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What The DOJ Expects Of 'Effective' Compliance Programs

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If you have been keeping up with current U.S. Department of Justice (DOJ) antitrust investigations, you have no doubt noticed the hefty criminal fines that have been paid by violators of U.S. antitrust laws. In recent years, the United States government has literally collected billions of dollars in criminal fines. In light of the staggering fines, one important factor that antitrust practitioners should consider is the DOJ's evaluation of a company's compliance and ethics program. In theory, a company that pleads guilty to antitrust violations may be afforded a reduction in its culpability score if it can demonstrate that there was a compliance and ethics program in place at the time of the violation, and that the program was "effective" as defined by the U.S. Sentencing Guidelines. The Federal Sentencing Guidelines for Organizations are rules that provide a uniform procedure for determining the appropriate monetary fine that should be levied on a guilty company. Section 8B2.1 of the guidelines lays out general requirements for a company's compliance and ethics program to be deemed "effective," as defined by the guidelines. Section 8B2.1 provides in part:

> To have an effective compliance and ethics program, for purposes of subsection (f) of §8C2.5 (Culpability Score)…an organization shall (1) exercise due diligence to prevent and detect criminal conduct; and (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

If a company meets these requirements, it may qualify for a potential reduction in its overall culpability score. Pursuant to §8C2.5(f), an effective compliance program will afford a defendant company a three-point reduction in its culpability score, which may translate into millions if not tens of millions of dollars of savings. Although this application appears simple and intuitive enough in theory, it has proven to be very difficult to accomplish in practice. The confusion appears to be the result of logical tension between the guidelines and the recent position taken by antitrust enforcers. The guidelines acknowledge that "[t]he failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct." However, the DOJ in recent public statements has made clear that a corporate defendant has an uphill battle in earning a reduction in culpability score for its compliance program. On Sept. 10, 2014, Bill Baer, Assistant Attorney General, Antitrust Division, gave a speech at the Global Antitrust Enforcement Symposium in Washington, D.C. In his speech, Baer addressed the importance of effective compliance

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programs and the skepticism a corporate defendant will face when attempting to convince the DOJ it has, or had, an effective compliance program. Baer stated:

> "Some have argued that the mere existence of a compliance program should be sufficient…[to] dramatically reduce the penalties for criminal antitrust violations. That is a stretch. The fact that the company participated in a cartel, and did not detect it until after the investigation began, makes it difficult for the company to establish that its compliance program was effective. It is unlikely that a corporate defendant's pre-existing compliance and ethics program will be considered effective enough to warrant a slap on the wrist when it failed to prevent the company from violating the antitrust laws."

On its surface, Baer's comments make sense. A company cannot justifiably be rewarded for having an effective compliance program if the program in place was ineffective in deterring criminal conduct. Yet, such a position ignores the reality that even the most effective compliance programs may not deter a determined wrongdoer. The guidelines themselves acknowledge as much. Furthermore, it can be argued that such a staunch position by the DOJ makes the purpose of §8B2.1 and §8C2.5(f) moot. If the crime itself defeats a determination of effectiveness, then there is no point in offering a potential reduction in culpability score. More recently, the DOJ has provided a bit of clarity on its position. In a speech at the Sixth Annual Chicago Forum on International Antitrust in Chicago in June, Brent Snyder, Deputy Assistant Attorney General, Antitrust Division, addressed the issue of when the DOJ might consider reducing a criminal fine by virtue of a company's compliance program. In his speech, Snyder stated:

> "It is important here to distinguish between 'backward looking' and 'forward looking' compliance efforts. I do not mean that we are now willing to credit 'backward looking' compliance efforts —preexisting compliance programs that failed to deter or detect the illegal cartel conduct…A compliance program that fails to deter or detect cartel behavior cannot qualify for that credit…I also do not mean that we are going to credit companies that, after coming under investigation, put into place or nominally improve an antitrust compliance program. * * * "Only compliance efforts that go further, that reflect in some way genuine efforts to change a company's culture, will receive consideration in calculating a company's fine."

Snyder goes on to emphasize the importance of senior executives leading by example and holding themselves accountable for changing corporate culture and establishing a zero tolerance environment to effectuate change. Such "forward thinking" efforts will, in Snyder's opinion, qualify a defendant company for a recommendation of a reduced fine. This position is supported by recent reductions in criminal fines for companies that have endeavored to change corporate culture. Snyder cited Barclays Bank PLC as an example in the DOJ's currency exchange investigation. In May 2015, five major international banks, including Barclays, plead guilty to conspiring to manipulate the price of U.S. dollars and euros exchanged in the foreign currency exchange spot market. For its part, Barclays was able to demonstrate to the DOJ that the bank had implemented significant and "demonstrable" changes and improvements to its compliance programs and

corporate culture. As a result, the company was afforded a reduction in its criminal fine. Ultimately, a corporation under investigation needs to be prepared to overhaul not only its compliance program, but its culture in order to obtain credit. The DOJ will not recommend a fine reduction for merely revising written compliance and ethics policies. The company and its leadership must demonstrate that they have committed themselves to making compliance an institutional priority at all levels. As Snyder put it, “Where we see similar efforts that result in real remediation and change in a company’s compliance culture, we will consider them in making our sentencing recommendations. But credit will require action and results, not mere promises of future action.”