

## Lightning Strikes Twice: DOJ Gives 2nd Compliance Credit

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In the past, getting credit from the Antitrust Division of the U.S. Department of Justice for an effective compliance program was as likely as lightning striking the same place twice. Now, with a recent filing by the DOJ related to a plea deal it struck in September, it appears that has actually occurred. The DOJ has awarded another credit against a criminal fine under the federal sentencing guidelines in response to company efforts to implement or improve a compliance program. Compliance credit may now be in the forecast for companies that find themselves embroiled in a cartel investigation but move swiftly and decisively to address the precipitating circumstances.



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In connection with the Antitrust Division's long-running investigation into the broader automotive parts industry, the DOJ reached a plea agreement imposing \$62 million in criminal fines with Kayaba Industry Co. Ltd. (KYB), a maker of shock absorbers used in motorcycles and automobiles. The DOJ alleged that KYB, based in Tokyo, participated in a price-fixing conspiracy with two other companies stretching all the way back to the mid-1990s. A few weeks after announcing the plea agreement, the DOJ confirmed that the fine calculation reflects credit for KYB's "forward-looking compliance efforts."<sup>[1]</sup> In other words, as a result of the company's compliance program, it received an additional discount or reduction to its criminal fine.

Since the DOJ first offered compliance credit to Barclays PLC in May 2015, in connection with its investigation into the foreign currency exchange spot market, additional details have emerged as to what the DOJ might consider in deciding whether to credit pleading companies for compliance efforts. Deputy Assistant Attorney General for Criminal Enforcement Brent Snyder, in remarks to the Sixth Annual Chicago Forum on International Antitrust in June, elaborated on what sorts of "extraordinary efforts" a company must make to overcome DOJ skepticism about company compliance in the wake of cartel activity.<sup>[2]</sup>

First, he drew the distinction between "backward-looking" and "forward-looking" compliance efforts and explained that the DOJ is unwilling to offer credit to pre-existing "backward looking" compliance programs that neither detected nor deterred the cartel conduct at issue. Instead, the DOJ is interested in "forward looking" compliance programs and only those that go above and beyond the sort of program that a company might be expected to implement or improve following the launch of an investigation.

Previously, Snyder outlined the attributes of what the DOJ views as an "effective" compliance program.

In a September 2014 speech, Snyder stated that effective compliance programs require senior management to build a “corporate culture that encourages ethical conduct and a commitment to compliance” and outlined five guideposts for creating an “effective” program: (1) create a “culture” of compliance from the top management; (2) ensure the entire organization is committed to, participates, and understands the program and has the opportunity to report violations anonymously and without fear of retaliation; (3) proactively monitor and audit the program; (4) appropriately discipline employees engaged in collusive conduct; and (5) implement procedures to prevent recidivism.[3] Among these characteristics, it is increasingly clear that corporate culture is the DOJ’s main focus.

Snyder’s more recent remarks shed additional light on what a company might do when it finds itself subject to an investigation or faced with a compliance program that has been ineffective. Following the Barclays announcement, Snyder emphasized that any new or enhanced compliance program implemented by a company must address the company’s culture, or in his words, “change the corporate culture that allowed a cartel offense [to] occur.” Such prospective, or “forward-looking” compliance programs must “reflect in some way genuine efforts to change a company’s culture” in order for the DOJ to offer consideration for compliance when calculating the company’s criminal penalty.

Moreover, Snyder drew a sharp contrast between programs aimed at corporate culture and so-called “paper compliance programs” suggesting that the necessary change in corporate culture requires senior level executives to “lead by example” by “hold[ing] themselves and others accountable.” He suggested that creating a “zero tolerance compliance environment” from the top-level downward is one way to accomplish the required cultural shift, as is “mak[ing] responsible decisions about culpable employees,” those individual employees excluded (carved out) from the company’s plea agreement protection. Rather than mere “rhetoric,” a company must demonstrate to the DOJ “real commitment” to compliance.[4]

Now, with the KYB matter, we have added detail as to how a company can demonstrate the “real commitment” Snyder described. According to court filings, KYB’s “comprehensive and innovative” compliance program had a number of features that impressed the DOJ:[5]

- **Top-Down Direction:** Upon learning of the DOJ’s investigation, the company’s president ordered a thorough internal investigation to be conducted, requiring all employees to assist and cooperate. At the same time, senior management created, implemented, and directed a compliance program that had the express goal of “chang[ing] the culture of the company.” In doing so, and by participating in compliance training themselves, senior management “set the tone at the top” by making it clear throughout the company that compliance is a priority.
- **Training:** Senior management and all sales personnel received classroom training on antitrust compliance and individuals in higher-risk positions, notably salespeople, received one-on-one training as well. The training program was itself tested for effectiveness by measuring employee knowledge of antitrust compliance issues both prior to and after training.
- **Reporting:** The program required all contacts with competitors to be reported internally and anticipated competitor contacts to be preapproved before they may occur. In addition, an

anonymous tip line was created to allow employees to report concerning conduct to management.

- Certification: For all sales, employees were required to certify that prices were determined independently and that they did not exchange information with competitors or otherwise conspire with competitors when calculating prices.
- Auditing and Discipline: Employee reports were proactively monitored and audited by in-house counsel. The program also provided for discipline and penalties for employees found to be in violation of company policy.

The DOJ indicated the above features were not exhaustive, but they clearly reflect the DOJ's emphasis on corporate culture, the role of upper management and employee accountability.

Notwithstanding this added insight from the KYB case, we are still in the dark as to the extent of the compliance credit, though in the Barclays case Snyder described it as "modest." The DOJ has made clear, however, that reform of a company's corporate culture is the linchpin of any effective compliance program and a prerequisite to the DOJ even considering compliance credit.

But the forecast is good for those companies that do qualify, as the DOJ has signaled its intention to offer compliance credit in the future. And the DOJ is not the only agency highlighting this issue; competition authorities in Brazil and Canada have also recently offered similar compliance credit. Clearly, the DOJ and its international peers are serious about encouraging effective compliance and willing to reward companies that actively improve their compliance programs post-violation. We expect that future bolts of lightning will further illuminate ways that companies can design effective programs in the aftermath of antitrust violations, qualifying them for credit and averting future violations.

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[1] Leah Nysten, Car Parts Maker KYB Becomes Second Company to Gain Compliance Credit in Antitrust Case, MLEX (Sept. 29, 2015).

[2] The speech is available at <http://www.justice.gov/opa/speech/deputy-assistant-attorney-general->

brent-snyder-delivers-remarks-sixth-annual-chicago.

[3] See <http://www.justice.gov/atr/file/517796/download>

[4] The speech is available at <http://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-sixth-annual-chicago>.

[5] Memorandum & Motion for Downward Departure, United States v. Kayaba Industry Co., Ltd., No. 15-CR-00098 (S.D. Oh. Oct. 5, 2015).

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