

DOJ Antitrust Enforcers Take to the Bully Pulpit on Prosecuting Antitrust Crimes and Antitrust Compliance Programs

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In recent years, antitrust criminal enforcement efforts have increased around the world. These efforts focus mainly on cartels — which the Supreme Court calls “the supreme evil of antitrust” — that conspire to fix prices, rig bids, or allocate markets. Courts have imposed criminal fines on corporations totaling as much as \$1.4 billion in a single year; the average jail term for individuals now stands at 25 months, double what it was in 2004.

In back-to-back speeches, top Department of Justice Antitrust Division (DOJ or Division) enforcers took to the “bully pulpit” to spotlight the Division’s criminal enforcement efforts and to put out some policy positions with respect to the Division’s corporate leniency policy and how the Division weighs the adequacy and effectiveness of corporate compliance programs. Under the Division’s corporate leniency policy, the Division will not prosecute the first qualifying corporation to report a cartel, fully admit to its role in the conspiracy, identify its co-conspirators and the events of the conspiracy, and provide complete and timely cooperation. There are similar leniency policies that have been adopted by competition enforcement agencies around the world.

On September 10, 2014, in a speech entitled “Prosecuting Antitrust Crimes,” Assistant Attorney General Bill Baer, head of the Division, highlighted DOJ’s vigorous and successful cartel enforcement against industries ranging from auto parts, ocean shipping, air cargo to municipal bond investment contracts, and financial benchmarks like LIBOR. But more importantly, Baer offered some significant observations regarding the administration of the leniency policy:

- Qualifying for the leniency policy requires a prompt investment of time and resources by the corporate applicant, “including conducting a thorough internal investigation, providing detailed proffers of the reported conduct, producing foreign-located documents, preparing translations, and making witnesses available for interviews.”
- Baer noted that “[w]e have recently seen instances where counsel for an individual wanted to pick and choose where and how a client would cooperate — to confess to crimes in one market in hopes of qualifying for leniency, but not cooperate in another market, for which the client is culpable but not eligible for leniency. It does not work this way.” When an “employee is not being fully cooperative...the employee does not meet the leniency policy’s requirements and will be subject to prosecution” — and by implication is not assisting the corporation to meet its obligations.
- Even if a company is too late to qualify for leniency, early acceptance of responsibility and meaningful cooperation are taken into account in determining the appropriate consequences for offending corporations and their executives. Under the Sentencing Guidelines, companies that choose to accept responsibility will receive a lower culpability score, and therefore a lower fine range. Baer emphasized, however, that cooperation requires more than accepting responsibility, and promises to cooperate are not enough. Significant reductions are reserved for those companies that actually help DOJ investigate and prosecute antitrust crimes.
- Sentencing recommendations are based on the value of the cooperation received, not simply on the order in which companies begin to cooperate.
- During negotiations on corporate plea agreements, DOJ is also prepared to discuss the appropriate treatment of company executives and employees. Some individuals may be “carved in” to the non-prosecution provisions of corporate plea agreements, while others are excluded or “carved out.”
- Baer rejected the notion that the mere existence of a compliance program should be sufficient, in and of itself, to avoid prosecution, secure a non-prosecution agreement, or otherwise dramatically reduce the penalties for criminal antitrust violation.
- Taking compliance seriously includes making an institutional commitment to change the culture of the company. Baer emphasized that “corporate compliance starts at the top. The board of directors and

senior officers must set the tone for compliance to ensure that the company's entire managerial workforce not only understand the compliance program but also has the incentive to actively participate in its enforcement."

- Baer was skeptical of the situation where guilty companies sometimes want to continue to employ culpable senior executive who do not accept responsibility and are carved out of the corporate plea agreement, while at the same time arguing that their compliance programs are effective and their remediation efforts laudable. In such circumstances, the Division "will have serious doubts about that company's commitment to implementing a new compliance program or invigorating an existing one."
- Baer indicated that a company caught multiple times will be treated more harshly for its failure to disclose its participation in a second conspiracy. He gave the example of a fine increasing by over \$100 million dollars in such a recent situation.

The day before the Baer speech, his criminal deputy, Brent Snyder, gave a speech entitled "Compliance is a Culture, Not Just a Policy." Snyder opined that a "company with at least a partially effective compliance program should be able to discover the cartel early, increasing its chances of seeking leniency before its co-conspirators do, and then promptly stop its participation, disclose its antitrust crimes completely, and fully cooperate with the Division's investigation."

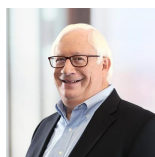
Snyder — and the Division historically — have not defined what constitutes an effective compliance program, nor have they offered a model program. Snyder did point to Chapter 8 of the general United States Sentencing Guidelines as providing guidance for minimal requirement of an effective compliance and ethics program. Snyder offered a few attributes (some of which were echoed in Bill Baer's remarks) that he felt such programs should contain:

- A company's senior executives and board of directors must fully support and engage with the company's compliance efforts. "If senior management does not actively support and cultivate a culture of compliance, a company will have a paper compliance program, not an effective one." Executives and board members cannot simply go through the motions and hope that the company's compliance program is working. They must make clear to employees that compliance is important and mandatory.
- Second, a company should "ensure that the entire organization is committed to its compliance efforts and can participate in them. This means educating all executives and managers, and most employees — especially those with sales and pricing responsibilities."
- Third, the compliance program should be proactive. A company should make sure that at-risk activities are regularly monitored and audited. The company should regularly evaluate the program to understand what it can approve.
- Fourth, a company "should be willing to discipline employees who either commit antitrust crimes or fail to take the reasonable steps necessary to stop the criminal conduct in the first place. A company's retention of culpable employees in positions where they can repeat their conduct "raises serious questions and concerns about the company's commitment to effective antitrust compliance."
- Finally, a company that discovers criminal antitrust conduct should be prepared to take the steps necessary to stop it from happening again.

Corporate compliance in many sensitive areas is an important concern for boards of directors, senior management, and counsel today. These antitrust "bully pulpit" speeches underscore that robust and effective antitrust compliance programs should be an essential part of those efforts.

If you have any questions about this topic, please contact the author(s) or your principal Mintz Levin attorney.

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