compliance program.

The evaluation of an effective compliance program may come into play when a company faces criminal charges and hopes to enter into a deferred prosecution agreement ("DPA"). The Department of Justice's Justice Manual considers DPAs an "important middle ground between declining prosecution and obtaining the conviction of a corporation."[7] Such agreements present opportunities for companies to delay prosecution of filed charges for a time in exchange for compliance with a set of terms. The terms range from monetary penalties to agreements to cooperate in investigations. The rise in the Division's use of DPAs in recent years for companies of all sizes in a variety of industries could indicate the Division's desire to give prosecutors more latitude to determine the outcome of any particular case.

The Antitrust Division's guidelines are based, in part, on the Department's Criminal Division's guidelines for evaluating corporate compliance programs and the U.S. Sentencing Guidelines.[8] The Criminal Division's guidelines were updated in 2020. This article looks at notable modifications to the Criminal Division's revision of its guidelines and assesses whether practitioners and the business community can expect similar changes to the Antitrust Division's guidelines in the future.

I. REVIEW OF THE CRIMINAL DIVISION'S UPDATED GUIDELINES

The guidelines drafted by the Antitrust and Criminal Divisions are intended to be a window into the factors federal prosecutors consider at the charging stage of a criminal investigation.[9] At the same time, the guidelines seek to incentivize companies to enhance its internal compliance programs and meet the expectations of the Department. Former Assistant Attorney General Delrahim quoted Benjamin Franklin in saying, "an ounce of prevention is worth a pound of cure" when it comes to incentivizing corporations to create programs that facilitate quick reporting, cooperation, remediation, and prevention of future misconduct.

The Criminal Division's updated guidelines from June 2020 may tell us what to expect of future changes to the Antitrust Division's guidelines.[10] Acting Assistant Attorney General of the Antitrust Division Richard Powers has remarked on the need for the Department's divi-

2 U.S. Dep't Justice, Antitrust Div., Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (July 2019).

3 Richard A. Powers, Acting Assistant Att'y Gen., U.S. Dep't Justice, Antitrust Div., Criminal Antitrust Enforcement: Individualized Justice in Theory and Practice, Remarks at the Symposium on Corporate Enforcement, and Individual Accountability (July 21, 2021).

4 Makan Delrahim, Assistant Att'y Gen., U.S. Dep't Justice, Antitrust Div., Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs, Remarks at the New York University School of Law Program on Corporate Compliance and Enforcement (July 11, 2019).

5 *Id.*

6 Powers, *supra* note 3.

7 Delrahim, *supra* note 4.

8 *Id.*

9 *Id.*

10 U.S. Dep't Justice, Criminal Div., Evaluation of Corporate Compliance Programs (June 2020).

sions to take a "consistent approach" and to adapt "policies and practices to reflect the realities of a changing world."[11] The updated Criminal Division guidelines echo this approach and appear to grant prosecutors a wider range of context-dependent factors to consider when assessing the effectiveness of a compliance program. The updated guidance also provides more tenable, data-driven, and objective factors for companies to reference when instituting or enhancing its own programs.

Both the Criminal Division's and Antitrust Division's guidelines focus on three similarly nuanced questions. The Antitrust Division's "fundamental questions" ask: (1) is the corporation's compliance program well designed; (2) is the program being applied earnestly and in good faith; and (3) does the corporation's compliance program work?[12]

The Criminal Division's three key questions ask: (1) is the corporation's compliance program well designed; (2) is the program being applied earnestly and in good faith – in other words, is the program adequately resourced and empowered to function effectively; and (3) does the corporation's compliance program work in practice?[13]

II. QUESTION 1 – IS THE CORPORATION'S COMPLIANCE PROGRAM WELL DESIGNED?

In assessing the design of a compliance program, the Criminal Division's updated guidelines include new "risk assessment" factors. Of significance, is the notion that a company should actively track and assess "lessons learned either from the company's own prior issues or from those of other companies operating in the same industry and/or geographical region." This factor puts the onus on corporations to not only pay attention to and learn from its own actions – but to actively follow and react to the public misconduct and/or allegations of peer companies.

The Antitrust Division's guidelines do not reference the expectations the Division has when it comes to a company reacting to allegations of another company. The Antitrust Division may expect companies to look outward as well and assess not just what its peers are doing but also more generally what the recent criminal antitrust developments are. For example, with the recent employee wage-fixing and no-poach criminal charges making their way through the court system, the Antitrust Division may update its guidelines to include an expectation that a corporate compliance program internally react and quickly adjust according to new prominent criminal antitrust developments.

Additionally, under the "training and compliance" section of the Criminal Division's guidelines, there is a new push for companies to institute "shorter, more targeted training sessions" to effectively train employees to identify and raise compliance issues.[14] This factor similarly emphasizes the significance of a company paying attention to external events and conducting internal trainings accordingly.

The Antitrust Division's current guidance around training and compliance is more particularized to the nuanced antitrust compliance obligations. The guidelines already emphasize the need for training programs to be detailed and thorough to effectively instruct employees of the fine line between legitimate collaboration and an antitrust violation. As to be expected, companies should be equipped to articulate the complexities of antitrust compliance when communicating its antitrust policies to employees.[15]

III. QUESTION 2 - IS THE PROGRAM BEING APPLIED EARNESTLY AND IN GOOD FAITH? IN OTHER WORDS, IS THE PROGRAM ADEQUATELY RESOURCED AND EMPOWERED TO FUNCTION EFFECTIVELY?

The second question of the Criminal Division's guidelines go to the heart of whether a compliance program – regardless of how well it is designed – is "adequately resourced" to actually "function effectively" in practice. The Criminal Division's update to this question further explains what it means to implement a program effectively by asking whether a company provides adequate resources and empowerment to its program for it to function.

11 Powers, *supra* note 3.

12 Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations, *supra* note 2, at 2.

13 Evaluation of Corporate Compliance Programs, *supra* note 10, at 2.

14 Evaluation of Corporate Compliance Programs, *supra* note 10, at 5.

15 Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations, *supra* note 2, at 8.

The Antitrust Division's guidelines already comment on the need for an antitrust compliance program to have adequate resources for "training, monitoring, auditing and periodic evaluation of the program" and a focus on "high antitrust risk areas."[16] Even so, we may expect the Antitrust Division to further push for a well-resourced compliance program in any forthcoming update.

The Criminal Division's update to this question further includes a "data resources and access" bullet that asks prosecutors to consider whether those in charge of the compliance program have "sufficient direct or indirect access to relevant sources of data to allow for timely and effective monitoring and/or testing of policies, controls and transactions"[17] With the added impetus on data, the Division may be trying to create more objective and concrete considerations for prosecutors when assessing a compliance program. Time will tell if the Antitrust Division takes a similar approach.

IV. QUESTION 3 – DOES THE CORPORATION'S COMPLIANCE PROGRAM WORK IN PRACTICE?

The central update to this question again asks if a company actively reviews and adapts its compliance program based on "lessons learned" from its own misconduct or the misconduct of "other companies facing similar risks." Here, the Criminal Division continues to expect companies to actively monitor and respond to developments by other companies in the same sector or geographic area.

V. STILL SEARCHING FOR A "GOLD STANDARD" COMPLIANCE PROGRAM

The Antitrust Division's central mission revolves around deterrence, detection, and prosecution of antitrust crimes.[18] With the Division's recent emphasis on the deterrence factor, practitioners and the business community should welcome any update that seeks to provide even an ounce of further clarity to the guidelines.[19]

The Division's emphasis on corporate compliance programs is belied by the fact that the Division has yet to point publicly to a "worthy compliance" program to highlight. In remarks made by Acting Assistant Attorney General Powers in January 2021, Powers seemed to downplay the fact that the Division has yet to highlight a worthy compliance program by noting that such programs are just one of the factors the Division considers at the charging stage.[20]

Since the issuance of the Division's first set of guidelines in July 2019, the Division has issued a nearly a dozen DPAs—a large increase as compared to previous years.[21] None of the DPAs or related documents and statements lauded a successful compliance program as the central reason for entering into the DPA in the first place. While it is clear that the Division wants to see the implementation of robust compliance programs in response to the guidelines, a company has yet to be rewarded publicly for doing so.

For example, in April 2020, the Division entered into a DPA with Florida Cancer Specialists & Research Institute and simply noted that the Institute "has implemented and will continue to implement a compliance program.[22] In May 2020, the Division announced a DPA with Apotex Corporation after the generic pharmaceutical company agreed to pay a fine for conspiring to artificially raise the price of a cholesterol medication.[23] The Apotex DPA only mentions that the company "has implemented and will continue to implement a compliance program."[24]

In January 2021, the Division entered into a DPA with Argos USA, a producer and seller of ready-mix concrete, after the company was

16 *Id.* at 6-7.

17 Evaluation of Corporate Compliance Programs, *supra* note 10, at 12.

18 Powers, *supra* note 3.

19 *Id.*

20 *Id.*

21 U.S. Dep't Justice, Antitrust Div., Antitrust Division Press Releases.

22 Deferred Prosecution Agreement at 11, *U.S. v. Fla. Cancer Specialists & Research Inst.*, LLC, No. 2:20-cr-78 (M.D. Fla. Apr. 30, 2020).

23 Press Release, U.S. Dep't of Justice, Generic Pharmaceutical Company Admits to Fixing Price of Widely Used Cholesterol Medication (May 7, 2020).

24 Deferred Prosecution Agreement at 9, *U.S. v. Apotex Corp.*, No. 2:20-cr-169 (E.D. Pa. May 7, 2020).

indicted for participating in a conspiracy to fix prices, rig bids, and allocate market sales. In granting the DPA, the Division noted several facts that guided its consideration, including the fact that the illegal conduct was limited to a small number of employees, that two employees who were primarily responsible for the company's participation in the conspiracy had previously been indicted and terminated, and that Argos' was cooperating with the DOJ and made an agreement to aid in the prosecution of co-conspirators. The DPA did not go so far as to recognize Argos' compliance program, other than noting Argos' promise to continue to enhance its' compliance program going forward.

The Division also entered into two separate DPAs with two foreign-language training companies, Comprehensive Language Center Inc., ("CLCI") and Berlitz Languages, after the companies were charged in a conspiracy to defraud the U.S. by impeding, impairing, obstructing and defeating competitive bidding for a multi-million dollar foreign language training government contract.[25] The DPA with CLCI notes that the company ceased doing business and intended to dissolve but would be required to implement a compliance program were it to resume operations.[26] The Berlitz DPA states that Berlitz committed to "continuing to enhance" its compliance program.[27]

The rise in DPAs in the last few years reinforces the Division's desire to more actively "reward and incentivize good corporate citizenship." Though without an example that highlights an effective compliance program, it is unclear what exactly a display of good corporate citizenship looks like in practice as it relates to compliance. In July 2021, Acting Assistant Attorney General Powers gave insight as to why the Division may have entered into more DPAs with companies in a larger variety of industries rather than doing so in recognition of a strong compliance program. Powers said the Division considers the harm a company's guilty plea may have on innocent third parties.[28] This has led the Division to enter DPAs with large market players, for example, in "instance[s] where a company's mandatory debarment would have considerable consequences for health care patients" and small market players, when a neutral analysis indicates "their convictions would cause similar consequences."[29]

We stand at a turning point as the Division awaits the confirmation of President Biden's newly nominated head of the Antitrust Division, Jonathan Kanter. Although we expect continued emphasis on corporate compliance, whether Kanter will revise the Antitrust Division's guidelines, continue the trend of favoring DPAs, or highlight a company's compliance program as the gold standard remains to be seen.

25 Press Release, U.S. Dep't of Justice, Foreign-Language Training Companies Admit to Participating in Conspiracy to Defraud the United States (Jan. 19, 2021).

26 Deferred Prosecution Agreement at 4, *U.S. v. Comprehensive Language Center, Inc.*, No. 3:21-cr-50 (D.N.J. January 19, 2021).

27 Deferred Prosecution Agreement at 4, *U.S. v. Berlitz Languages, Inc.*, No. 3:21-cr-51 (D.N.J. January 19, 2021).

28 Powers, *supra* note 3.

29 *Id.*

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