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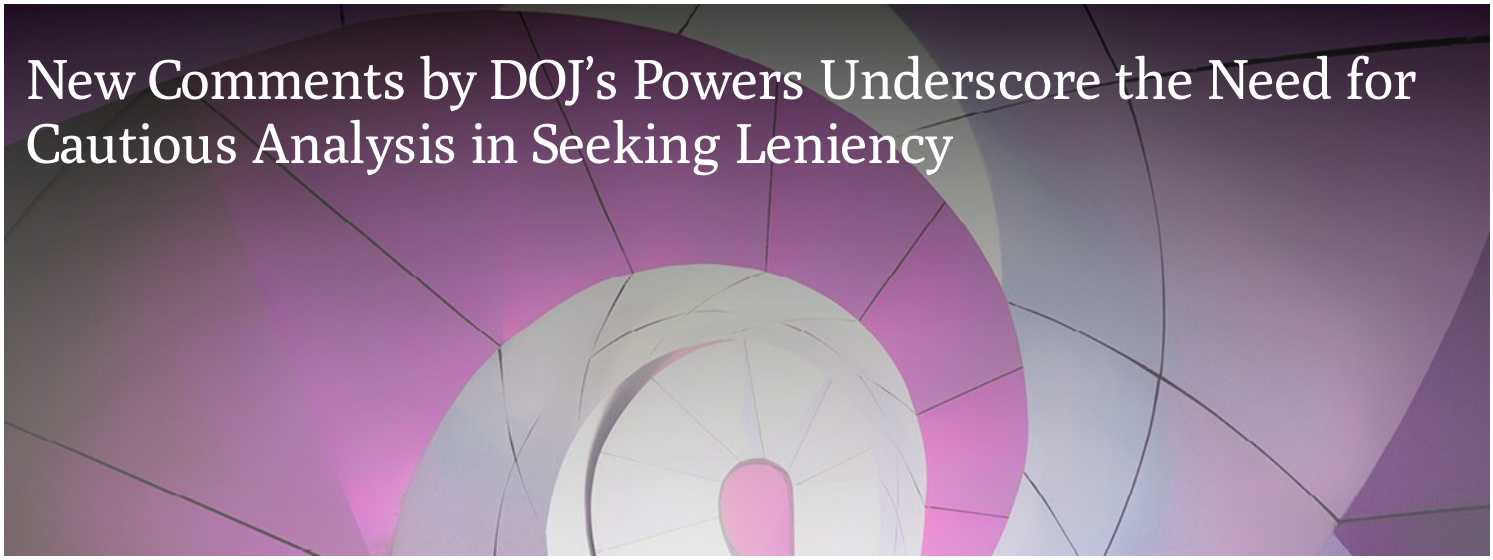

New Comments by DOJ's Powers Underscore the Need for Cautious Analysis in Seeking Leniency

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Deputy Assistant Attorney General Richard A. Powers has recently issued several warnings—some "new"—regarding the Department of Justice (DOJ) Antitrust Division's leniency program. Powers' comments should be carefully considered by companies that are considering cooperation or are cooperating already. In a nutshell, they are:

- It is best if cooperation begins at the start of the company's involvement in the Division's investigation.
- Cooperating defendants and their counsel must "be candid and provide complete information, even when the facts may be unfavorable." Consistent with the Justice Manual, "all individuals substantially involved in or responsible for the misconduct at issue" must be identified, along with all other "relevant facts relating to that misconduct."
- Similarly, evidence should not be "shaded" in favor of a cooperating defendant, and no information may be omitted deliberately. Doing so could not only "foreclose any credit for cooperation at the charging stage" but also impact the Division's fine calculation. Honest mistakes that are later corrected will be treated differently.
- Corporate defendants may not make public statements that "disclaim their wrongdoing" or otherwise contradict their "acceptance of responsibility through the facts descrhttps://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-13th-international ibed in the information or the factual basis of the plea agreement."
- Can good compliance result in a deferred prosecution agreement even if self-reporting is not "prompt"? The answer seems to be probably not. The "adequacy and effectiveness of a company's compliance program is one of the ten factors the Justice Manual directs prosecutors to consider when weighing charges against a corporation." "Prompt self-reporting, cooperation, and remedial action" are additional considerations, and "the choice to take a wait-and-see approach when a company uncovers evidence of cartel conduct could prove to be a costly mistake."
- It "takes longer now to receive a conditional letter than it did 20 years ago; attorney proffers and hot documents are no longer sufficient and multiple witness interviews are almost always requested by staff." At the same time, companies should continue to "race in for the marker" even if they don't have specific evidence of cartel activity. The Division will "work with counsel as they sort through the evidence, and if the evidence indicates that there has not been a U.S. criminal antitrust violation, a company may withdraw its marker or let it expire."

- If a company wants to maintain its marker, “the Division expects to receive motivated and engaged cooperation throughout the investigation beginning with the grant of the marker until the very last prosecution in that conspiracy.”

The full remarks are available here:

- Deputy Assistant Attorney General Richard A. Powers Delivers Remarks on the State of Criminal Antitrust Enforcement in 2020
- Deputy Assistant Attorney General of the Antitrust Division, Richard A. Powers Delivers Remarks at the Global Competition Review Live Ninth Annual Antitrust Law Leaders Forum
- Deputy Assistant Attorney General Richard A. Powers Delivers Remarks at the 13th International Cartel Workshop

Some of the comments are not surprising and essentially reiterate the Division’s previously communicated positions on cooperation—*e.g.,* that a cooperating company and its counsel should be careful when characterizing evidence, and prompt reporting is best if leniency is going to be sought. But Powers’ comments, particularly stressing the high expectations of the Division from day one, underscore the increasing need for a very nuanced analysis of whether a company should seek leniency. For example, Powers urges the usual “race in for the marker” even with no specific or direct evidence of antitrust violations. But, that bell cannot always be unrung—even if the resulting investigation turns up no violations—resulting, at times, in jaw-dropping civil exposure from a decision made too quickly.

3 Min Read

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