

1 Small Provision For Barclays, 1 Big Step For Compliance

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For the first time, the Antitrust Division of the U.S. Department of Justice has awarded a company sentencing credit for implementing an effective compliance program after the start of an investigation. Getting credit for compliance efforts should not be as hard as space travel, but up until last week, a company's chances for getting any credit (short of being the winner-takes-all leniency applicant) were no better than landing on the moon.

Barclays PLC, along with four other investment banks, entered into a plea agreement with the DOJ on May 20, 2015, for its participation in the alleged forex cartel conspiracy to manipulate the price of U.S. dollars and euros exchanged in the foreign currency exchange (FX) spot market. The sentencing credit is apparent from a single line in the plea agreement: "The parties further agree that Recommended Sentence is sufficient, but not greater than necessary to comply with the purposes set forth in 18 U.S.C. §§ 3553(a), 3572(a), in considering, among other factors, the substantial improvements to the defendant's compliance and remediation program to prevent recurrence of the charged offense." [1] The four other major banks that entered into plea deals did not have this same provision, and it appears that they did not receive credit for their compliance programs. [2]



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The Barclays plea deal represents the first time that the DOJ has awarded credit against a fine under the federal sentencing guidelines for a company taking steps to implement or improve a compliance program. As noted in our prior Law360 article, "Criminal Antitrust Policy: Bigger Sticks, Smaller Carrots," [3] the DOJ last fall hinted that it may be willing to "credit" companies that strengthen compliance programs during an investigation. In a Sept. 9, 2014, speech titled "Compliance is a Culture, Not Just a Policy," [4] Brent Snyder, deputy assistant attorney general of the Antitrust Division and head of criminal enforcement, noted that the federal sentencing guidelines "allow Companies to receive lower culpability scores, and thus lower fines, if they have 'effective' compliance programs." Bill Baer, assistant attorney general for the Antitrust Division, in a Sept. 10, 2014, speech titled "Prosecuting Antitrust Crimes," [5] reiterated the importance of "effective" compliance and outlined what "cooperation" really entails in criminal antitrust investigations.

The speeches also outlined key characteristics of an "effective" program. Effective compliance programs

require senior management to build a “corporate culture that encourages ethical conduct and a commitment to compliance.” Snyder outlined five guidelines for creating an “effective” program: (1) creating a “culture” of compliance from the top management; (2) ensuring 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 monitoring and auditing the program; (4) appropriately disciplining employees engaged in collusive conduct; and (5) implementing procedures to prevent recidivism.

These officials warned that the DOJ may be willing to seek court-supervised probation, including appointing an external compliance monitor or recommending increased fines against repeat offenders who fail to implement an “effective” program. Additionally, both officials stressed that the DOJ may have “serious” doubts as to a company’s commitment to compliance if it employs individuals who do not accept responsibility for conduct. Both speeches clarified that “effective” compliance programs are an important policy goal.

The sentencing credit given to Barclays, as reflected by a single line in Barclays’ plea agreement, confirms that the DOJ is more serious about its policy of encouraging “effective” compliance programs. It also clarifies that the DOJ is willing to provide a “carrot” to encourage companies to achieve “effective” compliance programs. Such incentives are in line with the recent global push toward policies that incentivize improved compliance programs, including the 2011 Organization for Economic Cooperation and Development discussions on compliance and the International Chamber of Commerce’s Compliance Toolkit. However, the DOJ has not gone as far in rewarding compliance programs as other antitrust authorities who provide compliance credit for ex ante compliance, such as the U.K.’s Competition and Markets Authority, the Competition Commission of Singapore, and Chile’s National Economic Prosecutor’s Office. Currently, both Canada and Brazil are working on compliance guidelines as well.

Barclay’s sentencing credit does not represent a shift in policy with regard to prior existing compliance programs. The DOJ is unlikely to award credit for compliance programs that fail to prevent collusion. However, as Snyder emphasized, while “[a] truly well-run compliance program should prevent” collusion, a program that “does not prevent all collusion ... may allow a company to self-report ... under [the] Corporate Leniency Program.”

In sum, the sentencing credit awarded to Barclays signals that the DOJ is serious about its policy of encouraging effective compliance programs and willing to reward companies that actively improve their compliance programs post-violation. The exact steps needed to qualify for a post-violation compliance credit and how much Barclays’ recommended sentence was reduced, however, remains unclear given that the plea deal did not expressly address these issues. We expect that the DOJ will provide answers to these questions in the near future, and hopefully continue to take steps to incentivize companies to enhance compliance.

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[1] Barclays PLC Plea Agreement ¶ 13, available at <http://www.justice.gov/file/440481/download>.

[2] We are not prejudging the steps taken by other banks to improve compliance, nor do we have knowledge of whether the other banks might have also been given credit. Our observation is that the other plea agreements did not contain the same provision which suggests that the other four banks did not receive credit for compliance.

[3] <http://www.law360.com/articles/577955/criminal-antitrust-policy-bigger-sticks-smaller-carrots>.

[4] The speech is available at <http://www.justice.gov/atr/public/speeches/308494.pdf>.

[5] The speech is available at <http://www.justice.gov/atr/public/speeches/308499.pdf>.