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Robust Compliance Programs May Provide Significant New Benefits to Companies Facing Criminal Antitrust Exposure

In a recent [speech](#), Makan Delrahim, Assistant Attorney General for the Antitrust Division of the United States Department of Justice, discussed the Division's ongoing evaluation of whether and how corporate antitrust compliance programs should be taken into account in the Division's criminal antitrust enforcement decisions. Mr. Delrahim indicated that, unlike in the past, the Antitrust Division may give credit to a company for having a "robust" corporate antitrust compliance program even if that program did not prevent an antitrust violation, though he did not specify what sort of credit may be given.

Historically, when making prosecutorial decisions, the Antitrust Division has not explicitly rewarded companies with strong compliance programs at the time of a criminal violation – the violation was taken as proof that the program was inadequate. Generally, in order for the Antitrust Division to agree to mitigate a company's criminal antitrust exposure, a company has to qualify for the Division's leniency program (which would result in a company not being criminally charged) or at least engage in early and significant cooperation in the government's investigation (which may result in a penalty reduction). As such, the Division historically has only given credit for existing compliance programs indirectly (because strong compliance gives companies an enhanced chance at leniency or early-in cooperation). Certain companies have also received credit by reforming their corporate culture and demonstrating a commitment to "extraordinary prospective compliance" following a criminal investigation. Again, however, existing compliance programs have not received credit from the Antitrust Division.

Last year, the Antitrust Division hosted a roundtable on compliance and is now considering changes to its approach to crediting companies for having existing compliance programs. This would bring the Antitrust Division more in line with the rest of Department of Justice. On May 10, Mr. Delrahim said that in light of its recognition "that there are companies taking proactive steps and currently making significant investments in their compliance programs," "the Division will move away from its previous refrain that leniency is the *only* potential reward for companies with an effective and robust compliance program. In line with the Department of Justice and its other components, we can and must do more to reward and incentivize good corporate citizenship."

This pronouncement from the Antitrust Division – which comes shortly after the release of updated [guidance](#) from the Criminal Division regarding how that division evaluates the effectiveness of compliance programs – highlights the importance of antitrust compliance. The potential value of a strong antitrust compliance program – beyond its inherent good-governance value – has been increased, perhaps very

much, and it behooves companies to revisit their compliance programs to ensure that they are “effective and robust,” thoughtfully designed, up-to-date and diligently implemented.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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