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# Memorandum

## U.S. Department of Justice Antitrust Division Releases Updates to Criminal Leniency Program Frequently Asked Questions (FAQs)

April 11, 2022

On April 4, 2022, the U.S. Department of Justice Antitrust Division (the "Division") announced important clarifications and modifications to its Corporate and Individual Leniency Policies (the "Leniency Program") in the form of revised Frequently Asked Questions about the Antitrust Division's Leniency Program ("FAQs").[1] The Leniency Program is unique to the Division and provides for immunity for companies and individuals who are first to self-report criminal antitrust violations—price-fixing, bid-rigging and market/customer allocation agreements among competing companies (so called "antitrust cartels"). For the last thirty years, the Leniency Program has remained a mainstay of the Division's anti-cartel enforcement efforts, touted by the Division as its most effective tool for destabilizing and rooting out otherwise clandestine antitrust cartels. The success of the Division's Leniency Program has led countries around the world to adopt similar programs to combat antitrust cartels within their jurisdictions.

Many of the new updates to the Leniency Program reflect a formalization of the Division's evolving practices, which are now more expressly clarified in the revised FAQs. These clarifications include a more extensive discussion of the requirements for securing certain statutory limitations on civil damages claims under the Antitrust Criminal Penalty Enhancement and Reform Act ("ACPERA"); guidance around the inclusion of current and former employees, corporate affiliates, agents and contractors in the scope of a leniency application; and further detail regarding the circumstances under which a leniency application may expire or be withdrawn or revoked.

Other updates, however, appear to fundamentally alter the Leniency Program by imposing new and more stringent requirements on applicants. The most notable of these changes include:

**1. Leniency applicants are required to "promptly" self-report potential violations.**

The Division has long recommended that companies seek a leniency marker at the first indication of wrongdoing and have emphasized the prisoner's dilemma aspect of the Leniency Program, which permits only the first company to report potential wrongdoing to obtain a marker. However, the Division now expressly places the burden on the applicant to show that its self-reporting was "prompt." According to the updated FAQs, reporting is

[1] U.S. Department of Justice Antitrust Division, *Frequently Asked Questions About the Antitrust Division's Leniency Program* (April 4, 2022), available at https://www.justice.gov/atr/leniency-program.

still considered prompt if a company first conducts a preliminary internal investigation "in a timely fashion" in order to confirm whether a potential violation occurred, but any undue delay beyond a preliminary investigation may put leniency eligibility at risk.

This requirement is also coupled with revised guidance as to when a company is considered to have "discovered" potential misconduct—*i.e.*, the time the proverbial prompt-reporting clock starts to tick. According to the updated FAQs, the Division considers an organization to have discovered the illegal activity "at the earliest date on which an authoritative representative of the applicant for legal matters—the board of directors, its counsel…or a compliance officer—was first informed of the conduct at issue." What remains unclear is whether a potential violation is "discovered" when such a representative is actually aware of the illegality of the conduct, or if the Division intends to hold companies to a constructive knowledge or "should have known" standard. For example, in the circumstance where a non-lawyer compliance officer became aware of possible misconduct but failed to recognize its legal significance, only for the conduct to then be discovered and properly recognized a year later by in-house legal counsel, the updated FAQs raise questions about whether a company would be barred from seeking leniency.

The combination of these promptness and discovery requirements, as well as the ambiguity surrounding their application in practice, raises new strategic considerations for companies evaluating a potential application for leniency. Companies now need to consider whether, on the one hand, to risk self-reporting at a time when they may have not have thoroughly explored potential discovery issues that may bar them from receiving leniency, and on the other hand, conducting a comprehensive and more time-intensive internal investigation before seeking leniency and running the risk the Division will ultimately consider their application untimely.

**2. Leniency applicants are required to remediate conduct and demonstrate a restitution plan before a conditional leniency letter will be granted.**

While the Leniency Program has traditionally required an applicant to remediate conduct and pay restitution to victims, the updated FAQs introduce an expected timeline and scope for these requirements that raise still additional, new considerations for potential leniency applicants.

As to remediation, according to the updated FAQs, a leniency applicant must demonstrate to the Division that it has remedied its conduct and mitigated future antitrust risks before any conditional leniency (*i.e.*, immunity conditioned on continuing cooperation) will be granted. The updated FAQs recognize that remediation can be achieved in "a variety of ways," but also emphasize that the remediation will be highly fact-specific and dependent on the nature of the conduct and harm and the applicant's role in the misconduct. The updated FAQs cite not only improvements to antitrust compliance programs, but also reference "additional steps" that may be necessary to show that a leniency applicant recognizes the seriousness of and accepts responsibility for the conduct. Importantly, the updated FAQs also note that the Division may require applicants to discipline or remove any culpable or non-cooperating personnel.

As to restitution, the Division now requires leniency applicants to present "concrete, reasonably achievable plans" about how they will make restitution in order to receive conditional leniency. This requirement may prove challenging because, as recognized elsewhere in the FAQs, the restitution obligation is often fulfilled through settlements in parallel civil actions brought on behalf of victims. The updated FAQs do not address whether a proposal to pay restitution as part of a civil settlement is sufficient to meet this requirement, and because civil actions tend to follow or lag behind criminal investigations—particularly in the context of a leniency application where the applicant self-reports conduct the Division is not already aware of (so called "Type A" leniency)—leniency applicants may struggle to meet this requirement until far down the road in civil litigation. The updated FAQs are also silent on other key questions like how restitution will be calculated if no civil suit has commenced; what happens if a civil suit is filed after restitution has already been made; and what process will be afforded to an applicant where there are disputes about the scope of what constitutes appropriate restitution.

While remediation and restitution requirements are not themselves new to the Leniency Program, the updated FAQs create significant uncertainties about what will be expected from leniency applicants going forward in these areas and how the Division may choose to wield the broad discretion it has now reserved for itself to disqualify applicants under these requirements. These requirements also raise more practical issues for potential applicants in identifying problematic conduct suitable for self-reporting by introducing new obstacles for companies seeking to secure the cooperation of potentially culpable employees in the course of an internal investigation.

**3. Leniency applicants are prohibited from taking positions in civil litigation that contravene its corporate confession.**

Because investigations by the Division often coincide with or lead to parallel civil actions by private damages claimants, leniency applicants must routinely be prepared to juggle the demands of meeting the Leniency Program requirements while also defending against civil claims. The updated FAQs narrow the tightrope that leniency applicants must be willing to walk in these circumstances: mounting a valid and robust defense in parallel civil actions while refraining from taking positions or making statements that contradict the corporate confession of wrongdoing made to the Division in furtherance of a leniency application. This balancing act is no small feat, as there are often material differences between the nature and scope of the conduct an applicant self-reports under the Leniency Program and that which may be broadly claimed in any civil damages action. Nonetheless, the updated FAQs make clear that applicants choosing to navigate this tightrope will now do so without a safety net and at their own risk by expressly reserving to the Division the right to disqualify applicants for any actual or perceived inconsistencies between an applicant's leniency application and its civil defense strategy.

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Whether, when and how to apply for leniency are complex decisions, requiring careful consideration of the numerous requirements, risks and collateral consequences involved for a company and its employees. The

Division's latest FAQs further clarify many of those considerations, but also introduce and muddy certain others. Accordingly, companies and individuals would be well advised to seek expert guidance when assessing their options for navigating a potential criminal antitrust problem.

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