# DEPARTMENT OF JUSTICE

# Wind of Change*: A New Model for Incentivizing Antitrust Compliance Programs

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## I. Introduction

Thank you, Professor First for your kind introduction and for inviting me back to this great institution. Let me also thank Professor Jennifer Arlen and Executive Director Allison Caffarone, along with everyone involved in the Program on Corporate Compliance and Enforcement (PCCE), for organizing this event. You should be proud of the incredible enduring program you have developed exploring the causes of corporate misconduct and the nature of effective enforcement and compliance.

It is great to be back at NYU Law School and to be joined by many colleagues from across the Department of Justice and other government officials, scholars, and leaders in the antitrust bar and the world of corporate compliance.

As you know, a violation of the U.S. antitrust laws may have criminal or civil consequences depending on the conduct. Although robust compliance programs are important to avoiding both criminal and civil antitrust liability, my remarks today will focus exclusively on how compliance programs are relevant to the Antitrust Division's *criminal* enforcement efforts.

Although compliance has long been a feature of the corporate criminal enforcement landscape, the Antitrust Division's approach largely has remained unchanged since the early 1990s.[1] In recent years, though, the Antitrust Division's approach to evaluating and crediting effective compliance programs has been evolving.[2]

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* SCORPIONS, *Wind of Change* (Vertigo/Mercury Records 1990).

[1] *See* Gary R. Spratling, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, The Experience and Views of the Antitrust Division, Remarks as Prepared for Corporate Crime in America: Strengthening the "Good Citizen" Corporation, a National Symposium Sponsored by the U.S. Sentencing Commission (Sept. 8, 1995), https://www.justice.gov/atr/file/519136/download.

[2] *See* Brent Snyder, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Compliance Is A Culture, Not Just A Policy, Remarks as Prepared for the International Chamber of Commerce/United States Council of International Business Joint Antitrust Compliance Workshop (Sept. 9, 2014), https://www.justice.gov/atr/file/517796/download, and Brent Snyder, Deputy Assistant Att'y Gen., Antitrust Div., Remarks Delivered at the Sixth Annual Chicago Forum on International Antitrust (Jun. 8, 2015),

To help us explore compliance programs and their implications for improving our enforcement policies for criminal antitrust offenses, I proposed a public workshop which we held last year.[3] We heard from in-house and outside corporate counsel and international enforcers, all of whom shared their perspectives on antitrust compliance and offered suggestions on how the Antitrust Division could better encourage compliance efforts.

Since the roundtable, we have reviewed this issue internally, across the Department, and with cartel enforcement authorities outside the United States, to better assess improvements we could make to our policies and practices to further incentivize antitrust compliance and good corporate citizenship, more generally.

In an ideal world, corporate compliance programs prevent wrongdoing altogether. If violations do occur, robust compliance programs should lead to prompt detection, which not only nips the conduct in the bud earlier, minimizing the harm to consumers, but also gives companies the greatest chance of winning the race for leniency under the Antitrust Division's Corporate Leniency Policy.[4] If a company does not win the race for leniency, then the Division's approach has been to insist that it plead guilty to a criminal charge with the opportunity to be an early-in cooperator, and potentially receive a substantial penalty reduction for timely, significant, and useful cooperation assisting the Division's efforts to hold co-conspirators and culpable individuals accountable.

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https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-sixth-annual-chicago.

[3] Public Roundtable on Criminal Antitrust Compliance materials are available at https://www.justice.gov/atr/public-roundtable-antitrust-criminal-compliance.

[4] U.S. DEP'T JUSTICE, ANTITRUST DIV., CORPORATE LENIENCY POLICY (Aug. 10, 1993), https://www.justice.gov/atr/file/810281/download.

This all-or-nothing philosophy was born of our efforts to highlight the value of winning the race for leniency at a time when the modern leniency program was establishing itself as the Division's most important investigative tool.

I believe the time has now come to improve the Antitrust Division's approach and recognize the efforts of companies that invest significantly in robust compliance programs. In the words of our former Deputy Attorney General Rod Rosenstein, "[t]he fact that some misconduct occurs shows that a program was not foolproof, but that does not necessarily mean that it was worthless. We can make objective assessments about whether programs were implemented in good faith."[5]

I agree completely with Rod and I know his successor, our current Deputy Attorney General Jeffrey Rosen shares the same view. Therefore, effective immediately, the Antitrust Division will: (1) change its approach to crediting compliance at the charging stage; (2) clarify its approach to evaluating the effectiveness of compliance programs at the sentencing stage; and (3) for the first time, make public a guidance document for the evaluation of compliance programs in criminal antitrust investigations. I will address each of these points in turn.

First things first—and at the risk of wading into a longstanding rivalry—let me share the words of a wise Philadelphian, Benjamin Franklin, who famously coined the phrase, "an ounce of prevention is worth a pound of cure" to urge fire awareness and prevention. He warned that in the absence of trained fire-fighters, and public education about fire safety and prevention,

[5] Rod J. Rosenstein, Deputy Att'y Gen, U.S. Dep't of Justice, Keynote Address on FCPA Enforcement Developments (Mar. 7, 2019), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-keynote-address-fcpa-enforcement.

Philadelphians "may be forced, (as [he] once was) to leap out of …Windows, and hazard [their] Necks to avoid being oven-roasted."[6]

Some of you here today may relate to Franklin's vivid descriptions of 18th century Philadelphia fires with your own "hair on fire" experiences when a corporate client first realizes that it is implicated in a criminal antitrust investigation. A company's cartel "fire" can quickly spread from criminal fines to civil treble damages and other collateral consequences, and engulf the entire company, its employees, and shareholders in expensive investigations, and protracted litigation, and cause real damage to its reputation and standing with its customers.

## II. Deterrence, Compliance, and Good Corporate Citizenship

Franklin's words ring just as true today when applied to deterring antitrust crimes. On the "cure" side of the equation, it is tough to disagree that, "[t]he most effective deterrent to corporate criminal misconduct is identifying the people who commit crimes and sending them to prison."[7] As prosecutors, we maximize deterrence by devoting significant resources to investigating and prosecuting individuals and corporations involved in cartels. We seek heavy fines for corporate offenders and actual jail time for culpable individuals acting on their behalf.

The focus of my remarks today, however, is on the benefits of an "ounce of prevention." Enforcement often is of inherently limited deterrent value because it is retrospective. On the other hand, a company with a robust compliance program actually can prevent crime or detect it early, thus reducing the need for enforcement activity; minimizing the harm to consumers earlier and saving precious taxpayer resources. As Rod previously has put it, "strong corporate

[6] "On Protection of Towns from Fire, 4 February 1735," *Founders Online*, National Archives, accessed July 10, 2019, https://founders.archives.gov/documents/Franklin/01-02-02-0002. Original source: *The Papers of Benjamin Franklin*, vol. 2, *January 1, 1735, through December 31, 1744*, ed. Leonard W. Labaree. New Haven: Yale University Press, 1961, pp. 12–15.

[7] Rod J. Rosenstein, Deputy Att'y Gen, U.S. Dep't of Justice, Keynote Address on FCPA Enforcement Developments (Mar. 7, 2019), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-keynote-address-fcpa-enforcement.

compliance programs are the first line of defense" to white-collar crime,[8] including antitrust crimes and cartel "fires."

It is important to keep in mind that while compliance is the focus of today's program, compliance programs do not exist and are not assessed in a vacuum. Indeed, the adequacy and effectiveness of a compliance program is but one of the ten factors the Justice Manual directs prosecutors to consider when weighing charges against a corporation pursuant to the Principles of Federal Prosecutions of Business Organizations.[9] Among the "Factors to Be Considered" (Factors), four in particular stand out as hallmarks of good corporate citizenship. Good corporate citizens: (1) implement robust and effective compliance programs, and when wrongdoing occurs, they (2) promptly self-report, (3) cooperate in the Division's investigation, and (4) take remedial action.[10] These Factors go hand in hand. Companies should want to work with us to root out criminal antitrust misconduct within their organizations and help us hold accountable the individuals who created this liability for the organization.

The Antitrust Division's new approach to compliance programs should not be misconstrued as an automatic pass for corporate misconduct. The Principles of Federal Prosecutions of Business Organizations counsel against crediting compliance programs when the other three hallmarks of good corporate citizenship are absent. When all four are present, however, the Antitrust Division should reward and "provide incentives for companies to engage in ethical corporate behavior. That means notifying law enforcement about wrongdoing, cooperating with government investigations, remedying past misconduct, and preventing future

[8] Rod J. Rosenstein, Deputy Att'y Gen, U.S. Dep't of Justice, Remarks at the Wharton School's Legal Studies and Business Ethics Lecture Series (Feb. 21, 2019), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-wharton-school-s-legal-studies.
[9] *See* Factors to Be Considered, Justice Manual § 9-28.300 [updated November 2018].
[10] *See* Justice Manual §§ 9-28.300 [updated November 2018], 9-28.700 [updated November 2018], 9-28.800 [updated November 2018], 9-28.900 [new November 2015] and 9-28.1000 [renumbered November 2015].

misconduct by implementing a robust compliance program."[11] The more we do to recognize efforts to institute, strengthen, and improve compliance programs—consistent with Department policy and the Sentencing Guidelines—the stronger a company's incentives are to invest in compliance in the first place, and to incentivize others to do the same.

## III. The Antitrust Division's New Approach to Crediting Compliance at the Charging Stage

We can begin recognizing and rewarding these compliance efforts as early as the charging stage. As many of you know, the Division has had a longstanding policy "that credit should not be given at the charging stage for a compliance program and that [leniency] is available only to the first corporation to make full disclosure to the government" in the prosecution of an antitrust crime.[12] The Justice Manual further recognized that "the nature of some crimes, e.g., antitrust violations, may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program."[13]

It is important, however, that the Division's practices and policies evolve to ensure we have the right framework for maximizing deterrence and detection. We recognize the progress that has been made over the years in antitrust awareness and increased compliance and want to encourage companies to further invest in compliance efforts.

I am pleased to announce that the Justice Manual has been updated to reflect the Division's new approach to compliance. At our request, the Justice Manual's editors have

[11] Rod J. Rosenstein, Deputy Att'y Gen, U.S. Dep't of Justice, Keynote Address on FCPA Enforcement Developments (Mar. 7, 2019), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-keynote-address-fcpa-enforcement.
[12] Justice Manual § 9-28.400 [new August 2008].
[13] Justice Manual § 9-28.800 [revised November 2015].

deleted language from Sections 9-28.400 and 9-28.800 stating that the Antitrust Division would not give credit at the charging stage for a compliance program.

These revisions to the Justice Manual will be posted to the Department's website by tomorrow.

Going forward, when deciding how to resolve criminal charges against a corporation, Division prosecutors must consider the Division's Corporate Leniency Policy, the Principles of Federal Prosecution and the Principles of Federal Prosecutions of Business Organizations, including "the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of the charging decision."[14]

The Antitrust Division Manual has also been updated to direct Division prosecutors to evaluate all the Factors including pre-existing compliance programs in every corporate charging recommendation. [15] In line with the Justice Manual guidance, the Division has no checklist or formulaic requirements for evaluating the effectiveness of corporate compliance programs. Rather prosecutors are to consider three "fundamental" questions in their evaluation: "[1] Is the corporation's compliance program well designed? [2] Is the program being applied earnestly and in good faith? [3] Does the corporation's compliance program work?"[16] They are also to consider the relevant antitrust-specific compliance questions detailed in the Division's new public guidance document.

I will return to this document a bit later in my remarks.

This change in the Division's approach is a recognition that even a good corporate citizen with a comprehensive compliance program may nevertheless find itself implicated in a cartel

[14] Justice Manual § 9-28.300. [updated November 2018].
[15] U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL (Updated July 2019), https://www.justice.gov/atr/division-manual [hereinafter ANTITRUST DIVISION MANUAL].
[16] Justice Manual § 9-28.800 [revised November 2015].

investigation. Precisely how much weight and credit to give a compliance program will depend on the facts of the case.

The Division's new approach allows prosecutors to proceed by way of a deferred prosecution agreement (DPA) when the relevant Factors, including the adequacy and effectiveness of the corporation's compliance program, weigh in favor of doing so. DPAs, as the Justice Manual recognizes, "occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation."[17]

We will, however, continue to *disfavor* non-prosecution agreements (NPAs) with companies that do not receive leniency because complete protection from prosecution for antitrust crimes is available *only* to the first company to self-report and meet the Corporate Leniency Policy's requirements.

I should take a moment to emphasize that a compliance program does not guarantee a DPA. As the Justice Manual points out "the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal misconduct undertaken by its officers, directors, employees, or agents."[18] Instead, Department prosecutors are directed to conduct a fact-specific inquiry into "whether the program [at issue] is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees."[19] In making a charging recommendation, Antitrust Division prosecutors will evaluate the compliance program's effectiveness or lack thereof, and holistically, consider it together with all the other relevant Factors.

[17] Justice Manual § 9-28.200 [revised November 2015].
[18] Justice Manual § 9-28.800 [revised November 2015].
[19] Justice Manual § 9-28.800 [revised November 2015].

I also want to underscore the importance of the Division's Corporate Leniency Policy.[20] Leniency has been an integral part of the Antitrust Division's criminal enforcement program for over 25 years, and will continue to be the ultimate credit for an effective compliance program that detects antitrust crimes and allows prompt self-reporting. The key benefits of leniency are well known: immunity from criminal charges and penalties for the company, non-prosecution protections for its covered cooperating employees and the detrebling and other benefits available under the Antitrust Criminal Penalty Enhancement & Reform Act (ACPERA).[21]

Nothing about today's compliance announcement changes the Antitrust Division's commitment to leniency, which remains "available only to the first corporation to make full disclosure to the government."[22]

## IV. Crediting Compliance at the Sentencing Stage

I will turn now to compliance considerations at the sentencing stage and briefly discuss the Antitrust Division's practice as it relates to various Sentencing Guidelines provisions that may implicate compliance.

Antitrust compliance could be relevant to a corporation's sentencing in at least three ways.

First, the Sentencing Guidelines provide for a three-point reduction in a corporate defendant's culpability score if the company has an "effective" compliance program under the Guidelines.[23]

[20] *See Leniency Program,* ANTITRUST DIV., U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/leniency-program.
[21] *See* Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, tit. II, 118 Stat. 661 (codified as amended in scattered sections of 15 U.S.C.).
[22] Justice Manual § 9-28.400.
[23] U.S.S.G. § 8C2.5(f).

Second, a compliance program may be relevant to determining the appropriate corporate fine to recommend within the Guidelines range, or in extraordinary circumstances, whether to recommend a fine below the Guidelines range.[24]

Third, the existence and effectiveness of a compliance program is relevant to the Division's probation recommendation.[25]

The Division has yet to recommend credit for a defendant's "pre-existing" antitrust compliance program under the Guidelines' three-point reduction provision. Delay in reporting and the involvement of "high-level" or "substantial authority" personnel, as defined by the Guidelines, often weigh against application of this provision. The Division has, however, credited a company's extraordinary "prospective" compliance efforts in certain cases,[26] and advocated for a reduction in the corporate fine to recognize efforts to prevent recurrence by "chang[ing] its corporate culture and instill[ing] a new attitude toward compliance and good corporate citizenship."[27]

A company without an effective compliance program may also face probation under the Sentencing Guidelines.[28] Typically, the Division will not seek probation for pleading corporations except in limited circumstances, such as when a company has not accepted responsibility or has received a "penalty plus" fine adjustment for failing to report other cartel conduct at the time of a prior plea.[29] We may also seek probation when a company has been

[24] U.S.S.G. § 8C2.8; 18 U.S.C. § 3572.
[25] U.S.S.G. § 8D1.1.
[26] *See, e.g., United States v. Kayaba Indus. Co.,* 1:15-CR-00098 (S.D. Ohio 2015); *United States v. Barclays PLC*, 3:15-cr-00077 (D. Conn. 2015), and *United States v. Inoac Corp.,* 2:15-cr-00052 (E.D. Ky. 2017).
[27] United States' Sentencing Memorandum and Motion for Departure at 10, *United States v. Barclays PLC*, 3:15-cr-00077 (D. Conn. Dec. 1, 2016)
[28] U.S.S.G. §8D1.1
[29] *See, e.g., United States v. Hitachi Auto. Sys.,* 1:16-cr-00078 (S.D. Ohio 2017), and *United States v. Bridgestone Corp.,* 3:14-cr-00068 (N.D. Ohio 2015).

convicted after trial, if the company still does not accept responsibility and declines to take measures to implement or improve its antitrust compliance program.[30]

Consistent with Department Guidelines and our past practice, our prosecutors are more likely to recommend an external monitor in egregious cases where: (1) the company refuses to improve its corporate culture to encourage compliance with the law; (2) it refuses to implement an adequate antitrust compliance program or it employs a grossly inadequate compliance program after the antitrust violation; or (3) it has engaged in recurrent antitrust violations.

Going forward, the Antitrust Division Manual, which is publicly available, will provide additional clarity on how we consider compliance programs at sentencing including our approach to recommending probation and guidance for selecting monitors. The revisions to the Antitrust Division Manual will also make clear that our prosecutors evaluate programs on a case-by-case basis and will consider the new antitrust compliance guidance in doing so.

## V. New Public Guidance Document on Antitrust-Specific Compliance Considerations

Speaking of this new guidance document, let me take a minute to discuss our motivations for drafting and publishing this document and provide a preview of its content.

Last fall, we had the opportunity to celebrate the 25th anniversary of our leniency program with many current and former Division prosecutors. Earlier this year we dedicated an auditorium and lecture hall to Anne K. Bingaman, the former Assistant Attorney General who approved and oversaw the implementation of the Leniency Program in 1993—a significant change at the time that was made to propel our enforcement efforts forward (and one, we could say, that raised a few eyebrows in its day).

[30] *See, e.g., United States v. AU Optronics Corp.*, 3:09-cr-09-0110 (N.D. Cal. 2012).

Both celebrations served not only as moments to reflect on the past 25 years, but also as a time to consider the next 25 years.

As we think about the future of our criminal program, it is important for us to consider areas where we can make changes to further strengthen and enhance our enforcement efforts. That's why, for example, we have hosted a number of roundtables where we have heard from all sides of various issues we face today.

In that spirit, one of the points that was re-emphasized for me at last year's compliance roundtable was a desire for greater clarity and transparency on the considerations weighed by the Antitrust Division when evaluating compliance programs. The consensus in-house counsel view appeared to be that clear written guidance from the Division could be a useful tool in lobbying internally for increased antitrust compliance resources.

We heard you. For the first time in the criminal program's history, we are issuing public written guidance intended to assist Division prosecutors in their evaluation of compliance programs at the charging and sentencing stages of investigations.[31] This guidance document draws on the experiences of Division staff and leadership with antitrust compliance programs as well as other resources within the Department including the Justice Manual, and the Criminal Division's Guidance Document on the Evaluation of Corporate Compliance Programs.[32] It also draws on the United States Sentencing Guidelines' evaluation of effective compliance programs.

The document has two main sections: one on compliance considerations at the charging stage, and another focused on sentencing considerations.

[31] U.S. DEP'T OF JUSTICE, ANTITRUST DIV., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS IN CRIMINAL ANTITRUST INVESTIGATIONS (Jul. 2019), https://www.justice.gov/atr/page/file/1181891/download.
[32] U.S. DEP'T OF JUSTICE, CRIMINAL DIV., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS (updated Apr. 2019), https://www.justice.gov/criminal-fraud/page/file/937501/download.

Like the Criminal Division's guidance, the charging section is framed around the three fundamental compliance questions in the Justice Manual that I mentioned earlier. Is the program well designed? Is it being applied earnestly and in good faith? Does it actually work?

The guidance elaborates on these questions by identifying elements of an effective antitrust compliance program including: (1) the design and comprehensiveness of the program; (2) the culture of compliance within the company; (3) responsibility for, and resources dedicated to, antitrust compliance; (4) antitrust risk assessment techniques; (5) compliance training and communication to employees; (6) monitoring and auditing techniques, including continued review, evaluation, and revision of the antitrust compliance program; (7) reporting mechanisms; (8) compliance incentives and discipline; and (9) remediation methods. For each of these elements, it also provides additional questions prosecutors may consider depending on the facts that go to the effectiveness of the antitrust compliance program in deterring and detecting criminal antitrust conduct.

Recognizing that this is a lengthy list, the guidance emphasizes that these elements and questions are not a checklist or formula, and not all of them will be relevant in every case. With that in mind, Division prosecutors should ask three preliminary questions at the outset to help focus their analysis. First question: does the company's compliance program address and prohibit criminal antitrust violations? Second, did the antitrust compliance program detect and facilitate prompt reporting of the violation? Third, to what extent was a company's senior management involved in the violation?

Turning to the sentencing section; here the guidance document details the Division's approach to compliance considerations pursuant to the U.S. Sentencing Guidelines and 18 U.S.C. § 3572. A subsection on sentencing reductions for an "effective" compliance program provides

prosecutors guidance on a case-by-case assessment of the Guidelines' rebuttable presumption that a compliance program is not effective when certain "high level personnel" or "substantial authority personnel" "participated in, condoned, or [were] willfully ignorant of the offense."[33] Other subsections provide guidance on the Division's approach to recommending probation, periodic compliance reports as a condition of probation, or an external monitor to ensure implementation of an effective compliance program and timely reports.

I hope and encourage you to review this guidance document which will be available on the Division's website.

## VI. Conclusion

We at the Antitrust Division remain committed to continuously evaluating all of our practices as we have done over the past year to see if we can improve them. I hope my remarks today will incentivize more companies to make antitrust compliance a top priority. I and the rest of the Division's leadership look forward to engaging more on this important issue in the months to come—for now, thank you for your time and I hope you enjoy the rest of this evening's program.

[33] *See* U.S.S.G. § 8C2.5(f)(3)(A)-(C).