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Skadden Discusses DOJ Leniency Program Updates

By David Meister, Steven C. Sunshine, Tiffany Rider and Warren Feldman March 6, 2017

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The Department of Justice (DOJ or Department) released updated guidance on the Antitrust Division's Leniency Program, on January 17, 2017.[1] The Leniency Program allows corporations and individuals who self-report their cartel activity and cooperate in the Antitrust Division's (Division) investigation of the cartel to avoid criminal conviction, fines and prison sentences.[2] The program has become an important tool for the Division in its investigation and prosecution of criminal cartel activity. In 2008, the Division issued "Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters" to provide guidance to individuals and corporations seeking to utilize the program.[3] In one of the last acts of the outgoing Obama Administration, the DOJ revised the Frequently Asked Questions (FAQs) to provide greater clarity to potential participants and bring the guidance in line with the DOJ's current practices. This alert addresses several major changes. The changes in the new FAQs reflect the fact 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.

Anonymous 'Markers'

The revised FAQs reflect that the Division is less willing to grant a "marker" (*i.e.*, a place in line) without naming the company seeking the marker. Because the first to identify a violation ("first-in") receives leniency, there is an advantage to reporting a violation to the DOJ as early as possible. To qualify for a marker, counsel must (1) report that they have uncovered some information indicating that their client has engaged in a criminal antitrust violation; (2) disclose the general nature of the conduct; (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 (4) identify the client.[4] The FAQs provide for an "anonymous marker," which allowed for counsel to secure a short-term marker for a client if it disclosed the requisite information but needed more time to verify additional information before providing the client's name.[5] The revised FAQs, however, added, "In some cases, an identification of the industry may be sufficient for the Division to determine whether leniency is available. In many cases, however, it is necessary to identify specific products or services, other companies involved in the conspiracy, or the identity or location of affected customers, for the Division to determine whether leniency is available and the proper scope of the marker."[6]

The updated language reflects the Division's current policy and practice, providing greater clarity, but the revision shows that the Division has become less willing to accept anonymous markers without being provided the complete information up front. While confirmation of an antitrust violation in not required to gain a marker, the FAQs note, "It is not enough for counsel to state merely that the client has received a grand jury subpoena or has been searched during a Division investigation and that counsel wants a marker to investigate whether the client has committed a criminal antitrust violation."[7] Thus, no longer will parties be able to approach the Division when they believe they have a violation, get an anonymous marker, and then withdraw if they do not find a problem. This makes an early assessment even more important because once a party approaches DOJ they may be required to disclose everything they know at the time and unable to turn back.

Current and Former Employees Coverage

The Leniency Program has two types of leniency, A and B. Type A leniency is when the DOJ had no knowledge about the conduct when the company applied, while Type B is when the DOJ already had information about the illegal acts. Under Type B, the DOJ has greater discretion about whether current employees receive protection. For current employees, the FAQs add stricter requirements for conditional leniency for current employees under Type B leniency: "[T]he Division may exercise its discretion to exclude from the protections that the conditional leniency letter offers those current directors, officers, and employees who are determined to be highly culpable."[8] The language about "highly culpable" employees was not in the previous iteration, and it may add a level of uncertainty for employees considering cooperation. This may make it more difficult to obtain cooperation from employees and therefore makes it more challenging for companies and their counsel to obtain the information necessary to support a leniency application.

The revised FAQs also change the language regarding former employees in a way that signals a shift away from covering former directors, officers and employees. The original FAQs stated that the policy "does not refer to former directors, officers or employees, so the Division is under no obligation to grant leniency … ."[9] The revised FAQs replaced that statement with "Former directors, officers, and employees are presumptively excluded from any grant of corporate leniency."[10] The revision makes gaining cooperation and obtaining information from former employees more difficult because of the unlikeliness that they will qualify for the Leniency Program.

ACPERA Cooperation

The revised FAQs address what constitutes cooperation with plaintiffs under the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) of 2004.[11] ACPERA reduces the potential damages liability for an amnesty applicant if the applicant provides "satisfactory cooperation" to plaintiffs. The revised FAQs say that to qualify, the party must be "cooperating fully with the Division's investigation, and must meet certain requirements in connection with the claimant's civil action, including providing the claimant with a full account of all potentially relevant facts known to the corporation or cooperating individual and all potentially relevant documents."[12] This updated language, requiring provision of "a full account," clarifies and might increase the required disclosure to plaintiffs from parties seeking leniency.

Penalty Plus

The revised FAQs also include the Department's informal Penalty Plus policy. The Division has utilized a Leniency Plus policy that permits leniency applicants who uncover a separate violation to receive credit for reporting that violation if they provide additional information to the DOJ.[13] The flip side of Leniency Plus, the Penalty Plus policy provides that if a company pleads guilty to an antitrust offense but fails to report an additional crime it was involved in, the company forgoes credit under the Leniency Plus policy and the Antitrust Division will generally seek a more severe punishment for the additional crime.[14] Ultimately, this addition is not new because the Antitrust Division had articulated the Penalty Plus policy in speeches and had utilized it in practice,[15] but it formalizes the policy and reiterates the need for parties to be comprehensive and diligent in their initial investigations to ensure they fully cooperate with the DOJ.

Immunity for Crimes Outside of Antitrust

Sometimes, a party cooperating in an antitrust investigation and receiving leniency under the Leniency Program can also receive leniency credit and avoid prosecution by the Antitrust Division. The Division will grant leniency for acts committed "in furtherance of" and "integral to" the violation that constitute non-antitrust violations, like mailing or emailing bids in a bid rigging scheme, which would be mail or wire fraud. The leniency credit only binds the Antitrust Division, however, and does not prevent prosecution from other federal and state prosecuting authorities, including other divisions of DOJ. The revised FAQs emphasize, "The Division's Leniency Program does not protect applicants from criminal prosecution by other prosecuting agencies for offenses other than Sherman Act violations."[16] The FAQs state that a non-antitrust crime, like bribing an official in violation of the Foreign Corrupt Practices Act, "in furtherance of" an antirust crime will not prevent prosecution by other authorities.[17]

In recent years, the DOJ has had to grapple with an increasing number of investigations where both the Antitrust Division and Criminal Division had prosecutorial interest. This includes cases like LIBOR, foreign exchange spot trading and certain Foreign Corrupt Practices Act matters. This has led the Antitrust Division to clarify that leniency obtained through the Antitrust Division does not necessarily translate into immunity from prosecution for non-antitrust offenses by the Criminal Division. The revision seeks to strike a balance in applying leniency to non-antitrust violations. The FAQs note that "other prosecuting agencies do not use other criminal statutes to do an end-run around leniency," but the FAQs emphasize that "leniency applicants should not expect to use the Leniency Program to avoid accountability for non-antitrust crimes."[18] Moreover, in an apparent attempt to distinguish wire fraud by mailing conspiratorial bids — which would be integral to an antitrust violation — from bribery, the FAQs state "not every fraud that an applicant commits while engaged in an antitrust crime is committed in furtherance of that crime."[19]The Division's view that other agencies will not do an "end-run around leniency" is encouraging but offers no concrete protection against prosecution from other agencies, particularly given the FAQs' emphasis that those agencies are not bound by the leniency letter. The revised FAQs indicate the need for parties facing multifaceted criminal issues to balance the potential benefits of leniency from the Antitrust Division with the risk that another arm of the DOJ will pursue the case nevertheless. A company will be well advised to incorporate this risk into its strategic thinking at the outset of the matter.

Conclusion

The Antitrust Division's Leniency Program can be extremely valuable in the right situation, as it enables cooperating parties to avoid incarceration or fines for antitrust crimes. Overall, the revised FAQs reflect the Division's stricter interpretation of the Leniency Program and offer less certainty for leniency applicants. The new tone of the FAQs is illustrated by the introduction, where language regarding "obtaining" leniency was revised to "receiving" leniency. This shift in tone appears to emphasize the DOJ's discretion in granting leniency. The success of the Leniency Program is based on certainty, but the updated FAQs demonstrate that there may be a higher price for leniency, as well as greater uncertainty about the availability of leniency. The changes reinforce the importance of the early detection and assessment of any potential violations. Individuals and corporations considering participating in the Leniency Program will need experienced counsel with capabilities in antitrust, white collar and criminal investigations to navigate the program and the internal investigations. Compliance should continue to be a focus at companies to prevent and detect antitrust violations.

ENDNOTES

1 U .S. Department of Justice, Antitrust Division, "Frequently Asked Questions about the Antitrust Division's Leniency Program and Model Leniency

Letters" 7 (Jan. 26, 2017), *available at* https://www.justice.gov/atr/page/file/926521/download (Leniency Program FAQs) (the updated FAQs were issued on January 17, 2017 and were reissued on January 26, 2017)

2 *See* https://www.justice.gov/atr/leniency-program. The Division first implemented a leniency program in 1978. It issued its Corporate Leniency Policy in 1993 and a Leniency Policy for Individuals in 1994.

3 U.S. Department of Justice, Antitrust Division, "Frequently Asked Questions about the Antitrust Division's Leniency Program and Model Leniency Letters" (November 19, 2008), *available at* https://www.justice.gov/atr/frequently-asked-questions-regarding-antitrust-divisions-leniency-program. (2008 Leniency Program FAQs).

4 Leniency Program FAQs at 3.

5 Leniency Program FAQs at 3 n.6. The revised FAQs originally omitted the footnote describing anonymous markers, but the Division reissued the FAQs on January 26, 2017 with the footnote included because it "was inadvertently omitted from the January 17 version." *See* https://www.justice.gov/opa/blog/updated-faqs-provide-answers-antitrust-division-s-leniency-program-and-model-leniency-0.

6 Leniency Program FAQs at 3.

7 *Id.*

8 *Id.* at 21.

9 2008 Leniency Program FAQs at 18.

10 Leniency Program FAQs at 22.

11 *See* Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, tit. II, 118 Stat. 661 (2014).

12 Leniency Program FAQs at 18.

13 *Id.* at 9.

14 *Id.* at 11.

15 *See, e.g.*, Scott D. Hammond, Deputy Assistant Att'y Gen., Antitrust Div., Measuring The Value Of Second-In Cooperation In Corporate Plea Negotiations, Presented at the The 54th Annual American Bar Association, Section of Antitrust Law, Spring Meeting (Mar. 29, 2006), *available at* https://www.justice.gov/atr/speech/measuring-value-second-cooperation-corporate-plea-negotiations.

16 Leniency Program FAQs at 7.

17 *Id.*

18 *Id.*

19 *Id.*

This post comes to us from Skadden, Arps, Slate, Meagher & Flom LLP. It is based on the firm's client update, "DOJ Updates Leniency Program FAQs," dated January 27, 2017, and available here.

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