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DOJ Narrows Paths To Immunity For Antitrust Crimes

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UPDATE: On Jan. 26, 2017, the DOJ issued a correction because the anonymous marker option had been inadvertently omitted from the revised FAQs. This revision reinstated the DOJ's anonymous marker option as part of the leniency program. Accordingly, the section of this article pertaining to the elimination of the anonymous marker option has been removed.


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On Tuesday, one of the final days of the Obama administration, the U.S. Department of Justice's Antitrust Division released a revised version of its "Frequently Asked Questions About the Antitrust Division's Leniency Program."[1] The FAQs are the most important and comprehensive published resource for prospective applicants who are considering whether to approach the Antitrust Division and apply for immunity from criminal prosecution for antitrust crimes under its corporate leniency policy or individual leniency policy. The revised FAQs represent the Antitrust Division's first formal and comprehensive guidance on the leniency program since 2008.

The Antitrust Division lays out the basic requirements necessary to qualify for immunity from antitrust crimes in its corporate leniency policy and individual leniency policy. More detailed information about the application of the leniency program in practice is provided in the Antitrust Division's FAQs. The leniency policies therefore must be read in conjunction with the FAQs to best understand how the leniency program will be applied.

While many of the changes in the revised FAQs merely clarify how the policies will be interpreted and applied, they all reflect a trend toward narrowing the immunity protections offered under the program. Accordingly, the revised FAQs should be reviewed carefully before making a determination whether to self-disclose to the division as an applicant. In this article we describe a few of the most notable changes.

The Antitrust Division's Leniency Program

The Antitrust Division first implemented its corporate leniency policy in 1978.[2] It provided for corporate immunity from criminal prosecution for antitrust crimes

under the Sherman Act, such as price-fixing, bid-rigging, and market allocation. In 1993, the Antitrust Division dramatically expanded the corporate leniency policy to increase incentives for companies to report criminal activity and cooperate with the Antitrust Division.[3] In 1994, the Antitrust Division implemented its individual leniency policy, which allows individuals who approach the division on their own behalf, and not as part of a company proffer or confession, to report anti-competitive activity and avoid prosecution for the activity that they report.[4] The leniency program enables corporations and individuals to avoid criminal convictions, jail sentences, and fines by reporting their antitrust violations at an early stage, cooperating with the Antitrust Division, and meeting other specified conditions. In order to qualify for leniency, among other things, the corporate or individual conspirator must be the first to confess participation in an antitrust crime.[5]

Narrowed Scope of Protection for Individuals Under Corporate Leniency

The revised FAQs also go further to limit the situations where individuals can qualify for leniency under the corporate leniency policy. Given that employees and executives who participated in (or are aware of) potentially illegal antitrust activity are typically primary sources of evidence, placing such individuals outside the automatic protection of the corporation's leniency application can have a chilling effect on their willingness to cooperate with its internal investigation.

Under the leniency program, two types of leniency are available — Type A and Type B. Corporations can qualify for "Type A" leniency, which makes cooperating directors, officers, or employees automatically eligible for protection under a corporate conditional leniency letter in circumstances where there is no existing investigation. Under the prior version of the FAQs, Type A leniency was available if, among other conditions, the Antitrust Division "has not received information about the activity from any other source."[8] Now, the revised FAQs further clarify that such a "source" may include "an anonymous complainant, a private civil action, or a press report."[9] When Type A leniency is unavailable, "Type B" leniency may still be available. Under Type B leniency, the current officers, directors and employees of a corporate leniency recipient will not automatically obtain leniency themselves. A potential consequence of this change is that corporations controlled by individuals facing criminal liability may not seek a marker once news of the potential illegal antitrust conduct breaks.

The revised FAQs also explicitly note that former directors, officers or employees are only eligible for protection under a corporate conditional leniency letter "when these specific former directors, officers, or employees provide substantial, noncumulative cooperation against remaining potential targets, or when their cooperation is necessary for the leniency applicant to make a confession of criminal antitrust activity sufficient to be eligible for conditional leniency."[10] The prior iteration of the FAQs stated that the Antitrust Division was not obligated to grant leniency to former representatives, but had the authority to do so. This new provision may discourage former employees from cooperating with an internal investigation, which could severely hamper the ability of the company to uncover anti-competitive activity. This revision formalizes recent statements by the Antitrust Division in the wake of the Yates memorandum and its focus on criminal accountability for individual offenders.[11]

Emphasis on Leniency Binding Only the Antitrust Division for Antitrust Crimes

The revised FAQs also warn that corporate applicants "should not expect to use the Leniency Program to avoid accountability for non-antitrust crimes."[12] Similar to language in the prior version, the revised FAQs state that leniency "binds only the Antitrust Division; it does not bind other federal or state prosecuting agencies, including other components of the Department of Justice" and that the leniency program "does not protect applicants from criminal prosecution by other prosecuting agencies for

offenses other than Sherman Act violations."[13] While statements like this are also found in the earlier version of the FAQs, the additional emphasis is notable, and could discourage companies from seeking leniency where, for example, conduct could be construed as either an antitrust violation or as a violation of other criminal statutes, such as a conspiracy or wire fraud violation.[14]

The new FAQs underscore that "[n]ot every conspiracy among competitors amounts to an antitrust crime. And not every fraud that an applicant commits while engaged in an antitrust crime is committed in furtherance of that crime."[15] Using a hypothetical example of a leniency applicant that bribed foreign public officials in violation of the Foreign Corrupt Practices Act, they note that the applicant will receive "no protection from prosecution by any other prosecuting agency, regardless of whether the bribes were also made in furtherance of the reported antitrust violation."[16] Indeed, the revised FAQs urge applicants with exposure for both antitrust and non-antitrust crimes to report all crimes to the relevant prosecuting agencies. This language goes further than the prior FAQs to acknowledge the possibility that the same set of facts could give rise to non-antitrust charges, or charges by other enforcers. In addition, an added reference that "[i]t has been the Antitrust Division's experience that other prosecuting agencies do not use other criminal statutes to do an end-run around leniency"[17] provides cold comfort for companies and individuals in terms of what may unfold in the future in an arguably crowded and competitive enforcement environment. The FAQs also warn corporations required to abide by agreements to self-disclose misconduct that a leniency application "does not discharge prior reporting obligations to other prosecuting agencies, nor does it insulate the leniency applicant from the consequences of violating earlier agreements not to commit crimes."[18]

Furthermore, although the revised FAQs maintain that a leniency letter can be tailored to a broader conspiracy that emerges in the course of the investigation, as did the earlier FAQs, a new provision has been added, stating that a leniency letter can also be narrowed if the investigation reveals that the conspiracy is narrower than originally reported.[19] This provision appears to reflect the Antitrust Division's desire to narrowly define the immunity protections under the leniency program going forward.

Increased Penalties and Cooperation Required for ACPERA Benefits

The revised FAQs also formalize the Antitrust Division's "penalty plus" policy, which has been articulated in several speeches over the years.[20] The penalty-plus policy seeks enhanced sentences where a company pleads guilty to one antitrust offense under the leniency program but fails to report a second antitrust crime it was also involved in. According to the policy, the severity of the penalty-plus enhancement sought will depend on the reason that the company failed to report the additional antitrust crime — the enhancements will be greatest for a company that makes no meaningful effort to conduct an internal investigation, or that was aware of the additional antitrust crime but elected not to report it. Again, this new provision places an increased onus on leniency applicants to complete costly and exhaustive internal investigations early on, and may discourage leniency applicants who do not have the time, resources, or firm knowledge of wrongdoing from seeking to enter the program.

The Antitrust Criminal Penalty Enhancement and Reform Act of 2004, also referred to as ACPERA, limits the liability for civil damages claims in private state or federal antitrust actions for qualifying leniency applicants. ACPERA was addressed in the 2008 FAQs, but the revised FAQs provide additional information on ACPERA and explicitly note that, in addition to cooperating with civil plaintiffs, a company must also fully cooperate with the Antitrust Division's investigation in order to receive the benefits of ACPERA.

Conclusion

The Antitrust Division's leniency program is unique. No other DOJ component offers similar nonprosecution protections for corporations or individuals, and therefore the narrowing of pathways to leniency reflected in the revised FAQs could be seen as a part of the outgoing Obama administration's desire to render this program less of an outlier within the Justice Department. Although most of the guidance articulated in the revised FAQs has previously been stated in speeches or carried out in practice, the public is now formally on notice as to how the division intends to implement its leniency program, and therefore the provisions of the FAQs should be carefully considered by any party contemplating a leniency application.

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[1] U.S. Dep't of Justice, Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters (January 17, 2017), available at https://www.justice.gov/atr/page/file/926521/download.

[2] Id.

[3] U.S. Dep't of Justice, Corporate Leniency Policy (1993), available at http://www.justice.gov/atr/public/guidelines/0091.pdf.

[4] U.S. Dep't of Justice, Leniency Policy for Individuals (1994), available at http://www.justice.gov/atr/public/guidelines/0092.pdf.

[5] See supra note 1.

[6] "A marker gives a leniency applicant a finite period of time to hold its place at the front of the line for leniency while the applicant gathers the information needed to perfect the application. To obtain a marker an applicant must: '(1) report that he or she has uncovered some information or evidence indicating that his or her client has engaged in a criminal antitrust violation; (2) disclose the general nature of the conduct discovered; (3) identify the industry, product, or service involved in terms that are specific enough to allow the Division to determine whether leniency is still available and to protect the marker for the applicant; and (4) identify the [applicant].'" ABA Section of Antitrust Law, Antitrust Law Developments 979 (7th ed. 2012).

[7] “It is also possible in limited circumstances for counsel to secure a very short-term ‘anonymous’ marker without identifying his or her client. An anonymous marker is given when counsel wants to secure the client’s place first in line for leniency by disclosing the other information listed above, but needs more time to verify additional information before providing the client’s name. For example, the Division might give counsel two or three days to gather additional information and to report the client’s identity to the Division.” U.S. Dep’t of Justice, Frequently Asked Questions Regarding the Antitrust Division’s Leniency Program and Model Leniency Letters (November 19, 2008), available at https://www.justice.gov/sites/default/files/atr/legacy/2014/09/18/239583.pdf.

[8] Id.

[9] See supra note 1.

[10] Id.

[11] Brent Snyder, Deputy Assistant Att’y Gen., Antitrust Div., Individual Accountability for Antitrust Crimes, Presented at the Yale School of Management Global Antitrust Enforcement Conference (Feb. 19, 2016), available at https://www.justice.gov/opa/file/826721/download.

[12] See supra note 1.

[13] Id.

[14] 18 U.S.C. §§ 1343, 1349 (2012).

[15] See supra note 1.

[16] Id.

[17] Id.

[18] Id.

[19] Id.

[20] See, e.g., Scott D. Hammond, Dir. of Criminal Enf’t, Antitrust Div., Cornerstones of an Effective Leniency Program, Presented at ICN Workshop on Leniency Programs (Nov. 22-23, 2004), available at https://www.justice.gov/atr/file/518156/download.