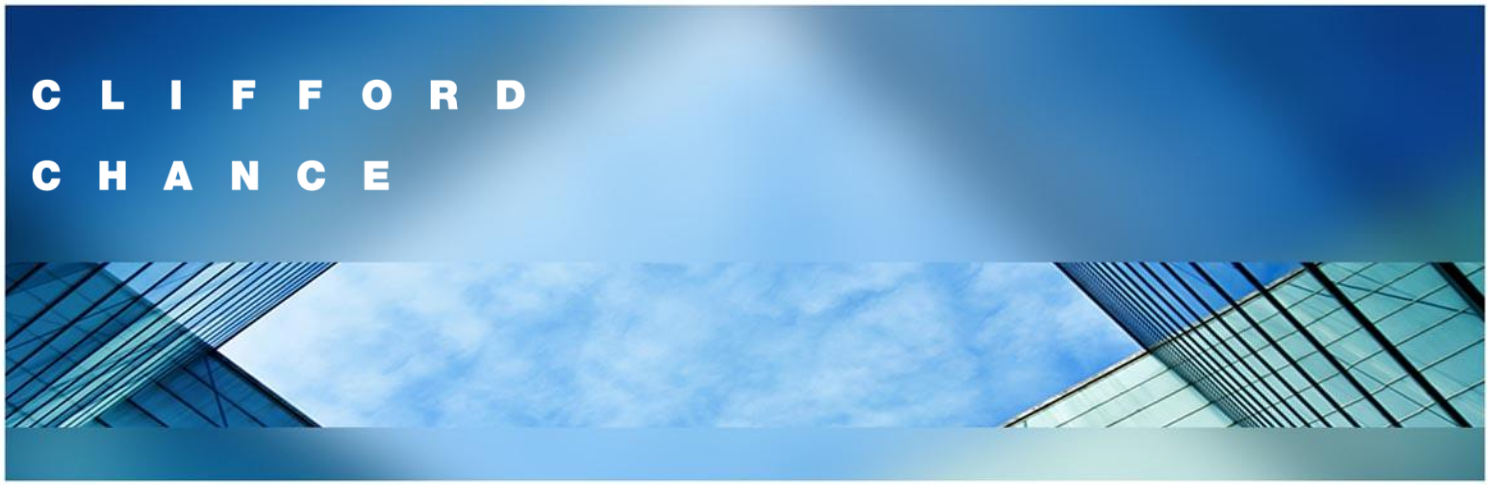

DOJ ANTITRUST DIVISION UPDATES LENIENCY POLICY

In April 2022, the U.S. Department of Justice, Antitrust Division (the "Division") announced significant updates to its Leniency Policy, which provides full criminal immunity and the opportunity for reduced civil damages to the first company (or individual) to self-report their role in a criminal antitrust violation and cooperate in the Division's prosecution of other conspirators.[1] The Division's updates to the Leniency Policy come at a time when some believed that the leniency program was falling out of favor, given the substantial burdens and uncertainties it presents to would-be applicants. The updates may only create more disincentives, however, for companies and individuals considering whether to seek leniency.

INTRODUCTION

The Leniency Policy is the centerpiece of the Division's criminal enforcement efforts. The Division has exclusive authority to prosecute criminal violations of Section 1 of the Sherman Act, which prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce."[2] The Division reserves criminal prosecution for so-called *per se* violations of Section 1, such as agreements between horizontal competitors to fix prices, rig bids, or allocate markets or customers.

The Policy allows the first company or individual to self-report a criminal antitrust violation to receive full criminal immunity from prosecution. In addition, leniency recipients that cooperate with plaintiffs in follow-on class action litigation can qualify for "detrebling" of civil damages under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA").

These benefits do not come without cost. The Leniency Policy obligates applicants to confess to their involvement in the conspiracy; cooperate throughout the

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1 U.S. Dep't of Justice, Frequently Asked Questions About the Antitrust Division's Leniency Program (Apr. 4, 2022), *available at* https://www.justice.gov/atr/page/file/1490311/download.

2 15 U.S.C. § 1.

duration of the Division's investigation into other co-conspirators, which may take years; provide restitution and remediation to harmed individuals; and cooperate in follow-on private litigation.

The Updated Leniency Policy

The updated Leniency Policy, issued on April 4, 2022, adds 48 questions and answers to the Division's list of FAQs about the policy, which was first published in November 2008 and revised in January 2017, when it consisted of 34 questions and answers. In addition, the Leniency Policy has been codified in the Division's chapter of the DOJ's Justice Manual, which is used by antitrust enforcers when investigating and prosecuting federal antitrust violations.

But with the changes made to the FAQs, the results may not be as predictable. Bright line rules have been replaced with more discretionary standards, such as the addition of a "prompt" reporting requirement as a condition of receiving leniency. There are also new requirements, such as remediation, that potentially place a heavy burden on leniency applicants.

We review below implications of the following updates: (i) the "prompt" self-reporting requirement; (ii) the "remediation of harm" requirement; (iii) the "compliance improvements" requirement; (iv) considerations for determining Type B leniency for individuals; (v) consideration of "leader or originator" role; and (vi) expectations for the conduct of civil litigation.

(i) "Prompt" Self-Reporting

The updated Leniency Policy adds the requirement that an applicant must "promptly" report its role in the illegal activity to qualify for leniency.

The Division recognizes that its "promptness" assessment will be deeply factual, including the "circumstances of the illegal activity and the size and complexity of operations of the corporate applicant." The Division explains that "promptness" will run from the time an organization has "discovered" its role in the illegal activity, with "discovery" measured from "the earliest date on which an authoritative representative of the applicant for legal matters" is informed of the conduct. That nebulous definition can include the board of directors, internal or external counsel, or a compliance officer.

The FAQs parse that a company can satisfy the "promptness" inquiry even if it first conducts a "preliminary internal investigation in a timely fashion to confirm that it committed a violation before self-reporting." Such a preliminary investigation is a prudent step for any party weighing the benefits and burdens of leniency. By contrast, an organization that "confirms" its role in the illegal activity and "chooses" not to self-report until "later learning that the Division has opened an investigation will not be eligible for leniency."

This new "promptness" requirement is a significant change in policy, and one that adds layers of uncertainty to the calculus of whether to seek leniency. Under prior iterations of the Leniency Policy, the first company to self-report its role would receive leniency, if all other conditions were met. Companies were (and are) able to inquire about the availability of a "marker"—the first place in line for leniency—

including on an anonymous basis. Now, even an applicant that secures a marker may lose the chance for leniency if the Division—in its sole discretion—later determines that the applicant failed to establish that its self-report was sufficiently "prompt."

Paradoxically, this change therefore raises the prospect that *no* applicant will qualify for leniency for a given conspiracy. That is especially true given the Division's recent push to pursue criminal charges for activities not previously subject to criminal enforcement, such as efforts to fix wages and allocate workers in labor markets. Companies that—rationally—debate whether to self-report, may decide against doing so for fear that their internal deliberations have undermined the "promptness" requirement. As a result, the promptness requirement may run counter to the Division's enforcement objectives.

(ii) Remediation of Harm

The updated Leniency Policy adds a requirement that the applicant has used its "best efforts" to "remediate the harm caused by [its] illegal activity." The purpose and effect of this new, backward-looking obligation is not clear. For one thing, the Leniency Policy already obligated leniency applicants to provide "restitution to injured parties." As a practical matter, leniency recipients fulfilled their restitution obligation through the follow-on private litigation that is an inevitable consequence of any Division cartel investigation.

While the updated FAQs require the applicant to "fully" remedy the harm "to the extent not covered by restitution," it remains unclear what, beyond restitution, should appropriately "remedy" an economic crime like an antitrust violation. The FAQs say only that an applicant can meet this requirement in "a variety of ways," depending on the "nature of the illegal activity, the nature of any harm caused . . . and the applicant's role in it." This new, open-ended requirement thus makes it more difficult for companies to objectively assess what will be required of them to obtain leniency. That uncertainty may create further apprehension for companies and individuals contemplating leniency.

(iii) Compliance Improvements

Each applicant must now use "best efforts" to "improve its compliance program to mitigate the risk of engaging in future illegal activity." The Division will assess the applicant's compliance program using its July 2019 "Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations" ("2019 policy").[3] The evaluation is a fact-specific inquiry, which will vary from applicant to applicant (*i.e.*, no "one size fits all" approach). As the Division made clear at the time of that policy announcement, formal compliance programs should be appropriately tailored to the applicant's size and lines of business.

Further, to guard against "the risk of recidivism," the Division expects leniency applicants to "conduct a thorough analysis of causes of underlying conduct (*i.e*., a root cause analysis) and undertake remedial efforts tailored to address the root causes." The additional steps may include the "implementation of measures to reduce the risk of repetition of the illegal activity, including measures to identify

[3] U.S. Dep't of Justice, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (July 2019), *available at* https://www.justice.gov/atr/page/file/1182001/download.

future risks." Additionally, the Division will consider "the applicant's efforts to discipline or remove its culpable, non-cooperating personnel." This is a concept that is also reflected in the 2019 policy. Under the 2019 policy, remedial efforts that a company has undertaken since the detection of a violation, including "an analysis to detect why the antitrust compliance program failed to detect the antitrust violation earlier," should be considered by the Division's prosecutors during both the charging and sentencing stage of an investigation. Adding these requirements to the Leniency Policy seems to suggest that a mere abandonment of the alleged antitrust violation will not be enough to qualify for leniency. Instead, it seems that, to meet the new leniency requirements, companies will have to conduct a deep-dive analysis of—for example—their internal policies, control systems, or incentives to identify the factors that allowed the violation to happen in the first place and will have to take appropriate remedial measures. Hence, a big factor of uncertainty for any leniency applicant will now be whether its remedial measures will suffice to qualify for leniency.

(iv) Considerations for Determining Type B Leniency for Individuals

The updated policy also appears to narrow the availability of protections commonly afforded to executives, officers, and employees of a corporate applicant for "Type B" leniency, which prevails when a report is made to the Division after it has opened an investigation but lacks evidence "likely to result in a sustainable conviction." The benefits to Type B applicants have steadily eroded with each policy update.

Until now, the Division typically (and presumptively) afforded criminal immunity to cooperating individuals connected to Type B applicants. In the 2017 edition of the FAQs, the Division clarified that it retained "discretion" to "exclude" from leniency a Type B applicant's personnel whom the Division "determined to be highly culpable."

Now, the Division appears to tilt the scales the other direction, saying it retains "broad discretion" on whether to "provide non-prosecution coverage" for the personnel of Type B applicants. In addition to requiring personnel of Type B applicants, like those of Type A applicants, to admit wrongdoing and cooperate with the Division's investigation, the updated FAQs now refer to the DOJ's standard Principles of Federal Prosecution, which consider, for example, whether an individual employee's cooperation is "necessary to the public interest" and the individual's "relative culpability." In other words, it is no longer clear that even cooperating personnel of a Type B applicant are any better off than the personnel of a company that does not self-report.

(v) Consideration of "Leader or Originator" Role

In a bit of good news for some potential applicants, the updated Leniency Policy adds some nuance to the requirement that an applicant not be the "leader or originator" of the illegal activity. The ambiguity of this factor has long created anxiety for would-be applicants: in a horizontal conspiracy, it can be hard to distinguish "leaders" from "followers."

The updated FAQs clarify that the "leader or originator" is a party that, based on the totality of circumstances, is "uniquely situated from its co-conspirators and appears to be the driving force behind the cartel." That status can be established

"by virtue of" the leader's "relative economic power or influence." However, an applicant will not be disqualified for leniency solely because it is the largest organization or has the largest market share, or—importantly—"merely because it initiated the first invitation to participate in the cartel." To provide the "maximum incentive and opportunity for organizations to self-report," the Division explains that it has, "where possible," interpreted this criterion in favor of the grant of leniency with exclusion under this criterion being "rare."

This new elaboration on the "leader or originator" bar should give confidence to participants in a conspiracy that, absent extraordinary circumstances, they will not be barred from leniency on this factor.

(vi) Expectations for the Conduct of Civil Litigation

In another bit of welcome news, the updated FAQs add some contours to what constitutes "satisfactory cooperation" to make the leniency applicant eligible under ACPERA for reduced damages in private follow-on litigation. The benefits of ACPERA are substantial: instead of being jointly and severally liable for three times the harm caused by the *entire* conspiracy—a potentially punishing amount in the context of the sprawling classes of plaintiffs that typically pursue antitrust litigation—ACPERA cooperators can have their civil damages reduced to the actual harm caused by only *their* conduct.

The statute provides little guidance about what constitutes an applicant's "satisfactory cooperation." This has encouraged plaintiffs to demand all manner of capitulation under threat of reporting to the presiding judge that a leniency applicant is insufficiently "cooperative." In the updated FAQs, the Division explains that an applicant should not be disqualified from ACPERA benefits for refusing a plaintiff's "unreasonable requests." As examples, the Division explains that where plaintiffs allege a broader conspiracy than the Division charged (a common tactic in follow-on suits), applicants need not provide information that is "not relevant" to the conspiracy prosecuted by the Division.

Perhaps more importantly, the Division clarified that the applicant's obligation not to take positions in civil litigation that "conflict with [its] corporate admission of wrongdoing," does *not* foreclose applicants from raising other "valid defenses" in civil proceedings. This is a valuable clarification. Private plaintiffs must establish many elements that the government does not, including "antitrust standing" (*i.e.*, that the plaintiff is the appropriate party to recover for a given antitrust violation). The updated FAQs thus make clear that while a leniency applicant must admit its role in a conspiracy, it can vigorously push for dismissal of attenuated private suits.

CONCLUSION

It remains to be seen whether and how the updated Leniency Policy impacts the Division's criminal enforcement efforts. Unfortunately, the latest updates—coupled with the Division's aggressive pursuit of a string of unsuccessful criminal cases resulting in mistrials or acquittals—appear to suggest the Division is less focused on the "carrot" of a well-defined Leniency Program, than the "stick" of criminal penalties. The blurred lines and additional requirements contained in these updates do not appear tailored to encourage greater self-reporting. Attuned to the burdens of leniency, companies have adjusted to thinking long and hard about

whether to self-report. These updates suggest that a cautious approach should remain the default for the foreseeable future. In the interim, companies should continue not only to ensure that their compliance programs are adequately equipped to detect and address violations, but also to analyze thoroughly, if and when potential violations are found, the internal factors that led to the problem and how any deficiencies can best be remediated.

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