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DOJ ANTITRUST DIVISION WILL NOW CONSIDER DPAS FOR COMPANIES DEMONSTRATING "GOOD CORPORATE CITIZENSHIP"

To Our Clients and Friends:

The DOJ Antitrust Division recently announced that it will allow prosecutors to resolve criminal antitrust investigations with deferred prosecution agreements ("DPAs") for qualified corporate defendants. Under the Division's prior policies, the first company or individual to self-report an antitrust violation could qualify for leniency, but the Division required others involved in the conspiracy to plead guilty or face indictment. The Division's new policy allows for DPAs to be offered when a company has demonstrated the four hallmarks of "good corporate citizenship": (i) having an effective compliance program, (ii) self-reporting wrongdoing, (iii) cooperating with government investigations, and (iv) remedying past misconduct.

In announcing the new policy, Assistant Attorney General Makan Delrahim focused extensively on one aspect of corporate citizenship—corporate compliance programs and their importance in determining whether a company would qualify for a DPA. In conjunction with the new policy, the Antitrust Division also published guidance describing how it will evaluate corporate antitrust compliance programs and how that evaluation will affect charging decisions (including the possibility of a DPA) and sentencing recommendations (such as whether to seek probation or a corporate monitor). This new policy further adds incentives for companies to implement a well-designed, effective antitrust compliance program to detect—and ideally prevent—criminal antirust conduct within an organization.

The New Policy

As part of every corporate charging decision, the Division will now be required to evaluate ten factors outlined in the Principles of Federal Prosecution of Business Organizations (the so-called Filip Factors listed in the Justice Manual at § 9-28.300) in determining whether to charge a corporate defendant, including whether the company has a robust and effective compliance program. Based on an evaluation of those factors, prosecutors will be allowed to offer DPAs, under which the Division brings charges but agrees not to proceed with prosecution in exchange for the company's payment of a monetary penalty and commitment to abide by certain requirements or conditions.

In evaluating a company's compliance program, the Division will initially consider whether it prohibited criminal antitrust violations, whether it detected and facilitated prompt reporting of the violation, and to what extent the company's senior management was involved in the violation. Prosecutors will then

evaluate the effectiveness of the compliance program by examining nine factors: (1) design and comprehensiveness; (2) culture of compliance; (3) responsibility for the compliance program; (4) risk assessment; (5) training and communication; (6) periodic review, monitoring, and auditing; (7) reporting; (8) incentives and discipline; and (9) remediation and role of the compliance program in the discovery of the violation.

If the Division decides to prosecute a company, its compliance program can still be credited at the sentencing stage. An effective compliance program may, for example, result in a three-point reduction of the culpability score in calculating the recommended sentence under the Guidelines (potentially reducing the company's fine by millions of dollars), persuade the Division to recommend a corporate fine below the Guidelines range (provided that the defendant provided substantial assistance), or allow the company to avoid probation and a costly corporate monitorship.

Significance

Availability of DPAs in Criminal Antitrust Investigations. This announcement represents a shift from the Division's longstanding policy of not offering credit for a compliance program at the charging stage and disfavoring DPAs except in extraordinary cases where criminal prosecution would have jeopardized the defendant's eligibility to conduct business (*see, e.g.*, financial institutions in the LIBOR case or pharmaceutical manufacturers in the generic drugs investigations). The new policy appears to bring the Antitrust Division's practice regarding DPAs closer to the Criminal Division's and may create new options for companies that are not first-in-line leniency applicants.

Elements of Effective Compliance Program. The Division's new guidance recognizes that "no compliance program can ever prevent all criminal activity" and lists nine factors that prosecutors will consider when evaluating the effectiveness of an antitrust compliance program, suggesting that the Division will not view an antitrust violation as an inherent failure of a compliance program. Because this is a significant change from past policy and practice, it remains to be seen whether and how much the Division will credit a compliance program that satisfies many of the nine factors but ultimately fails to prevent or detect a violation. What is clear is that the Division is now placing a premium on the design and implementation of compliance programs such that companies should review their existing antitrust compliance programs and ensure they are consistent with the Division's new guidance.

A copy of the Assistant Attorney General's remarks can be found at: https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0

A copy of the Division's guidance about corporate compliance programs can be found at: https://www.justice.gov/atr/page/file/1182001/download

Gibson Dunn's 2018 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements can be found at: https://www.gibsondunn.com/2018-year-end-npa-dpa-update/

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Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the authors, the Gibson Dunn lawyer with whom you usually work, or any of the leaders and members of the firm's Antitrust and Competition or White Collar Defense and Investigations practice groups:

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