

The Corporate Leniency Program: Did the Antitrust Division Kill the Goose that Laid the Golden Eggs?

BY ROBERT B. BELL AND KRISTIN MILLAY

THE DEPARTMENT OF JUSTICE'S (DOJ) Antitrust Division first instituted a Corporate Leniency Program in 1978. The program was rarely utilized, though, as the Antitrust Division received on average only one leniency application per year and no application led to the discovery and prosecution of an international or large domestic cartel.¹ In August 1993, the Antitrust Division substantially revised its Corporate Leniency Program to increase the incentives for companies voluntarily to disclose antitrust violations to the DOJ. The revisions were a spectacular success: by 2016, the Antitrust Division had seen a nearly 20-fold increase in the leniency application rate compared to 1993 levels.²

The central aim of the Corporate Leniency Program³ is to incentivize companies to come forward and disclose criminal antitrust violations to the DOJ and thereby “destabilize cartels and [cause] the members of the cartels to turn against one another in a race to the Government.”⁴ As revised in 1993, the Program was straightforward: the first company to report cartel activity was not prosecuted criminally, nor were any of its officers, directors, or employees who cooperated with the DOJ investigation.

The Corporate Leniency Program created two types of leniency: Type A, where the leniency application is made before the Antitrust Division has learned about the illegal activity, and Type B, where the Division is aware of the ille-

gal activity but does not have evidence that is likely to produce a conviction. All employees of Type A corporate leniency recipients who cooperated with the DOJ's investigation were immunized from criminal prosecution, and while current employees of Type B recipients were not guaranteed criminal immunity, they historically had been unwaveringly protected: prior to 2017, the DOJ had never brought Sherman Act charges against a current employee of any successful leniency applicant, Type A or Type B.⁵

In 2004, corporations gained another significant incentive to apply for leniency when the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA)⁶ was enacted. Recognizing that civil antitrust exposure could deter companies from seeking leniency, Congress capped the damages liability for leniency recipients in follow-on civil actions at single damages instead of treble damages and removed the exposure to joint and several liability as long as the leniency applicant cooperated with the plaintiffs.⁷ In the first six years following ACPERA's enactment, the DOJ received nearly double the number of Type A leniency applications compared to the six years prior to ACPERA.⁸

Through these three core benefits of the Leniency Program—protection from criminal fines, protection for employees, and protection from civil treble damages and joint and several liability—the Antitrust Division successfully incentivized companies to be the first to self-report violations and receive leniency. In practice, this has often created a “race to the prosecutor's door” among companies seeking to be the first leniency applicant.⁹

Not only has the Leniency Program been a boon to companies seeking to avoid liability, but the Program has also been the lifeblood of the Antitrust Division's criminal enforcement program. Since 1996, investigations initiated or assisted by leniency applicants have accounted for over 90 percent of the fines that the Antitrust Division has collected for Sherman Act violations,¹⁰ and about two-thirds of the DOJ's antitrust investigations begin with a leniency application.¹¹ Nearly every major international cartel prosecution over the past two decades—including the Vitamins, LCD Panels, Auto Parts, and Foreign Currency Exchange prosecutions, to just name a few—has resulted from a leniency application. And, according to the DOJ, those who lose the race for leniency “often immediately begin cooperating toward a negotiated agreement to plead guilty” because they know the leniency recipient will often have enough information to incriminate them, thus also making DOJ investigations into cartel activity quicker, easier, and more successful.¹²

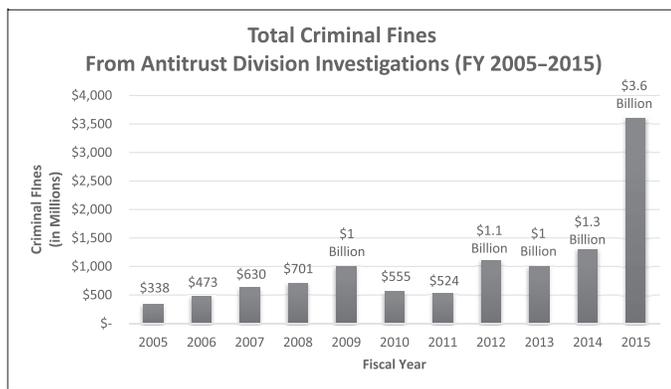
The incredible success of the Leniency Program became fully apparent about a decade ago, as the Antitrust Division collected unprecedented levels of criminal antitrust fines and penalties. In 2009, the DOJ collected criminal antitrust sanctions totaling over \$1 billion for the first time in Division history, and 2009 marked the fourth straight year in which fines exceeded those collected in the prior year. 2010 saw a

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decrease in receipt of criminal corporate fines, although they still totaled over half a billion dollars. While fines also remained around half a billion dollars again in 2011, spurred on by information gained from leniency applicants, the DOJ filed 90 criminal cases—the Antitrust Division’s highest number ever.

The Leniency Program and aggressive prosecution by the DOJ continued to bear fruit from 2012–2014, as over \$1 billion in fines were collected each year. Then in 2015, fueled by the Foreign Currency Exchange investigation—initiated by UBS’s leniency application—the Division secured a record-shattering \$3.9 billion in criminal antitrust fines and penalties.

The following figure demonstrates the significant growth in criminal antitrust fines the DOJ has collected since 2005 due in large part to the success of the Leniency Program.



Source: data from DOJ Criminal Enforcement Trends Charts, <https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts#b> and from Gibson Dunn 2016 Year-End Criminal Antitrust and Competition Law Update, <https://www.gibsondunn.com/2016-year-end-criminal-antitrust-and-competition-law-update/>

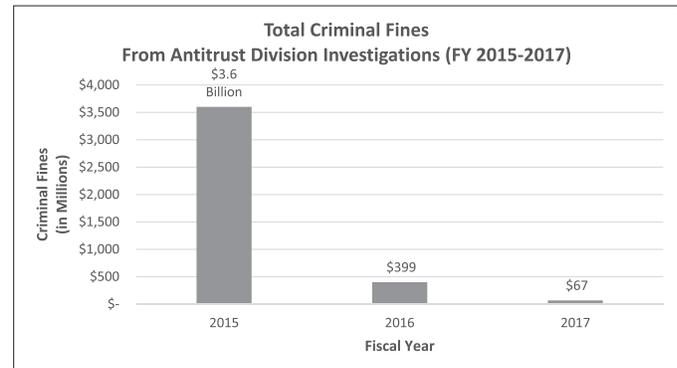
It is no surprise that DOJ antitrust officials have called the modern Leniency Program a “game changer” that “is now the most important tool either for detecting cartels or for developing the evidence necessary to prosecute them.”¹³

Recent Decline in Antitrust Enforcement

There has been a sharp decrease in criminal antitrust enforcement in the past several years, in terms of both total criminal fines imposed and the total number of cases brought against corporations. While the level of enforcement activity naturally ebbs and flows over time, there are several signs that this particular decline is unusual in both duration and severity. For the ten-year period from 2005 to 2014, which excludes the record-breaking fines imposed in 2015, the Division imposed an average of \$762 million in annual fines. The Division is now nearing the end of its third straight year of unusually low fines, a period for which the average amount of fines per year was only \$210 million dollars—an amount that is less than 30 percent of the 10-year average for 2005 to 2014.

Criminal fines fell precipitously in FY 2016, declining to \$399 million from a high of \$3.6 billion in FY 2015. The

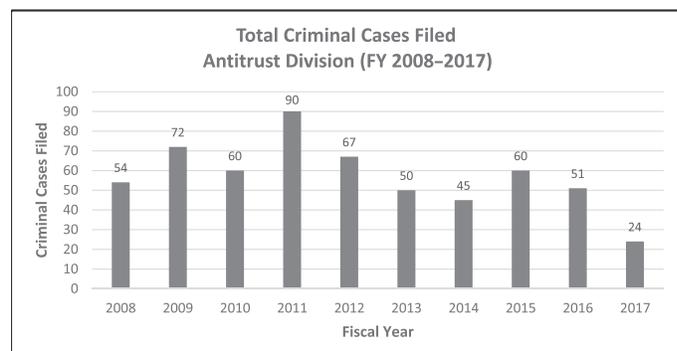
downward trend continued in FY 2017, which saw fines totaling only \$67 million. It appears that fines for fiscal year 2018 were similarly much lower than the 2005–2014 average. While one might reasonably have expected a lull in cartel fines following the record-breaking fines levied during the auto parts and foreign exchange investigations, the decline in fines in FY 2016 to FY 2018 is remarkable both because it represents a return to numbers not seen in over a decade and because the downturn now has lasted for three years.



Source: data from DOJ Criminal Enforcement Trends Charts, <https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts#b>

While the Division has not yet released statistics on the total amount of fines collected in fiscal year 2018, early reports indicate that this past year represents another low point in antitrust enforcement. Only three companies were charged with price fixing in fiscal 2018, compared with eight companies in fiscal year 2107 and 16 companies in fiscal year 2016.¹⁴ Based on information that is publicly available, criminal antitrust fines imposed in fiscal year 2018 total \$192.9 million.¹⁵ In sum, there have now been 3 straight years of unusually low fines, a period for which the average amount of fines per year was less than \$250 million—an amount that is less than one-third of the ten-year average from 2005 to 2014.

There has been a similar decrease in the total number of criminal cases filed by the Division, suggesting that the issue is not just a dearth of major investigations of the type that



Source: data from DOJ Criminal Enforcement Trends Charts, <https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts#b>

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generate large fines, but also a severe decline in the overall amount of cartel activity the Division is detecting and pursuing. After many years of filing 50 or more criminal cases per year, the number of criminal cases filed by the Division dropped to a low of 24 in 2017, a decrease of more than 50 percent from 2016.

Of course, what remains to be seen is whether these downward trends are temporary and, if so, how much longer they will last. While it is difficult to predict without insight into confidential investigations the Division may currently be pursuing, there are several signs beyond the raw numbers that the past three years may be indicative of a larger problem. First, some analysts had predicted that the level of fines would rebound in 2017 to their previous high levels.¹⁶ That they instead fell to a new low suggests that something is happening that is out of line with past expectations and experience. Second, a number of the cases that the Antitrust Division is currently pursuing stem from sources other than the Leniency Program and seem unlikely to lead to the detection of major global cartels.¹⁷ Indeed, 2016 and 2017 marked the first time in a decade that the Division did not appear to have any major international cartel investigations in its enforcement pipeline.¹⁸ Finally, a former DOJ official has recently acknowledged that the Division has seen a decline in Type A leniency applications,¹⁹ meaning that fewer corporations are alerting the Division to cartel activity of which it was not already aware. For these reasons, it is worth evaluating the decline in enforcement in light of a series of policy shifts in the Division's leniency program that began approximately two years before this downturn in enforcement activity became visible.²⁰

Possible Explanations for the Decline in Criminal Antitrust Enforcement Activity

There are several possible explanations for the decrease in enforcement activity. One is that individuals and corporations have taken notice of highly successful antitrust prosecutions such as auto parts and there is simply less price fixing, bid rigging, and market division going on. While this is possible, it seems unlikely that it could account for such a sudden and dramatic drop in enforcement activity. Another possible explanation is that cartelists have become more careful and sophisticated about how they operate, making it more difficult for enforcers to detect their illegal activity and

giving the co-conspirators less incentive to blow the whistle on themselves. Again, this may be a partial explanation but seems unlikely to account for such a large decrease over the last few years. There has been a significant increase in follow-on civil antitrust litigation in a number of jurisdictions outside the United States,²¹ and this may well be deterring some companies from seeking leniency but, likewise, does not seem to account for the abruptness and severity of the decline.

The possibility that we focus on here—because it seems to be the most significant factor—is that changes to the leniency program that began in 2014 have created greater uncertainty, which has made applying for leniency less attractive and has therefore reduced the number of leniency applications. These changes include, among others, the creation of greater uncertainty regarding the criminal exposure faced by corporate leniency applicants, an emphasis on the strict standards to which cooperating leniency applicants will be held, and less favorable treatment of the current and former employees of leniency applicants.

Use of Alternative Means to Punish Leniency Applicants

The Antitrust Division has demonstrated that even if leniency applicants provide valuable cooperation and successfully obtain leniency, the DOJ may find alternative ways to punish them for their behavior. Then-Assistant Attorney General Bill Baer spoke about this possibility during a speech on September 10, 2014, explaining:

In recent years we have on occasion investigated jointly with other DOJ components conduct reported by a leniency applicant that involves both antitrust violations and other crimes, such as fraud, tax evasion, or corruption. Our leniency policy is quite clear that it governs only the Antitrust Division's exercise of its prosecutorial discretion in connection with self-reported criminal violations and does not prevent other components from prosecuting offenses other than Sherman Act violations. Indeed, we have seen fact patterns where the antitrust crime is only part of the bad behavior engaged in by the leniency applicant.²²

Baer went on to provide reassurance that “the department never has and never would use other criminal statutes to do an end-run around antitrust leniency” and that “self-disclosure and cooperation . . . will be taken into account when the department considers criminal conduct outside the scope of the leniency application.”²³ But potential leniency applicants can only guess at (and take a gamble on) what the DOJ might consider an “end-run around antitrust leniency” versus what it would instead consider a legitimate exercise of prosecutorial discretion. Baer's mention of prosecuting leniency applicants for fraud is particularly troubling, as the Division has characterized bid rigging as simply “fraud which involves bidding.”²⁴ As was noted in the press in reaction to Baer's comments, the statement creates significant uncertainty as to how this principle will actually be applied.²⁵

Prior to Baer's speech, the Antitrust Division's stated policy was to provide leniency for any offense the leniency applicant may have committed "in connection with the anti-competitive activity being reported," and Foreign Corrupt Practice Act and tax violations were listed as examples of offenses that might be committed in connection with an antitrust violation.²⁶ And while it has always been the case that a leniency letter binds only the Antitrust Division and not other prosecuting agencies, the Antitrust Division pointed out that where additional offenses consisted of conduct "integral" to the criminal antitrust violation, there have been no instances where another prosecutor has prosecuted a leniency applicant for such conduct.²⁷ The Division has since changed the contents of its stated policy to make them more consistent with Baer's 2014 speech. In early 2017, the Division revised its Frequently Asked Questions regarding the leniency program to emphasize that the program is designed to offer leniency for antitrust crimes only, and that a grant of leniency does not prevent other components of the DOJ from prosecuting a successful leniency applicant for related offenses.²⁸

The heightened risks for leniency applicants that Baer hinted at in 2014 came to fruition in the DOJ's treatment of UBS. UBS had cooperated with the DOJ and obtained leniency by disclosing its conspiracy with four other banks to manipulate currency exchange rates. UBS's cooperation gave the Division its largest ever cartel case, resulting in four corporate guilty pleas and fines of \$2.5 billion. In return, UBS was publicly excoriated at a DOJ press conference, during which the DOJ announced that it was using the conduct that UBS had reported to the government regarding its misconduct as a basis for revoking UBS's 2012 non-prosecution agreement from a previous cartel investigation. As a result, UBS paid a \$203 million fine. As one analyst cautioned at the time, the DOJ's treatment of UBS threatened to undermine the Leniency Program and "may thwart the DOJ's effort to prosecute antitrust violations by discouraging large corporations from coming forward."²⁹

Emphasis on Burdens of Cooperation

Beginning in 2014, the DOJ made multiple statements suggesting that leniency applicants will need to work even harder to qualify for leniency. In September 2014 Bill Baer gave a speech emphasizing the scope of cooperation required in order to obtain leniency. Leniency applicants are expected to make extensive efforts, including "conducting a thorough internal investigation, providing detailed proffers of the reported conduct, producing foreign-located documents, preparing translations, and making witnesses available for interviews."³⁰ Baer also cautioned that companies that think they can provide this cooperation "on a timetable of their own choosing" will "lose their opportunity to qualify for leniency."³¹ While it is perfectly reasonable to expect applicants to work hard to earn the benefits of leniency, these statements could come across as unwelcoming to potential

leniency applicants who want to cooperate in good faith, but have legitimate concerns about their ability to bear the substantial costs involved or to provide thorough cooperation on a timetable that suits the DOJ.

Subsequent statements by Division officials have reiterated this stance. In February 2016, then-Deputy Assistant Attorney General Brent Snyder emphasized the amount of discretion that the Division has when evaluating the sufficiency of a company's cooperation. He warned that "a company that is the first to accept responsibility and plead guilty but delays providing cooperation risks losing the opportunity to obtain, or diminishing the amount of, a substantial assistance departure."³² Based on this statement, and Baer's earlier one, companies that are considering cooperation with the Division are left to wonder what would constitute a sufficient delay to jeopardize the benefits they would otherwise expect to earn through their cooperation.

The cumulative effect of these statements is to create concern and uncertainty for leniency applicants as to whether their cooperation will be thorough enough to meet the Division's standards, whether they will be able to secure adequate cooperation from individual employees, and whether they will be able to discover all of the relevant facts in time to provide what the Division considers prompt cooperation.

Termination of Culpable Employees

Beginning in September 2014, DOJ officials began publicly questioning the cooperation of companies that did not terminate employees culpable in the wrongdoing. On September 9, 2014, Brent Snyder stated that it historically had "been departmental policy not to insert itself into the personnel matters of companies by requiring the termination of culpable employees, and that has not changed."³³ However, he immediately followed up by remarking that a "company's retention, however, of culpable employees in positions where they can repeat their conduct . . . raises serious questions and concerns about the company's commitment to effective antitrust compliance."³⁴ Then, the following day, Baer doubled-down on the DOJ's skepticism of the retention of employees, proclaiming that it is "hard to imagine how companies can foster a corporate culture of compliance if they still employ individuals . . . who the companies know to be culpable."³⁵ Baer added that, regarding companies that retain culpable employees, the DOJ Antitrust Division "will have serious doubts about that company's commitment to implementing a new compliance program or invigorating an existing one. Indeed, the Sentencing Guidelines go so far as to suggest that companies that do so cannot be said to have an 'effective' compliance program."³⁶ Snyder directly criticized companies that seek leniency while keeping culpable employees in "positions where they can repeat their conduct,"³⁷ but Baer's comments were directed towards companies that retain culpable employees in any capacity.

Together, these speeches sent the message that the DOJ will look at any retention of culpable individuals as suspect,

and they put pressure on companies to terminate any and all employees who were involved in the antitrust violations. This is a significant burden for many companies, and is especially distasteful for companies in countries like Japan, where people typically work at one company for their entire career and there is very little opportunity to move to a different company.

Treatment of Former Employees

Another important revision to Leniency Program protocol involves the DOJ's changed treatment of former employees of leniency recipients. The Leniency Program's original Frequently Asked Questions explained that a corporate leniency award "does not refer to former directors, officers or employees," but noted that it is "advisable" for corporations to seek protection for former officers, directors, and employees.³⁸ It indicated that a number of factors would be considered in deciding whether to extend leniency to them, "most importantly" their cooperation. However, the FAQs were revised on January 26, 2017. The revised FAQs provide that former employees are now "presumptively excluded" from any grant of corporate leniency and can only be granted leniency in two scenarios. This change institutionally formalized Brent Snyder's statement in February 2016 that the DOJ "will not as a general rule include former employees in the non-prosecution terms of the agreement."³⁹ Many companies feel strongly about protecting their former employees, so presumptive exclusion of former employees from leniency protection serves as an additional deterrent to companies considering applying for leniency.

Treatment of Current Employees

Another change that has decreased companies' incentives to seek leniency involves the DOJ's increased willingness to criminally prosecute current employees of successful leniency applicants. Under the Leniency Policy, the type of leniency the corporation receives affects the kinds of immunity from individual prosecution that a corporation's employees receive. In Type A leniency, all current employees are guaranteed immunity if they fully admit their involvement in the violation and cooperate with the DOJ throughout the investigation. And as previously mentioned, even under Type B leniency, the DOJ had never brought a criminal action against a leniency recipient's current employee who cooperated.⁴⁰ Indeed, in the past, the DOJ tended to grant immunity to employees of Type B leniency recipients unless the employee refused to cooperate with the investigation.

However, the revised FAQs state that it is within the discretion of the DOJ to exclude "highly culpable" current employees from Type B leniency.⁴¹ The updated FAQs explain that because Type B leniency is discretionary, the DOJ will consider the individual's level of cooperation and culpability.⁴² This creates the possibility that employees of the leniency applicant can admit wrongdoing, cooperate fully with the DOJ investigation, and still face criminal prosecution.

Many companies care deeply about protecting their employees from criminal prosecution, and this revision creates further doubt in a company's mind whether it should seek leniency when it means valued and important employees—executives who may also be the individuals making the determination whether to apply for leniency—may face criminal punishment.

Impact of Changes on Potential Leniency Applicants

Taken together, the Division's statements about and changes to the leniency program since 2014 are significant enough that they have had an impact on how lawyers advise corporate clients that are weighing whether to report their misconduct and pursue leniency. At the very least, the changes discussed here express an increased level of skepticism on the part of the DOJ toward potential leniency applicants, which clients need to take into account when considering whether they will be able to cooperate in a way that the DOJ finds satisfactory. At worst, the Division's changes and statements suggest that the cost-benefit analysis has been significantly altered for leniency applicants, with the benefits of leniency now less certain and less comprehensive and the costs more unknown and potentially sweeping.

The overall effect is probably best understood by considering how an antitrust lawyer would have advised a potential leniency applicant in 2010, just prior to the slew of plea agreements and fines resulting from the auto parts investigation, compared to how that same lawyer would need to advise a similar client today. Overall, a lawyer advising a corporate client about whether to pursue leniency in 2010 likely would have given advice that made leniency seem to be an attractive option. In 2010, a lawyer was able to assure her client that the basic outlines of the leniency program had not changed since 1993 and that the Division's expectations of a leniency applicant were clear, consistent, and predictable. The lawyer could also advise that the client's current employees would be protected by the grant of leniency, even in cases involving Type B leniency, and that former employees were generally protected as well.

As things stood in 2010, the Division had expressed clearly its understanding of the bargain it had made to maintain a functional leniency program—namely, that in order to achieve the level of transparency and certainty required to properly incentivize leniency applicants to come forward, Division officials needed "to be willing to make the ultimate sacrifice to transparency—the abdication of prosecutorial discretion."⁴³ By curtailing its own discretion in favor of certainty and transparency, the Division had made it possible for lawyers to give their clients clear, confident advice that spelled out the considerable benefits of applying for leniency.

In contrast, a lawyer advising the same client in 2018 would need to give materially different advice that points out the uncertainty caused by recent changes. First, she would need to advise the client that over the past few years, the

Division has made multiple statements and policy changes indicating that the path to leniency is narrower and more difficult than it used to be and that the Division has repeatedly emphasized its high expectations for both the timing and the scope of an applicant's cooperation efforts.⁴⁴ The lawyer would then need to tell her client that even if the effort to obtain leniency is successful, the Division has made several prominent statements pointing out the ability of other divisions of DOJ to prosecute successful leniency applicants for related offenses.⁴⁵ Far from offering the certain protection that was meant to incentivize leniency applicants to come forward, the DOJ now advises potential applicants of the risk that their disclosures will open them up to prosecution for other offenses, including conduct related to the underlying antitrust offense.

The lawyer would also have to advise the client that there is now significant uncertainty concerning the treatment of its current and former employees. It would not be possible to tell the client definitively whether the company will be allowed to retain its culpable employees, and any advice given to the client would need to reflect that the DOJ has recently expressed skepticism as to whether a company can truly show a commitment to a culture of compliance while retaining those employees.⁴⁶ Moreover, the client would need to know that its former employees are now "presumptively excluded" from any grant of leniency.⁴⁷ In cases involving Type B leniency, the warning regarding treatment of employees would be even more dire, as clients would need to be advised that even their current employees may not be protected if the DOJ views them as "highly culpable" in the company's conduct.⁴⁸

Overall, the recent changes to the leniency program expand the Division's prosecutorial discretion, create new areas of uncertainty and undermine the expected benefits of applying for leniency. This does not bode well for the viability of the Leniency Program. As then-Deputy Assistant Attorney General Scott Hammond explained in 2008, leniency programs have tended to fail where they have "lacked transparency, were unpredictable and failed to provide the incentives necessary to induce self-reporting and cooperation."⁴⁹ A successful leniency program must properly balance the incentives faced by potential applicants, because, as Hammond observed, "Prospective amnesty applicants come forward in direct proportion to the predictability and certainty of acceptance into the program."⁵⁰

The changes in recent years have potentially upset the delicate balance of incentives faced by leniency applicants by increasing the uncertainty and risk that they face, and, given the decline in criminal antitrust enforcement, appear to be a factor in deterring potential applicants from coming forward.

Recommended Fixes

■ **"Lock in" Leniency Program Requirements.** The first change the Antitrust Division should make to its Corporate Leniency Program is to institute a simple policy that, once a company files its leniency application, the DOJ will

"lock in" the Program's requirements and benefits for the company at the time it applies for leniency so that no changes the DOJ makes to the Leniency Program will adversely affect the company. The DOJ has modified elements of the Leniency Program in several ways over the last few years, often with the result of placing additional burdens on corporations or their employees. A company cannot be certain whether more changes will be made after it applies for leniency but before it and its employees are granted leniency. Locking in the terms of the Leniency Program for a company at the time it applies for leniency would create greater certainty and security for leniency applicants and would allow companies to accurately predict risks and weigh the costs and benefits of seeking leniency.

■ **Provide Greater Protection for Employees.** Second, the DOJ should roll back its increasingly aggressive and demanding policies concerning the current and former employees of leniency applicants. Following changes to the Leniency FAQs and speeches by top Antitrust Division officials, companies are under pressure to terminate all culpable employees or risk being deemed uncooperative. Combined with the increased willingness of the DOJ to prosecute former employees of successful leniency applicants, companies now fear that terminating culpable employees could serve the employees up for criminal prosecution by the DOJ. These changes place companies in a highly precarious position: either save themselves or save their employees. As many companies—particularly foreign companies with less individualistic work cultures, such as the Japanese—rightfully highly value their employees, facing this choice will deter many companies from seeking leniency at all. Therefore, to reincentivize companies to come forward, the DOJ should return to the Leniency Program's original policies: guaranteed immunity for current cooperative employees, willingness to work with leniency recipients to protect former employees, and no required termination of culpable employees so long as the wrongdoers are reassigned to jobs where they cannot commit further antitrust violations.

■ **Clarify What Conduct Will Be Prosecuted Under Non-Antitrust Statutes.** Third, the DOJ should clarify what liability, if any, successful leniency applicants may face from alternative sources. Despite the Antitrust Division's assurances that other criminal statutes would never be used "to do an end-run around antitrust leniency,"⁵¹ the DOJ's treatment of UBS in 2014 following its application for leniency showed the risks that companies face when they apply for leniency. Given that the Antitrust Division's definition of "fraud" is sufficiently broad that antitrust violations like bid rigging could very likely lead to criminal liability for fraud if the DOJ pursued it,⁵² it is logical for leniency applicants to be deeply concerned that they will face criminal fines and prosecution for the exact same activity they sought leniency for in the first place. It may well be appropriate for leniency recipients to face criminal prosecution for factually unrelated crimes they commit other than antitrust viola-

tions. But greater clarity about what is considered an “end-run around” around antitrust leniency and what conduct will be prosecuted under other statutes is needed.

To be successful the Leniency Program must create sufficient incentives for wrongdoers to come forward and self-report. For over two decades—from 1993 until 2014—the Leniency Program worked extremely well, which led to an unprecedented period of successful antitrust criminal fines and prosecutions. While the Leniency Program has recently faltered due at least in part to the cumulative effect of a series of policy changes, the Antitrust Division is fully capable of revising the program and revitalizing criminal antitrust enforcement. ■

- 1 Scott D. Hammond, Address at the 24th Annual National Institute on White Collar Crime: The Evolution of Criminal Antitrust Enforcement over the Last Two Decades 2 (Feb. 25, 2010), <https://www.justice.gov/atr/file/518241/download>.
- 2 Brent C. Snyder, Remarks at the Yale Global Antitrust Enforcement Conference: Individual Accountability for Antitrust Crimes 10 (Feb. 19, 2016) [hereinafter Snyder, Individual Accountability for Antitrust Crimes], <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-yale-global-antitrust>.
- 3 U.S. Dep’t of Justice, Corporate Leniency Policy (1993), <https://www.justice.gov/atr/file/810281/download>. The DOJ also has an Individual Leniency Policy that was implemented one year after the Corporate Policy. See U.S. Dep’t of Justice, Individual Leniency Policy, (1994), <https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/0092.pdf>.
- 4 150 CONG. REC. S3614 (Apr. 2, 2004) (Statement of Sen. Orrin Hatch).
- 5 Ron Knox, *Former DOJ Officials Worry About US Leniency Changes*, GLOBAL COMPETITION REV. (Mar. 29, 2017).
- 6 Pub. L. No. 108-237, 118 Stat. 661 (June 22, 2004), extended through 2020 by Pub. L. No. 111-190, 124 Stat. 1275 (June 9, 2010), codified as amended at 15 U.S.C. § 1.
- 7 Pub. L. No. 108-237, § 213(a)–(b), 118 Stat. 661, 666–68 (June 22, 2004).
- 8 Niall Lynch & Kathleen Fox, *How ACPERA Has Affected Criminal Cartel Enforcement*, LAW360 (Aug. 11, 2011).
- 9 Snyder, *Individual Accountability for Antitrust Crimes*, *supra* note 2, at 11.
- 10 Scott D. Hammond, Address at the 26th Annual National Institute on White Collar Crime: Deterrence and Detection of Cartels: Using All the Tools and Sanctions 14 (Mar. 1, 2012), <https://www.justice.gov/atr/file/518936/download>.
- 11 See Bill J. Baer, Remarks at the Georgetown University Law Center Global Antitrust Enforcement Symposium: Prosecuting Antitrust Crimes 2 (Sept. 10, 2014) [hereinafter Baer, Prosecuting Antitrust Crimes], <https://www.justice.gov/atr/file/517741/download>.
- 12 Snyder, *Individual Accountability for Antitrust Crimes*, *supra* note 2, at 11.
- 13 Baer, *Prosecuting Antitrust Crimes*, *supra* note 11, at 2; Gregory J. Werden et al., U.S. Dep’t Just., *Deterrence and Detection of Cartels: Using All the Tools and Sanctions* 4 (Mar. 1, 2012), <https://www.justice.gov/atr/file/518936/download>.
- 14 Leah Nylen, *US Corporate Cartel Charges Dip for Third Straight Year*, MLEX (Oct. 1, 2018).
- 15 *Id.* The fine numbers that the Antitrust Division will release in early 2019 will differ somewhat from the \$192.9 million figure reported by MLex because the Division reports fines collected during the fiscal year, while MLex reports fines imposed. The numbers differ because some plea bargains allow the defendant to pay its fine in installments. This has the effect of smoothing the numbers. Under either metric, there is a similar trend of

drastically reduced criminal antitrust fines over the last few years. MLex reported fines imposed of \$396.5 million for fiscal year 2016, \$114.8 million for fiscal year 2017, and \$192.9 million for fiscal year 2018.

- 16 See, e.g., Timothy A. Westrick, *Decline in DOJ Antitrust Division Fines Is Likely Temporary*, LAW360 (Apr. 7, 2017).
- 17 This includes the Division’s active pursuit of no-poach and wage-fixing investigations, many of which arose in the course of merger reviews, and their investigation into price fixing of packaged seafood, which likewise arose out of the DOJ’s review of a proposed merger.
- 18 Lauren E. Briggerman, *Trends to Watch in DOJ Cartel Investigations This Year*, LAW360 (Feb. 7, 2017).
- 19 Charles McConnell, *Type A Leniency Applications Down, US DOJ Official Says*, GLOBAL COMPETITION REV. (June 15, 2018) (“Phelan said Type A applications are down a bit, suggesting that companies are holding back to see if the authority will begin an investigation on its own initiative.”).
- 20 One would expect a lag between any adverse changes of the leniency program and a decline in Division receipt of criminal fines and criminal prosecutions, as it usually takes between two to four years from the time when a company applies for leniency to when other parties implicated in an investigation have entered plea agreements.
- 21 See, e.g., Mark Sansom et al., *Recent Developments in Private Antitrust Damages Litigation in Europe*, ANTITRUST, Spring 2015, at 33 (“Private antitrust enforcement has been increasing in Europe for several years, in particular in jurisdictions such as the United Kingdom, Germany, and the Netherlands, in which private party civil antitrust damages claims now follow on from nearly every major antitrust agency infringement decision.”).
- 22 Baer, *Prosecuting Antitrust Crimes*, *supra* note 11, at 4.
- 23 *Id.*
- 24 U.S. DEP’T OF JUSTICE, ANTITRUST DIV., PREVENTING AND DETECTING BID RIGGING, PRICE FIXING, AND MARKET ALLOCATION IN POST-DISASTER REBUILDING PROJECTS: AN ANTITRUST PRIMER FOR AGENTS AND PROCUREMENT OFFICIALS (Jan. 31, 2013, updated June 25, 2015) [hereinafter DOJ, Preventing Bid Rigging], <https://www.justice.gov/atr/preventing-and-detecting-bid-rigging-price-fixing-and-market-allocation-post-disaster-rebuilding>.
- 25 Carl Hittinger et al., *Clear Expectations: DOJ Outlines Tenets of an Effective Antitrust Compliance Program*, Baker Hostetler, ANTITRUST ADVOCATE (Nov. 19, 2014), <https://www.antitrustadvocate.com/2014/11/19/clear-expectations-doj-outlines-tenets-of-an-effective-antitrust-compliance-program> (noting with respect to Baer’s comments that “some uncertainty in this area persists over exactly how this may operate”); Mark Rosman, *Criminal Antitrust Policy: Bigger Sticks, Smaller Carrots*, LAW360 (Sept. 16, 2014) (noting in the wake of Baer’s statement that “further guidance on how this will work in practice may be helpful” and that “a leniency program that leaves an applicant exposed to prosecution for conduct it brings forward would flip the program’s incentives on its head”).
- 26 U.S. DEP’T OF JUSTICE, ANTITRUST DIV., FREQUENTLY ASKED QUESTIONS ABOUT THE ANTITRUST DIVISION’S LENIENCY PROGRAM AND MODEL LENIENCY LETTERS 7 (Nov. 19, 2008) [hereinafter DOJ, Original FAQs].
- 27 *Id.* at 7–8.
- 28 U.S. DEP’T OF JUSTICE, ANTITRUST DIV., FREQUENTLY ASKED QUESTIONS ABOUT THE ANTITRUST DIVISION’S LENIENCY PROGRAM AND MODEL LENIENCY LETTERS ¶ 6 (Nov. 19, 2008, updated Jan. 26, 2017) [hereinafter DOJ, Updated FAQs], <https://www.justice.gov/atr/page/file/926521/download>.
- 29 Kirby Behre, *DOJ Treatment of UBS Undermines Leniency Program*, LAW360 (June 10, 2015).
- 30 Baer, *Prosecuting Antitrust Crimes*, *supra* note 11, at 3.
- 31 *Id.*
- 32 Snyder, *Individual Accountability for Antitrust Crimes*, *supra* note 2, at 12.
- 33 Brent C. Snyder, Antitrust Div. Deputy Assistant Attorney Gen., Remarks at International Chamber of Commerce/United States Council of International Business Joint Antitrust Compliance Workshop: Compliance Is a Culture, Not Just a Policy 6–7 (Sept. 9, 2014) [hereinafter Snyder, Compliance Is a Culture], <https://www.justice.gov/atr/file/517796/download>.
- 34 *Id.* at 7.

³⁵ Baer, Prosecuting Antitrust Crimes, *supra* note 11, at 8.

³⁶ *Id.*

³⁷ Snyder, Compliance Is a Culture, *supra* note 32, at 7.

³⁸ DOJ, Original FAQs, *supra* note 26, ¶ 24.

³⁹ Snyder, Individual Accountability for Antitrust Crimes, *supra* note 2, at 14.

⁴⁰ Knox, *supra* note 5.

⁴¹ DOJ, Updated FAQs, *supra* note 28, ¶ 22.

⁴² See *id.*

⁴³ Scott D. Hammond, *Cornerstones of an Effective Leniency Programme*, 4 COMPETITION L. INT'L 4, 9 (2008). Hammond acknowledged that this is a difficult sacrifice, and that as a result "the Division has had to swallow hard on a number of amnesty applicants that it would have preferred to prosecute." Nevertheless, he asserted that a leniency program that maintained a greater degree of prosecutorial discretion "simply did not work." *Id.* at 10.

⁴⁴ This change in the perception of the leniency program among practitioners is evidenced by the reaction to the Division's recent revisions to its "Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letter" in January 2017. See, e.g., Miller Canfield, PLC, *Justice Department Policy Changes Limit Avenues of Immunity for Antitrust Crimes* (Feb. 15, 2017), <https://www.millercanfield.com/resources-Justice-Department-Changes-Limits-Immunity-for-Antitrust-Crimes.html> (noting that "many of the updated FAQs narrow the immunity protections offered under the program"); Warren Feldman et al., *Skadden Discusses DOJ Leniency Program Updates*, BLUE SKY BLOG (Mar. 6, 2017),

<http://clsbluesky.law.columbia.edu/2017/03/06/skadden-discusses-doj-leniency-program-updates/> (noting that "there is no longer the same degree of predictability of a favorable outcome for a putative corporate leniency applicant and its present and former employees"); Elizabeth Prewitt, Robert Bell & Dina Hoffer, *DOJ Narrows Path to Immunity for Antitrust Crimes*, LAW360 (Jan. 19, 2017) (noting that the changes to the FAQs "all reflect a trend toward narrowing the immunity protections offered under the program" and should be "reviewed carefully before making a determination whether to self-disclose to the division as a leniency applicant"); Simpson Thacher & Bartlett LLP, *Updated DOJ Guidance Signals Closer Scrutiny of Antitrust Leniency Program Applicants Going Forward* (Jan. 30, 2017), http://www.stblaw.com/docs/default-source/memos/firmmemo_01_30_17.pdf (noting that "the shift in tone and emphasis may give would-be applicants pause").

⁴⁵ DOJ, Updated FAQs, *supra* note 28, ¶ 6; Baer, Prosecuting Antitrust Crimes, *supra* note 11.

⁴⁶ Snyder, Compliance is a Culture, *supra* note 33.

⁴⁷ Snyder, Individual Accountability for Antitrust Crimes, *supra* note 2.

⁴⁸ DOJ, Updated FAQs, *supra* note 28, ¶ 22.

⁴⁹ Hammond, *supra* note 43, at 4–5.

⁵⁰ *Id.* at 10.

⁵¹ Baer, Prosecuting Antitrust Crimes, *supra* note 11.

⁵² See DOJ, Preventing Bid Rigging, *supra* note 24.