More Carrot, Less Stick: The DOJ’s Evolution to Incentivize Antitrust Compliance Programs

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In a recent speech, Makan Delrahim, the Assistant Attorney General for the Antitrust Division of the U.S. Department of Justice (the Division), announced a new policy intended to incentivize corporations to design, develop, and institute robust antitrust compliance programs.¹ In the speech, AAG Delrahim announced a fundamental shift in how the Division treats corporations under investigation for committing criminal antitrust offenses: for the first time, a corporation with an effective antitrust compliance program that lost the race for leniency can receive a deferred prosecution agreement (DPA) and a reduced criminal fine.² The Division also published novel guidance for companies explaining how it will evaluate the effectiveness of antitrust compliance programs (Guidance).³

By titling his speech “Wind of Change,” AAG Delrahim was probably not channeling his inner desire to pay homage to The Scorpions’ 1990 hit of the same name. Rather, this was AAG Delrahim’s magic of the moment, making clear that the new approach marked a definitive break from the Division’s past practice of ignoring companies’ efforts to implement antitrust compliance programs, relying instead on its blockbuster corporate fines and its Corporate Leniency Policy to incentivize compliance.⁴

Although only time will tell what the new model and approach means for companies and how this new approach will affect criminal antitrust enforcement, we can draw on past and parallel experience to get a sense of what companies can expect. This article will explore the Division’s evolution in evaluating and crediting compliance programs, the Guidance, and the implications of the policy shift for both the Division and companies.

Antitrust Compliance Darwinism: The Division’s Protracted Evolution Regarding Evaluating and Crediting Compliance Programs

The All Stick, No Carrot Era (Pre-2014): No Credit for Antitrust Compliance Programs. For decades, the Division did not provide significant incentives for antitrust compliance programs. Instead, it relied on the threat of large corporate fines and its Leniency Program to incentivize compliance.

2 Id.
antitrust compliance programs. Beginning in 1993, the Division instituted its revised Leniency Policy to make it more attractive to companies to self-report criminal antitrust offenses.\(^5\) Under the Leniency Policy, assuming the requisite conditions are met, the first company to self-report a criminal antitrust violation—a naked price-fixing, bid-rigging, or market-allocation conspiracy—is eligible, along with all its cooperating employees, for complete immunity.\(^6\)

Following the success of the Leniency Policy, the Division circumnavigated the globe proselytizing the value of leniency programs as a means to detect and deter antitrust offenses. But in contrast to foreign competition regulators, such as the UK and Canada, the DOJ rarely discussed incentivizing corporate compliance programs for the same purpose.\(^7\) The Division, instead, believed the enticement of leniency was sufficient to incentivize effective compliance programs. Accordingly, from 1993 through 2014, the Division, as a matter of policy, did not credit compliance programs at the charging or sentencing stage—there was no fine reduction and no possibility of a declination, non-prosecution agreement, or a DPA.\(^8\)

This policy of not crediting companies for effective compliance programs put the Division squarely at odds with other criminal litigation components of the DOJ, and in certain cases, may have been contrary to the U.S. Sentencing Guidelines.\(^9\) Indeed, for decades, pursuant to well-established DOJ policy, the Criminal Division has routinely granted declinations, non-prosecution agreements, DPAs, and fine reductions based, at least in part, on a company's compliance initiatives.\(^10\) The lone exception to this DOJ policy was the Division, which, prior to AAG Delrahim's 2019 speech, enjoyed special provisions under the Justice Manual—stating, "credit should not be given at the charging stage for a compliance program."\(^11\) Not only did the Justice Manual state that credit should not be given, it further stated, "antitrust violations . . . mandate prosecutions of corporations notwithstanding the existence of a compliance program."\(^12\) Thus, if a corporation had an effective compliance program, it could potentially avoid criminal charges for committing serious fraud or corruption offenses; yet, the DOJ mandated the prosecution of corporations for antitrust offenses.

Likewise, the Sentencing Guidelines have long provided guidance to companies on what constitutes an effective compliance program and when a corporation should receive credit for having an effective compliance program.\(^13\) Indeed, the Sentencing Guidelines endorse a reduced sentence and criminal fine "[i]f the offense occurred even though the organization had in place

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\(^5\) Id.

\(^6\) Id.

\(^7\) See e.g., Canadian Competition Commission’s Corporate Compliance Programs Bulletin (Sept. 27, 2010), https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03280.html.

\(^8\) See Delrahim, supra note 1.


\(^10\) See U.S. Dep’t of Justice, Federal Prosecution of Corporations 3 (1999), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF. This memo was updated by a series of subsequent memos before the provisions of the memos were incorporated in the Justice Manual.

\(^11\) Id. at 4.

\(^12\) Id. at 7 (emphasis added).

\(^13\) U.S. SENTENCING GUIDELINES MANUAL, supra note 9, §§ 8C2.5 and 8B2.1.
at the time of the offense an effective compliance and ethics program.” 14 Furthermore, the Sentencing Guidelines make clear that the failure to prevent or detect the conduct at issue, including criminal antitrust conduct, does not necessarily mean the compliance program is ineffective. 15

Yet, notwithstanding the Sentencing Guidelines’ and other DOJ components’ recognition that no compliance program can prevent all criminal activity, the Division took the position that an effective compliance program would have prevented the antitrust offense in the first place or resulted in a leniency application. Thus, a company ensnared in a criminal antitrust investigation by the DOJ was not eligible to avoid charges or to obtain a fine reduction.

**The Baby Carrot Era (2014–2019): Reduced Fines for Adopting or Strengthening Compliance Programs During an Investigation.** In 2014, a light breeze of change occurred: the Division announced that it was “actively considering ways in which [it] can credit companies that proactively adopt or strengthen compliance programs after coming under investigation.” 16 Shortly thereafter, the Division announced that it would begin providing a company with a “modest reduction in its fine” where the entity made extraordinary efforts to implement or strengthen its compliance program after coming under investigation. 17 Concurrently, however, the Division reiterated its firm position against crediting a company by reducing the charges or fine based on a preexisting antitrust compliance program. 18 Thus, the Division was still unwilling to give corporations credit under the Sentencing Guidelines for having an otherwise effective compliance program, which would typically result in a larger fine reduction than the “modest” reduction proposed by the Division.

When the Division announced this change, it provided scant guidance about what constituted “extraordinary measures” and refrained from providing detailed information on how it would evaluate antitrust compliance programs. Accordingly, while this minor change was a positive development for corporations under investigation by the Division, corporations remained concerned that their proactive investment in antitrust compliance programs would not be credited if certain actors in the company defied policy and evaded compliance. Fundamentally, this policy shift provided no new incentive for companies to proactively institute antitrust compliance programs.

**The Large Carrot Era (2019–Present): Compliance Credit at Both the Charging and Sentencing Phase.** The Division’s gradual shift to incentivize compliance appeared to accelerate in 2018 when the Division signaled the final evolution in crediting compliance programs—offering credit for pre-existing, effective compliance programs. In April 2018, the Division hosted a public roundtable on criminal antitrust compliance during which compliance professionals posited that companies would be willing to proactively invest more in antitrust compliance if their efforts were recognized

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14 Id. § 8C2.5(f)(1).
15 Id. § 8B2.1(a).
18 Snyder, supra note 17.
and credited by the Division. Over the course of the following year, Division officials openly considered precisely how, and to what extent, to credit well-tailored antitrust compliance programs in place at the time of an investigation.

AAG Delrahim’s July 2019 announcement that the Division would credit preexisting compliance programs marked the culmination of the Division’s evolution and represented a significant policy shift. For the first time, the Division recognized that employees may commit antitrust violations despite a company’s best efforts at compliance. And the Division further concluded that when violations do happen, the corporation should still receive credit for its well-tailored, and well-intentioned, corporate compliance program.

It is clear that the Division’s evolution is based on the understanding that a strong antitrust compliance program is fundamental to deterring cartel conduct and is concomitant with the Division’s primary goal of deterring criminal antitrust activities. Moreover, the Division’s change to consider DPAs and reduced fines under the Sentencing Guidelines harmonizes its practice with broader DOJ policies. The Division will no longer be exempt from the Principles of Federal Prosecutions of Business Organizations by refusing to consider the adequacy and effectiveness of the corporation’s compliance program at the time of the offense.

The carrot of a DPA, which is a middle ground between a criminal charge and a non-prosecution agreement, is substantial. Essentially, under a DPA, the DOJ will file charges against the corporation, but will never move towards a conviction so long as the corporation satisfies certain conditions, such as paying a fine and restitution. Once the corporation has satisfied the conditions of the DPA, the government then dismisses the charges against the corporation. DPAs are strongly preferred by corporations because no conviction is ever entered, which potentially allows them to avoid potentially disastrous collateral consequences (e.g., debarment, suspension, and dissolution).

Cultivating the Antitrust Compliance Carrot: The Division Promulgates Instructive Guidance for Antitrust Compliance Programs

Beyond enabling companies to obtain DPAs and fine reductions for preexisting compliance programs, the other important aspect of the announcement was that the Division made public its Guidance for evaluating compliance programs in criminal antitrust investigations. The document is instructive for corporations not just during investigations and for making pitches to the Division for reduced charges and fines, but for designing, implementing, and updating existing antitrust compliance programs. This is especially true for companies creating an effective compliance program from the ground up. At the same time, corporations with existing antitrust compliance programs should also analyze the Guidance to review and update their programs to ensure effectiveness.

The Guidance provides detailed questions that illuminate what aspects of a compliance program are necessary for the Division to believe the program is, in fact, effective. While the Sentencing Guidelines have long provided some guidance as to what constitutes an effective compliance program, the Division’s Guidance expounds on the Sentencing Guidelines’ bedrock
principles and provides a window into the important aspects of an effective *antitrust* compliance program.

Although the Guidance addresses numerous elements of an effective antitrust compliance program, no one factor is determinative of whether the program is considered effective. Moreover, corporations and compliance personnel should not view the Guidance as a checklist or formula; rather, each company should consider the Guidance and apply solutions based on its unique risk profile, size, resources, and culture.\(^\text{22}\)

The Guidance emphasizes that a company has flexibility in designing their compliance programs so that the program is specifically tailored to the unique risks associated with a particular enterprise. Nevertheless, the Guidance focuses on certain factors that companies and compliance personnel should consider when designing and implementing antitrust compliance programs.\(^\text{23}\) Below are key considerations for each factor relevant to designing an effective antitrust compliance program.

**The Design of the Program.** To have an effective compliance program, a corporation should—at a minimum—have a written policy or code of conduct containing guidance on antitrust issues that is integrated into the company’s business and is readily accessible to relevant and high-risk employees (e.g., employees with pricing authority or that have occasions to meet with competitors). The company should not only make these materials accessible and easily digestible, but the materials should be periodically updated.\(^\text{24}\)

**A Culture of Compliance.** This factor focuses on whether and how the compliance program becomes part of the fabric of the company. Senior executives should take ownership in both conveying the importance of compliance and discouraging non-compliance. Those same leaders should be held accountable for their own actions and also when they tolerate lapses by subordinates. Corporations and executives can help ensure a culture of compliance through statements in compliance materials, as well as executives’ attendance and active participation in compliance training.\(^\text{25}\)

**The Responsibility for Antitrust Compliance.** This factor makes clear that for an antitrust compliance program to be effective, a corporation should appoint a senior-level individual to run the program. That individual should be independent, have direct access to the board of directors or equivalent leadership body, access to senior management, authority to interact with regulators, and sufficient resources and time to administer the program.\(^\text{26}\)

**Risk Assessments.** One-size-fits-all programs are typically looked at skeptically, especially for larger enterprises. An effective program will be specifically tailored to the risks associated with each line of business. For example, if the company often engages in bidding for new or existing business, the compliance program should provide focused training and controls regarding the bidding process. For larger companies with significant resources, the compliance team should periodically benchmark, and collect data and other metrics to enhance the efficacy of the program.\(^\text{27}\)
Compliance Training and Communication. Sufficient and tailored antitrust compliance training is paramount to any compliance program. For medium to large companies, inadequate or non-existent compliance training may well render a compliance program ineffective. It is important that the training and associated materials are clear, accessible, and reach the appropriate employees. Beyond explaining permissible and impermissible behavior, the training should make clear what employees should do in the event they identify concerning behavior and how to confidentially report the incident. Training and the dissemination of the policies should be conducted regularly, including as part of the employee onboarding process for appropriate personnel.28

Periodic Review, Monitoring, and Auditing. A corporation should periodically review its compliance program for its effectiveness by conducting audits and reviews. For example, where possible, a large corporation should conduct routine audits of high risk employees’ communications, documents, and practices. Audits can be done informally through meetings and discussions or through sophisticated screening and monitoring tools.29

Reporting. A key component of any antitrust compliance program is the ability for employees to quickly access an anonymous and confidential hotline or other reporting mechanism. It is also critically important that corporations make clear that its employees can report suspected violations without fear of retaliation.30

Compliance Incentives and Discipline. Corporations should consider how to incentivize compliance and recognize individuals that support a culture of compliance within the company consistent with other internal rewards (e.g., incentive pay or prerequisites for promotions). Conversely, a corporation should also consider a policy for disciplining individuals who violate the antitrust compliance policy (e.g., reassignment, suspension, or termination).31

Essential Elements. Each of these factors is instructive and provides guidance to corporations and compliance professionals regarding how to design and implement an effective compliance program. While some companies simply do not have the resources to implement all, or even most, of the considerations posed by the Division, it is important to remember that there are two essential elements of an effective compliance program: the organization must (1) exercise due diligence to prevent and detect criminal conduct; and (2) promote a culture that encourages ethical conduct and a commitment to comply with the law.32 Likewise, the compliance and ethics program should “be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct.”33

Harvesting the Antitrust Compliance Carrot: Earning Credit for a Preexisting Antitrust Compliance Program

The central purposes of an antitrust compliance program are to prevent, detect, and mitigate the effects of any anticompetitive conduct. Even if a corporation has followed the Sentencing Guidelines and the Guidance, no program is perfect, and lapses can occur. If a company finds itself under investigation by the Division despite its best efforts to implement an effective compliance program, it can affirmatively use its compliance program to respond, reduce its exposure,

28 Id. at 8–9.
29 Id. at 10–11.
30 Id. at 11.
31 Id. at 11–12.
33 Id.
and remediate. Specifically, the company can compare its preexisting program and remedial efforts to the Guidance to convince the Division to grant both charging credit (e.g., through a possible DPA) and sentencing credit (e.g., a possible fine reduction and/or no monitoring).

To earn that credit, the company must quickly decide whether to cooperate with the Division in its investigation. The Division is clear that unreasonable delays in reporting are inconsistent with a culture of compliance and could jeopardize a corporation’s ability to avoid a criminal conviction and a fine reduction. Deciding whether and when to cooperate with the Division is complicated and fact-specific. If a company is going to cooperate with an investigation by the Division, however, then it should consider proactively providing the Division with information about its compliance program. Moreover, waiting until the end of the investigation to discuss compliance may be too late because Division prosecutors will “evaluate compliance programs throughout the course of their investigation, including asking relevant compliance-related questions of witnesses, and should not wait for companies to offer a compliance presentation before beginning their evaluation of a company’s antitrust compliance program.”

A corporation should be aware that the Division is evaluating its compliance program from the outset of its investigation. Providing information on policies, procedures, and training early in an investigation is one effective way to demonstrate the culture of compliance within the company. If a company is planning to cooperate with the Division, it should also be prepared to quickly explain to the Division how its compliance program helped identify the conduct and assisted in the reporting of conduct to the Division. Once the investigation has progressed, the corporation should be mindful that the Division will ask witnesses about the compliance program and should therefore prepare its witnesses to discuss it.

At this point, the company should also be remediating the situation by assessing and analyzing how the anticompetitive conduct occurred despite the existence of the compliance program. For example, the company can consider steps to strengthen its training, expand the reach of the program to new employees, business lines, or regions, provide more practical examples, and make difficult concepts easier to digest. Likewise, the company should ensure that senior leaders participate in addressing the issue to prevent reoccurrence. The corporation should present its remediation efforts to the Division, including the enhancements to the compliance program and the involvement of senior leaders in preventing reoccurrence. Remediation efforts are a key component of obtaining credit for preexisting compliance programs because it helps show a culture of compliance and ethical conduct.

If a corporation did not have an effective compliance program at the time of the offense, it can still obtain credit from the Division for its remediation efforts. Although likely it will not be eligible for a DPA or a fine reduction pursuant to the Sentencing Guidelines, it may still be able to get a fine reduction and avoid probation if it institutes an effective compliance program after coming under investigation.

Policy Implications for the DOJ: Will This New Compliance Approach Affect Cartel Detection?

The central purpose of the DOJ’s new policy is to incentivize effective corporate antitrust policies, which helps deter and detect cartel conduct—the central mission of the Division’s criminal program. It is also axiomatic that if more companies have effective antitrust compliance programs,
then fewer companies will participate in cartel conduct, and when they do, the companies will be more likely to self-report the violation to the Division. Furthermore, if a corporation has a culture of compliance and respect for the law, then its internal investigation of potential cartel conduct will be quicker and more complete. The DOJ is thus trading DPAs and fine reductions for less cartel conduct, increased self-reporting, and more effective internal investigations, which theoretically leads to a reduced burden on Division staff and more successful prosecutions.

Indeed, if a company with an effective antitrust compliance program is involved in a criminal antitrust investigation but did not win the race for leniency, then the incentive of a DPA may lead that company to consider early cooperation with the Division. Historically, the Division offered the second company to cooperate with an investigation, even if it only lost the race for leniency by minutes, a significant fine reduction (30% to 35% off the bottom of the Guidelines range), while still requiring a guilty plea that included a large corporate fine. The Division would also criminally charge several executives from the second-in company, many of whom received significant terms of incarceration. Even with the incentive of a reduced fine, certain companies undoubtedly chose to delay cooperation to attempt to avoid criminal charges.

While the Leniency Policy is undoubtedly the single greatest tool for uncovering cartel conduct, the second-in company is often just as important. That second-in company typically provides new and corroborating evidence of the cartel and also reduces the Division’s reliance on immunized witnesses, both of which make subsequent convictions easier to achieve. Moreover, the second-in company often uncovers unrelated criminal antitrust conduct for which it could receive “leniency plus.” Thus, incentivizing more effective compliance policies through increased rewards for second-in companies is yet another opportunity for the Division to uncover more cartel conduct and prosecute more cases.

Conversely, some antitrust practitioners have voiced concern that this new compliance approach could actually result in a reduced number of leniency applicants, which remains the Division’s primary tool for uncovering cartel conduct. In recent years there has been a perceived decline in the number of large leniency applications. There are many reasons posited for why international cartel prosecutions have diminished, including the costs associated with obtaining leniency in numerous jurisdictions, the expense of follow-on civil litigation, changes in the program that have led to more uncertainty about the criminal and civil exposure of a company and its executives, and increased awareness of cartel offenses due to recent high-profile prosecutions and the proliferation of sophisticated compliance programs. Any further potential disincentive for leniency is therefore problematic.


36 “Leniency plus” is when a company self-reports unrelated cartel conduct while concurrently under investigation for other cartel conduct. When that occurs, the corporation can receive immunity for the newly reported conduct and a fine reduction for the original conduct.


38 See Robert B. Bell & Kristin Millay, The Corporate Leniency Program: Did the Antitrust Division Kill the Goose that Laid the Golden Eggs?, ANTITRUST, Fall 2018, at 81–82.

39 Id.
The theory is that the benefits of the Leniency Policy—non-prosecution agreement for the corporation and individuals and no criminal fines—may not sufficiently outweigh the benefits conveyed under the new compliance approach—the potential to earn a DPA and significant fine reduction. This is especially true if one considers the other concerns and costs associated with the Leniency Policy. Thus, if a company can now receive a DPA and significant fine reduction, its executives may not have the same strong incentive as before to run, not walk, to self-report conduct to the Division to enter into the Leniency Policy.

Furthermore, because the Guidance draws heavily on the Sentencing Guidelines, which contemplate reasonable potential delay or lack of self-reporting while still allowing corporations to obtain sentencing credit for having an effective compliance program, the all-or-nothing nature of the Leniency Policy may have created stronger incentives to immediately self-report even unsubstantiated or questionable conduct prior to conducting a complete internal investigation. This is so because some Division investigations, including successful investigations, are triggered by leniency applications that are not perfected due to a lack of evidence from the reporting company. The new compliance approach could thus lead to a reduction in self-reporting, especially when the conduct is unclear or the company does not have access to all the requisite information and witnesses.

The effects of this reduction in the benefit delta between leniency and obtaining compliance credit is currently unknown. It is also too soon to tell whether corporations can routinely meet the Division’s potentially high bar for what is an effective antitrust compliance program. If DPAs and lower fines are the new normal, then query whether certain executives will believe the penalties for non-compliance are such that they take antitrust compliance less seriously. Accordingly, how the Division applies the evaluation of compliance programs in practice will ultimately determine whether this change leads to the detection of more (or less) cartel offenses.

**Conclusion**

The Division’s decision to offer both charging and sentencing credit to corporations with effective compliance programs is welcome news to corporations around the world. Until the Division starts giving companies credit for effective compliance programs, though, the effect of the change will not be fully known. Regardless, incentivizing antitrust programs is good policy because antitrust compliance programs “act as the first line of defense to anticompetitive conduct.” The primary objective of the Division’s criminal program is to deter and prevent anticompetitive conduct, and this policy change and its accompanying Guidance is likely to generate more robust compliance programs, which achieve the same objective. Moreover, pursuant to the Sentencing Guidelines, a company with an otherwise effective antitrust compliance program should be able to receive credit for its investment. Likewise, with the Division now offering such rewards, companies that do not qualify for these rewards are effectively punished for not having an effective antitrust compliance program.

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40 “The organization will be allowed a reasonable period of time to conduct an internal investigation. In addition, no reporting is required by subsection (f)(2) or (f)(3)(C)(iii) if the organization reasonably concluded, based on the information then available, that no offense had been committed.” U.S. Sentencing Guidelines § 8C2.5, Application Note 10.

Moreover, while the Division has increased the carrot for companies to proactively implement effective compliance programs, it continues to wield a comparatively big stick against those companies that do not have effective compliance programs. The message from the Division remains clear: if a company does not have, or does not institute, an effective compliance program, then it will face significant criminal fines, a criminal conviction, probation, and potentially even a compliance monitor. Therefore, with this new policy, the Division has significantly increased the carrot for corporations to implement effective compliance programs (the leniency program, reduced fines, and potentially a DPA), while continuing to wield a large stick (enormous criminal fines, a criminal conviction, and post-sentencing supervision) for corporations that do not implement effective antitrust compliance programs.

Accordingly, it is imperative that corporations carefully review the Guidance to assess, update, or institute antitrust compliance programs. The Guidance is an important resource for understanding the Division’s expectations for, and how it will assess, a compliance program. Following the Guidance will greatly assist corporations in implementing an effective antitrust compliance program and obtaining both charging and sentencing credit if misconduct occurs.

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42 See, e.g., Delrahim, supra note 1.