Meaningful Cooperation Requires More than a Promise: DOJ Clarifies Its Expectations for Antitrust Corporate Leniency

October 6, 2014

Although the United States Department of Justice’s “corporate leniency” and “amnesty plus” programs offer some protection from the Antitrust Division’s increased enforcement activity, the DOJ recently clarified that to benefit under either program, the level of cooperation required is far more than a quick phone call and a promise to cooperate. Assistant Attorney General Bill Baer’s recent remarks highlight the need for companies that identify potential criminal antitrust violations to quickly devise and effectively implement response strategies, or risk losing the benefits of cooperation.

On September 10, 2014, speaking to the Georgetown University Law Center Global Antitrust Symposium, Baer stated that the DOJ expects all corporate leniency applicants to provide complete and meaningful cooperation throughout the DOJ’s investigation and any resulting prosecutions. According to Baer, such cooperation includes conducting a thorough internal investigation, providing the DOJ detailed proffers of the reported conduct, producing both domestic and foreign-located documents, preparing translations, and making witnesses available for interviews.

Baer also explained that the DOJ expects leniency applicants to make serious, institutional commitments to changing corporate culture to avoid recidivism. This requires companies to implement effective compliance programs—strongly supported by the board of directors and senior management—that include adopting an antitrust policy, training employees with pricing responsibility on antitrust issues, and establishing punishments for failure to comply. Baer also expressed the DOJ’s expectation that cooperating companies will remove culpable employees from positions with substantial authority, including from any position with supervision over compliance programs or as the superior of potentially hostile witnesses in a criminal trial.

Baer’s comments expanded on those of Deputy Assistant Attorney General Brett Snyder, who discussed effective compliance programs at the International Chamber of Commerce’s Joint Antitrust Compliance Workshop on September 9, 2014, stating that compliance programs should include an anonymous reporting mechanism, auditing of risky activity and regular review of the effectiveness of the program. As highlighted by Baer, the DOJ will significantly increase fines if a company fails to implement an effective compliance program and is later found to have committed additional antitrust violations. The DOJ recently increased one company’s fine by more than a $100 million for failing to uncover its role in one price-fixing conspiracy after pleading guilty for its role in another.

Companies that identify a potential antitrust conspiracy—whether through internal compliance programs or after receiving a criminal investigative subpoena from the DOJ—must be prepared to move quickly. The obligations for conditional leniency are often met by companies who invest the necessary resources within the first few months of discovering a potential problem. Even if a company is not the first to report a violation, it still may receive a discount on any fine by providing substantial assistance and meaningful cooperation. Delaying a response, however, likely makes cooperation less valuable and diminishes the company’s chance of receiving the full benefit of reduced penalties under the leniency program.

Should your organization need assistance in developing an antitrust compliance program, conducting compliance training, or responding to notice of a potential antitrust violation, please contact one of the attorneys listed on the left.

Attorneys
Jonathan S. Feld
Howard B. Iwrey
Cale A. Johnson
Meaningful Cooperation Requires More than a Promise: DOJ Clarifies Its Expectations for Antitrust Corporate Leniency (Cont.)

Cody D. Rockey
Dante A. Stella

Practice Areas
Antitrust & Trade Regulation

As part of our service to you, we regularly compile short reports on new and interesting developments and the issues the developments raise. Please recognize that these reports do not constitute legal advice and that we do not attempt to cover all such developments. Rules of certain state supreme courts may consider this advertising and require us to advise you of such designation. Your comments are always welcome. © 2020 Dykema Gossett PLLC.