"THE HEART OF THE BUSINESS": AN ANALYSIS OF THE ANTITRUST DIVISION'S NEW POLICY OF CREDITING CORPORATE COMPLIANCE AT THE CHARGING STAGE

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INTRODUCTION

Throughout its history, when prosecuting corporations for criminal antitrust violations,[1] the U.S. Department of Justice's Antitrust Division did not credit a corporation's demonstrated commitment to compliance at the charging stage.[2] The Division also disfavored the use of deferred prosecution agreements and non-prosecution agreements.[3] In July 2019, however, Assistant Attorney General Makan Delrahim announced a change to this approach under which the Division would begin taking a wider range of "Special Factors" into account before prosecuting a corporation.[4] If these

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1. There are many federal antitrust statutes, but only Sections 1, 2, and 3 of the Sherman Act, 15 U.S.C. §§ 1–3, Section 3 of the Robinson-Patman Act, 15 U.S.C. § 13a, Section 14 of the Clayton Act, 15 U.S.C. § 24, and Section 14 of the Federal Trade Commission Act, 15 U.S.C. § 54, contain criminal penalties. Antitrust laws are enforced by the Antitrust Division, the Federal Trade Commission, state attorneys general, and private entities. However, only the Antitrust Division can seek criminal sanctions. *See* E. THOMAS SULLIVAN, HERBERT HOVENKAMP, HOWARD A. SHELANSKI & CHRISTOPHER R. LESLIE, ANTITRUST LAW, POLICY, AND PROCEDURE 63 (8th ed. 2019). The Division only seeks criminal indictments to redress clearly intentional, or per se illegal, violations, such as price-fixing, bid-rigging, and market allocation. *See* ANTITRUST DIV., U.S. DEP'T OF JUST., ANTITRUST DIVISION MANUAL III-12 (Mar. 2012) [hereinafter DIVISION MANUAL].

2. *See* Press Release, U.S. Dep't of Just., Antitrust Division Announces New Policy To Incentivize Corporate Compliance (July 11, 2019), https://www.justice.gov/opa/pr/antitrust-division-announces-new-policy-incentivize-corporate-compliance (announcing that the Antitrust Division would consider compliance at charging "[f]or the first time" in criminal investigations); William Kolasky, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Address at the Corporate Compliance 2002 Conference: Antitrust Compliance Programs: The Government Perspective 14 (July 12, 2002), https://www.justice.gov/atr/file/519776/ (explaining that the Division policy is that "once a violation occurs, a compliance program can do little, if anything, to persuade the Division not to prosecute").

3. Robert E. Connolly & Eliot T. Burriss, *Antitrust Update*, DLA PIPER (Apr. 24, 2013), https://www.dlapiper.com/en/us/insights/publications/2013/04/the-antitrust-division-speaks-trends-in-criminal__/. Deferred prosecution agreements are negotiated agreements between prosecutors and defendants which require defendants to take certain steps in exchange for a prosecution's deferral. Charges are filed with the court, and fulfillment of their terms results in the charges being dismissed. *See* BRANDON GARRETT, TOO BIG TO JAIL 55–56 (2014). Non-prosecution agreements require no court filings where a firm complies with the agreement. *Id.* at 76.

4. Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Remarks at the New York University School Law Program on Corporate Compliance and

factors, including the corporation's effective compliance department, weigh against bringing a full prosecution, then the Division can negotiate a deferred prosecution agreement with the corporation instead.[5]

This Comment argues that the Antitrust Division's new policy pursues a worthy end of incentivizing antitrust compliance, but its specific approach of crediting compliance at charging, could benefit from fuller explication and limited usage. Part I outlines the Division's old approach, which functionally constituted a per se rule that compliance departments that permitted antitrust violations, with few exceptions, were ineffective. Part II reviews the Division's new policy and possible application in cases to date. Part III raises remaining questions regarding the new policy's rationales and practical effect, concluding that it may result in little change and could lead to the Division's underenforcement of criminal antitrust laws.

I. ANTITRUST DIVISION'S OLD APPROACH: DISREGARDING "FILIP FACTORS"

In 2003, the U.S. Department of Justice's ("DOJ") leadership created ten Special Factors, now known as the "Filip Factors," for prosecutors to weigh before criminally charging corporations.[6] One factor was "the adequacy and effectiveness of [a] corporation's compliance program at the time of the offense, as well as at the time of a charging decision."[7] These "Filip Factors," when taken alongside all the factual circumstances, could make it "[inappropriate] to impose liability [on] a corporation . . . with a robust compliance program in place . . . for the single isolated act of a rogue employee."[8] In such cases, prosecutors could instead negotiate deferred prosecution agreements ("DPAs") and non-prosecution agreements ("NPAs"), the "important middle ground between declining prosecution and obtaining the conviction of a corporation."[9] The DOJ's introduction of "Filip Factors" caused a sharp increase in DPAs and NPAs,[10] particularly

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Enforcement 7 (July 11, 2019), https://www.justice.gov/opa/speech/file/1182006/. These factors are known as "Filip Factors." *See infra* note 6.

5. Delrahim, *supra* note 4, at 8.

6. These factors broadly evaluate the seriousness of a firm's offense, its pre-indictment conduct, and possible harms of its prosecution to innocent stakeholders. *See* GARRETT, *supra* note 3, at 56. These revisions were partially spurred by the controversial 2002 "death penalty" issued to Arthur Andersen, and prosecutors' desire to incentivize more corporations to establish compliance departments. *Id.* at 44. For a complete explanation of "Filip Factors" terminology, *see* Michael Volkov, *DOJ's "Filip" Factors and Corporate Prosecutions*, VOLKOV L. BLOG (July 9, 2017), https://blog.volkovlaw.com/2017/07/dojs-filip-factors-corporate-prosecutions/.

7. U.S. Dep't of Just., U.S. Just. Manual, §9-28.300 (2020) [hereinafter *Justice Manual*].

8. *Id.* § 9-28.500 (2008).

9. *Id.* § 9-28.200 (2020).

10. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-110, CORPORATE CRIME: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 14 (2009), https://www.gao.gov/assets/300/299781.pdf (displaying the increase in DPAs and NPAs).

for fraud and FCPA violations.[11] Demonstrated compliance commitments became significant factors in many DOJ decisions to negotiate these agreements.[12]

However, before 2019, the Antitrust Division—as compared to other DOJ components—refused to consider all ten "Filip Factors" at charging,[13] including those related to compliance, and rarely negotiated DPAs or NPAs.[14] This refusal to credit compliance at charging emanated from three core presumptions. First, the Division reasoned that antitrust violations "by definition, go to the heart of a corporation's business,"[15] unlike many other corporate crimes. Because antitrust violations involve central facets of a business's operations, such as prices and output, the Division presumed that the acts implicated a corporation's entire culture,[16] and constituted

11. *2019 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements*, GIBSON DUNN (Jan. 8, 2020), https://www.gibsondunn.com/wp-content/uploads/2020/01/2019-year-end-npa-dpa-update.pdf (displaying the high level of fraud cases). *See also* Heather Tewksbury, Ryan D. Tansey & Alicia Berenyi, *Promoting Antitrust Compliance: The Antitrust Division's Subtle Shift Regarding Corporate Compliance: A Step Toward Incentivizing More Robust Antitrust Compliance Efforts*, 24 COMPETITION: J. ANTITRUST, UCL & PRIVACY SEC. CAL. L. ASS'N 157, 165 (Oct. 28, 2015) ("The Criminal Division, the unit [responsible] for FCPA enforcement, has routinely utilized DPAs and NPAs as a tool in FCPA enforcement."). DOJ's utilization of these agreements attracts strong praise and criticism. *Compare, e.g.*, Jennifer Arlen, *Corporate Criminal Liability: Theory and Evidence*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW 144, 146 (Alon Harel & Keith N. Hylton eds., 2012) (arguing that DOJ's approach is required to come closer to optimal deterrence levels), *with* GARRETT, *supra* note 3, at 286 (suggesting that DPAs and NPAs cause DOJ prosecutors to settle for insufficient fines and superficial compliance). *See also* Richard Epstein, *The Deferred Prosecution Racket*, WALL ST. J. (Nov. 28, 2006, 12:01 AM), https://www.wsj.com/articles/SB116468395737834160 (arguing that DPAs "read like the confessions of a Stalinist purge trial").

12. *See e.g.*, CRIM. DIV., U.S. DEP'T OF JUST. & ENF'T DIV., U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 57 (2020) ("DOJ … may decline to pursue charges against a company based on [its] effective compliance program . . . . "); Press Release, U.S. Dep't. of Just., Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (Apr. 25, 2012), https://www.justice.gov/opa/pr/former-morgan-stanley-managing-director-pleads-guilty-role-evading-internal-controls-required (crediting Morgan Stanley's strong compliance program as part of the decision not to prosecute the firm).

13. Delrahim, *supra* note 4, at 7.

14. The Division issued DPAs and NPAs on a handful of occasions before this policy's implementation. *See, e,g.*, Press Release, U.S. Dep't of Just., UBS AG Admits to Anticompetitive Conduct by Former Employees in the Municipal Bond Investments Market and Agrees to Pay $160 Million to Federal and State Agencies (May 4, 2011), https://www.justice.gov/opa/pr/ubs-ag-admits-anticompetitive-conduct-former-employees-municipal-bond-investments-market-and.

15. *Justice Manual*, *supra* note 7, at § 9-28.400.

16. *See generally* Brent Snyder, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Remarks as Prepared for the International Chamber of Commerce/United States Council of International Business Joint Antitrust Compliance Workshop: Compliance is a Culture, Not Just A Policy 1–2 (Sept. 9, 2014), https://www.justice.gov/atr/file/517796/download (describing how a well-run corporate

corporate acts involving employees acting in the scope of their employment to advance the firm's interests.[17]

Second, the Division reasoned that antitrust violations are, in practice, always performed by high-level employees, and any compliance program run by such employees is inherently unsuccessful.[18] The U.S. Sentencing Guidelines support this conclusion, laying out a rebuttable presumption that a compliance program is ineffective if "[s]ubstantial authority personnel," such as "individual[s] with [the] authority in an organization to negotiate or set price levels,"[19] "participated in, condoned, or [were] willfully ignorant of the offense."[20] This definition includes almost all conceivable antitrust defendants; a price-fixing scheme that was not condoned by *any* individual with price-setting authority would be a remarkable one.

The Division's third rationale was that it already credited compliance at charging through its Corporate Leniency Program.[21] Leniency grants immunity from subsequent criminal prosecutions to corporations that are first to report a criminal antitrust conspiracy in their industry, regardless of whether or not a Division investigation is under way.[22] Leniency represents one method of turning cartel members into witnesses, which is frequently necessary to detect anticompetitive conduct and gather evidence.[23] The program's successes are evident: following its expansion, the Division

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compliance department prevents antitrust violations from occurring or quickly detects them).

17. *Id.* at 7–8.

18. Division employees describe "lone rogue employees" that institute price-fixing schemes as "like Bigfoot–often talked about but never actually seen." *See* Robert Connolly, *Some Highlights from the ABA Antitrust Spring Meeting*, CARTEL CAPERS (Apr. 20, 2015) http://cartelcapers.com/blog/some-highlights-from-the-aba-antitrust-spring-meeting/.

19. U.S. SENT'G GUIDELINES MANUAL § 8A1.2 cmt. n.3 (U.S. SENT'G COMM'N 2005).

20. *Id.* § 8C2.5(f)(3)(B).

21. *See* Snyder, *supra* note 16, at 2.

22. Reporting a conspiracy before a Division investigation begins qualifies a firm for "Type A" leniency. The firm must also cease participation in illegal activity, cooperate with Division investigators, confess guilt, provide restitution, and show that they did not coerce other firms into joining the conspiracy. U.S. DEP'T OF JUST., ANTITRUST DIV., CORPORATE LENIENCY POLICY (Aug. 10, 1993), https://www.justice.gov/sites/default/files/atr/legacy/2007/08/14/0091.pdf. The Division first instituted "Type A" leniency in 1978 but used it sparingly for some time. In 1993, the Division created "Type B" leniency, which allowed a corporation to receive leniency after an investigation began, but only if it met the requirements of "Type A" leniency and the Division lacked evidence to prosecute. *See* Scott Hammond, Dir. of Crim. Enf't, Antitrust Div., U.S. Dep't of Just., Address at the International Workshop on Cartels: Detecting and Deterring Cartel Activity Through an Effective Leniency Program 2 (Nov. 21–22, 2000), https://www.justice.gov/atr/file/518521/download. These changes increased the number of corporate leniency applicants by more than twenty-fold in the following years. *See* Gary R. Spratling, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Address at the Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust: Making Companies an Offer They Shouldn't Refuse: The Antitrust Division's Corporate Leniency Policy (Feb. 16, 1999), https://www.justice.gov/atr/file/518611/download.

23. *See* Hammond, *supra* note 22, at 1 (describing how the Leniency Program is "the single greatest investigative tool available" to antitrust enforcers).

collected the same number of fines in one year as it had in the prior two decades.[24] Leniency receives high praise,[25] and its success generated a host of similar international programs.[26] Yet the program is controversial in some circles,[27] and may be showing cracks in its structure.[28] Whatever leniency's strengths or weaknesses, the Division's desire to keep its incentive to report first strong—being second to report, even by a matter of hours, makes a corporation as open to prosecution as being last[29]—pushed it to the conclusion that a successful antitrust compliance department would detect violations fast enough to report first and receive the program's benefits.[30]

Read in tandem, the Division's three precepts—antitrust violations go to the "heart of the business"; they involve high-level personnel; and effective compliance prevents violations, or discovers them fast enough for leniency—functionally established a per se rule: If a corporation violates

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24. Spratling, *supra* note 22.

25. *See* Scott D. Hammond, Deputy Assistant Att'y Gen. for Crim. Enf't, Antitrust Div., U.S. Dep't of Just., Address at the OECD Competition Committee: Cracking Cartels with Leniency Programs 2 (Oct. 18, 2005), https://www.justice.gov/atr/file/517846/download (describing leniency as the Antitrust Division's "most effective investigative tool"); GARRETT, *supra* note 3, at 237 (describing leniency as "the clearest approach to corporate prosecutions that any group of prosecutors has devised").

26. *See, e.g.*, Scott D. Hammond, Deputy Assistant Att'y Gen. for Crim. Enf't, Antitrust Div., U.S. Dep't of Just., Address at the National Institute on White Collar Crime: The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades 3 (Feb. 25, 2010), https://www.justice.gov/atr/file/518241/download.

27. *See, e.g.*, D. Daniel Sokol, *Cartels, Corporate Compliance, and What Practitioners Really Think About Enforcement*, 78 ANTITRUST L.J. 201, 203 (2012) (arguing that leniency encourages "gam[ing]" by cartel members seeking to punish competitors).

28. As of 2014, over a third of investigations began without a leniency application. Bill Baer, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Remarks as Prepared for the Georgetown University Law Center Global Antitrust Enforcement Symposium: Prosecuting Antitrust Crimes 2 (Sept. 10, 2014), https://www.justice.gov/atr/file/517741/download. This number is down from ninety percent of antitrust penalties proceeding from a leniency application from 1997 to 2004. *See* Scott D. Hammond, Dir. of Crim. Enf't, Antitrust Div., U.S. Dep't of Just., Address at the ICN Workshop on Leniency Programs: Cornerstones of an Effective Leniency Program 1 (Nov. 22, 2004), https://www.justice.gov/atr/file/518156/download. *See also* Robert Connolly, *Some Theories on Why Antitrust Cartel Case Filings Are Down*, CARTEL CAPERS (Oct. 9, 2018), http://cartelcapers.com/blog/some-theories-on-why-antitrust-division-cartel-case-filings-are-down/ (suggesting that rhetoric from previous enforcers made it appear too difficult to attain leniency).

29. *See* Hammond *supra* note 28, at 5.

30. Additionally, corporations that reported too late to receive leniency could receive sentencing benefits by providing substantial assistance to an investigation, or obtain "amnesty-plus" by reporting on a separate cartel. *See* Scott D. Hammond, Deputy Assistant Att'y Gen. for Crim. Enf't, Antitrust Div., U.S. Dep't of Just., Address at the 54th Annual American Bar Association Section of Antitrust Law: Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations 1 (Mar. 29, 2006), https://www.justice.gov/atr/file/518436/download; DIVISION MANUAL, *supra* note 1, at III-102–03.

the antitrust laws, and does not report promptly enough for leniency, it has an ineffective compliance department and deserves no credit at charging.[31]

II. ANTITRUST DIVISION'S NEW APPROACH AND SOME POSSIBLE IMPLEMENTATIONS

Over time, the Division opened the door to greater compliance credits for defendant firms, but just "a crack."[32] In 2018, furthering the Trump administration's general emphasis on compliance,[33] the Division held a public roundtable with the defense bar, general counsels, and international enforcers on how they could better incentivize compliance.[34] These talks likely informed the Division's new policy, which Assistant Attorney General Delrahim announced in 2019: the Division would now evaluate whether to prosecute a corporation based on all ten "Filip Factors," including the corporation's pre-existing compliance commitments.[35] Corporations facing prosecution could win credit for their compliance by maintaining a robust program, promptly self-reporting, cooperating in the investigation, and taking immediate remedial action upon discovery of a violation.[36] These compliance credits, when weighed alongside a case's facts and the other relevant "Filip Factors," could result in the Division forgoing prosecution and negotiating a DPA.[37]

The Division also issued guidelines on how it would evaluate compliance going forward.[38] At the charging stage, the Division would now ask three questions about a corporation's compliance department: whether it "address[ed] and prohibit[ed]" criminal antitrust behavior; whether it

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31. At the sentencing stage, the Division grants benefits to corporations that expanded their compliance commitments post-violation. *See* Robert Connolly, *Brent Snyder Explains Antitrust Division Approach to Credit for Compliance Programs*, CARTEL CAPERS (Sept. 30, 2015), http://cartelcapers.com/blog/brent-snyder-explains-antitrust-division-approach-to-credit-for-compliance-programs/ (reporting that Division officials would not give "backward looking" credit for failed compliance, but would give credit to a company that takes "substantial steps" to improve compliance after a violation).

32. Connolly, *supra* note 31. *See also* Baer, *supra* note 28, at 7.

33. *See* Rod Rosenstein, Deputy Att'y Gen., U.S. Dep't of Just., 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.

34. Press Release, U.S. Dep't of Just., Department of Justice To Hold Roundtable on Criminal Antitrust Compliance (Mar. 12, 2018), https://www.justice.gov/opa/pr/department-justice-hold-roundtable-criminal-antitrust-compliance.

35. Delrahim, *supra* note 4, at 7.

36. *Id.* at 5.

37. *Id.* at 8. Delrahim cautioned that the Division would continue to disfavor NPAs, as full immunity remained only available to leniency recipients, and broadly reiterated the Department's commitment to leniency. *Id.* at 8–9.

38. U.S. DEP'T OF JUST., ANTITRUST DIV., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS IN CRIMINAL ANTITRUST INVESTIGATIONS 1 (2019) [hereinafter EVALUATION OF COMPLIANCE].

"detect[ed] and facilitate[d] prompt reporting of the violation [to the Division]"; and whether senior management was involved.[39] Prosecutors would also evaluate whether the department met nine detailed hallmarks of effective compliance.[40]

The Division has issued five DPAs since this policy's announcement, though it seems that pre-violation compliance credits were not a material factor in these agreements. From late 2019 to early 2020, the Division issued four DPAs to pharmaceutical firms involved in a generic-drug price-fixing cartel, all of which required the firms involved to expand compliance.[41] In 2020, the Division also issued a DPA to another healthcare firm—this time an oncology services provider that ran a market-allocation scheme.[42] However, none of these agreements mentioned compliance in the agreement's "relevant considerations," as they likely would if said credits were a significant factor in the DPA's issuance.[43] The "relevant considerations" section instead mentioned each firm's cooperation, and the harsh consequences that flow from convicting healthcare firms of antitrust violations.[44] As a result, it is likely that these factors contributed to the issuance of these agreements more than any firms' pre-existing compliance departments.[45]

III. ONGOING QUESTIONS

It remains unclear how often the Division will actually offer compliance credits at charging. The Division, as part of the new policy's implementation, deleted the language stating that it disfavored DPAs in the Justice Manual.[46] However, it retained core aspects of its previous policy.

39. *Id.* at 3.

40. *Id.* at 3–4.

41. *See, e.g.*, United States v. Sandoz Inc., No. 20-CR-111, 2020 WL 1972560, at *1–2, *10 (E.D. Pa. Mar. 2, 2020).

42. United States v. Florida Cancer Specialists & Rsch. Inst., LLC, No. 2:20-CR-78-FLM-60MRM, 2020 WL 2092778, at *1–2 (M.D. Fla. Apr. 30, 2020).

43. *Compare, e.g.*, *id.* at *4 (lacking any mention of compliance in "relevant considerations"), *with* United States v. Samsung Heavy Indus. Co., Case No. 1:19-CR-328, slip op. at 3–4 (E.D. Va. filed Nov. 22, 2019) (describing in "relevant considerations" how the corporation's compliance department, which quickly reported the violation and would be expanded, contributed to the issuance of this DOJ Fraud DPA).

44. *See, e.g.*, Sandoz, 2020 WL 1972560, at *2. *See also* 42 U.S.C. § 1320a-7 (excluding entities convicted of certain criminal offenses from any Federal health care program for at least five years).

45. This practice would fit with the Division's previous issuance of DPAs and NPAs to financial institutions, which also operate in a highly regulated industry. *See* Connolly & Burriss, *supra* note 3, at 3. The facts of these cases also tend to weigh against defendants' actually receiving compliance credits—awarding FCS credit for strong "pre-existing" compliance after its president and managing partner "knowingly entered into and participated in" an illegal scheme for over a decade would strain credulity. *See* United States v. William Harwin, No. 2:20-CR-115-FLM-66MRM, 2020 WL 6441233, at *2–4 (M.D. Fla. Sept. 23, 2020) (indicting FCS founder and president and his co-conspirators).

46. Delrahim, *supra* note 4, at 7–8.

The Division preserved the language in the Manual that antitrust violations go to "the heart of the corporation's business," making it "not necessarily [appropriate]" to consider pre-indictment conduct at charging.[47] The Sentencing Guidelines' presumption that compliance programs ignored by "substantial authority" officials are unsuccessful similarly remains intact.[48] And the Division prosecuted several firms—without any mention of compliance—after this policy's announcement.[49] More cases will make the application of the new policy clearer, as will the incoming Biden administration's choice to preserve, modify, or abandon it.

In addition, though the Division's new policy works towards the positive end of incentivizing antitrust compliance, its rationale for using compliance credits at charging in pursuing that goal remains vague. Creating strong compliance departments is a reasonable goal, particularly as antitrust compliance may lag relative to other practice areas.[50] The Division's policy change pursued several means to this end: issuing written guidance on how prosecutors will evaluate compliance, creating nine hallmarks of "effective" compliance, and offering more compliance credits at sentencing.[51] Following these steps, the Division's need to also institute compliance credits at charging to gain benefits becomes less clear. In particular, while compliance benefits at sentencing could generate similar benefits to charging credits,[52] they may not conflict with leniency to the same degree. Charging credits narrow the penalty gap between leniency applicants and other cartel members at that stage, and diminish the strong incentive to report first that this gap creates.[53] If applied carelessly, compliance credits at charging could push cartel members to continue illegal conduct and try to plead for a DPA when caught, rather than reporting quickly to qualify for leniency.[54] The Division could, at least, benefit from explaining why compliance credits are required at *both* charging and sentencing to achieve measurable compliance benefits.

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47. *Justice Manual*, *supra* note 7, at § 9-28.400.

48. U.S. SENT'G GUIDELINES MANUAL § 8C2.5(f)(3)(B) (U.S. SENT'G COMM'N 2004).

49. *See*, *e.g.*, United States v. Pilgrim's Pride Co., No. 20-cr-330-RM (D. Colo. filed Oct. 13, 2020). Given the length of antitrust investigations, it is possible that this policy's effects will remain unknown for several years.

50. *See* Heather Tewksbury et al., *supra* note 11, at 159.

51. *See* EVALUATION OF COMPLIANCE, *supra* note 38, at 3–4, 14.

52. *See* Heather Tewksbury et al., *supra* note 11, at 170, 172.

53. *See* JOHN C. COFFEE, JR., CORPORATE CRIME AND PUNISHMENT: THE CRISIS OF UNDERENFORCEMENT POLICY 58–59 (2020) (ebook) (describing how the Division's new policy will allow underdeterrence and weaken leniency); *but see* Richard Powers, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Remarks at the 13th International Cartel Workshop, A Matter of Trust: Enduring Leniency Lessons for the Future of Cartel Enforcement 5–6 (Feb. 19, 2020), https://www.justice.gov/atr/page/file/1250346/download (explaining that rates of leniency applicants remain "steady" since the announcement of this new policy).

54. Any issues with leniency, discussed *supra* in note 28, are not resolved or addressed by these changes.

CONCLUSION

Today's antitrust enforcers should be careful not to discount the valid reasons why the Division rejected a compliance credits at charging in the past. Antitrust enforcers recount many stories of violations committed by high-level officials ignoring formal compliance rules, or insulating themselves from knowledge.[55] Such examples led to the Division's rejection of similar policies as recently as 2014,[56] and in cases since, shocking malfeasance by high-level executives has persisted.[57] If the Division's prior reasoning was correct, and few valid compliance programs exist in practice, two endpoints for the new policy become likely: (1) so few violators exist which meet its requirements that the policy exists more "on paper" than in reality;[58] and (2) the policy is implemented in cases where it is unjustified, and allows knowing violators to receive lesser penalties. Neither endpoint represents a success. Here lies the difficulty in granting compliance credits to corporations that commit acts that antitrust laws deem per se illegal. These violations involve clearly proscribed conduct, core operational aspects, and penalties of immense, Cerberean proportions. Compliance departments that allow such unlawful acts—ones that go "to the heart of the business"—may not be "cosmetic," but it is difficult to say they are effective.[59]

55. *See, e.g.*, Kolasky, *supra* note 2, at 4–5 (discussing how many cartels are "cold blooded and bold" and operating in open contempt for the law); Robert Connolly, *Some Early Thoughts on the Division's New Policy on Corporate Compliance Programs*, CARTEL CAPERS (Aug. 8, 2019), http://cartelcapers.com/blog/some-early-thoughts-on-the-divisions-new-policy-on-corporate-compliance-programs-from-a-guy-who-was-admittedly-against-this-when-he-was-with-the-division/ (noting that, in every case the author had at the Division, "culpable individuals were very senior executives so any compliance program was, to us, a paper compliance program disregarded by the very people who were supposed to create the 'culture of compliance'").

56. Baer, *supra* note 28, at 7.

57. *See* Press Release, U.S. Dep't of Just., Former CEO Convicted of Fixing Prices for Canned Tuna (Dec. 3, 2019), https://www.justice.gov/opa/pr/former-ceo-convicted-fixing-prices-canned-tuna (describing the CEO of a company that authorized and supervised his subordinates' participation a price-fixing cartel and later attempted to conceal his participation in said conspiracy).

58. This would make the Division's credits for pre-existing compliance at charging much like their sentencing credits for pre-existing compliance at sentencing: existing in theory, but never granted, because every compliance department the Division investigated was found ineffective, due to "[d]elay in reporting" and the involvement of "substantial authority" personnel. *See* Delrahim, *supra* note 4, at 10.

59. *See* Heather Tewksbury et al., *supra* note 11, at 172 ("[A]ny compliance program that failed to prevent or first detect collusive behavior does not deserve full credit at sentencing.").