

Boosting Immunity: DOJ Injects Additional Burden and Uncertainty to Antitrust Leniency Process

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On April 4, 2022, the DOJ Antitrust Division announced updates to its Leniency Policy, updated frequently asked questions, and provided a new dedicated email address for corporations and individuals to use to apply for leniency. The updated Leniency Policy, which is included in the Antitrust Division's chapter of the Justice Manual at 7-3.400, now includes a requirement that an applicant "promptly self-report after discovering its wrongful conduct and undertake remedial measures to prevent reoffending." The changes serve as yet another signal of the DOJ's heightened focus on accountability for corporate criminal misconduct.

- With respect to promptness, the FAQs make clear the Antitrust Division will assess promptness "based on the facts and circumstances of the illegal activity and the size and complexity of operations of the corporate applicant. It is the applicant's burden to prove that its self-reporting was prompt." See FAQ 22 ("What does it mean to report the illegal activity 'promptly'?"). This could mean that an applicant seeks a marker "at the first indication of possible wrongdoing" or after "a preliminary internal investigation in a timely fashion to confirm that it committed a violation," but it will not be acceptable to confirm involvement in illegal activity and not self-report until learning that the Division has begun an investigation. FAQ 22.
- With respect to remediation and a compliance program, the FAQs now state that an applicant may satisfy the requirement to remediate the harm and improve its compliance program to mitigate the risk of future anticompetitive activity "in a variety of ways." See FAQ 49 ("How does an applicant satisfy the requirement that it 'uses best efforts . . . to remediate the harm caused by the illegal activity' and 'improve its compliance program to mitigate the risk of engaging in future illegal activity?").
- For the remediation requirement, an applicant may be required to "undertake additional remedial measures" that "fully remed[y] the harm caused by the offense, to the extent not covered by restitution, and eliminate[] or reduce[] the risk of recidivism" before obtaining a conditional leniency letter. Like the compliance program requirement, the Antitrust Division's evaluation of remediation efforts will be fact-specific. FAQ 49.
- For the compliance program requirement, the specifics of what will be sufficient will depend on the "applicant's size and line of business," but the Antitrust Division will generally assess antitrust compliance through a "fact-specific inquiry," including the existing compliance program and "when [the applicant] makes subsequent improvements." FAQ 49.

The additional requirements of prompt reporting and remediation narrow potential eligibility for leniency. They also introduce additional burdens and uncertainty for applicants at a time when, since 2016, leniency applications have apparently declined precipitously. The fall-off was so stark that Assistant Attorney General Makan Delrahim had to reassure the antitrust community in 2019 that, “[d]espite some recent eulogies over the purported death of leniency, the division’s leniency program is still alive and well.” The luster of leniency has dulled for several reasons, including the costs, burdens, and uncertainty of satisfying the government of full and complete cooperation; exposure to expensive and long-running private actions; and potential claims and investigations from multiple jurisdictions.¹¹ Given these incredible costs and burdens, companies may view leniency in the same way they consider any other business decision: by weighing the costs against the benefits. And it is not clear whether the updates to the Leniency Policy will, in fact, cause more companies to decide against leniency given the increased burdens.

Interestingly, the announcement comes at a time when the enforcement agencies have stated their intention to increase antitrust enforcement. Assistant Attorney General Jonathan Kanter of the Antitrust Division announced the updates to the leniency program during a competition Enforcers Summit with the FTC, at which he warned, “it’s important for the rules of the road to be clear so the business community knows what to expect and appreciates the costs of losing the race for leniency. Corporate boards and executives, and the counsel advising them, should understand that sitting on their hands after detecting an antitrust crime will have real ramifications – losing out on leniency means severe consequences.”

The approach under AAG Kanter’s Antitrust Division is a stark contrast to his predecessor, Makan Delrahim, who appeared to focus on incentives for reporting (carrots) instead of risks for failure (sticks). For example, the Division under Delrahim’s leadership announced a new policy to begin considering compliance at the charging and sentencing phases of criminal antitrust investigations to incentive antitrust compliance programs by. Today, AAG Kanter and his FTC counterpart, Chair Lina Khan, are sending a strong message in support of the Biden Administration’s more aggressive approach to antitrust enforcement, which now incorporates more severe punishments and stricter standards for leniency. They are also expanding the focus of antitrust enforcement, focusing not just on the traditional collusion and price-fixing matters but also on monopolization.

The current administration also expects to issue more frequent updates in the years to come. On April 6, 2022, at the ABA Antitrust Law Section Spring Conference, Deputy AAG Richard Powers, who served as acting AAG before AAG Kanter was confirmed, noted that the Leniency Policy had not been updated since 1993 and previously was separate from the Justice Manual. The decision to centralize key policies in a single location was a deliberate choice, and he expects the FAQs to be treated as a living document with more regular updates to ensure they incorporate necessary clarifications.

Takeaway

While the updated leniency program and the detailed guidance provided in the FAQs are intended to “reaffirm the Antitrust Division’s commitment to transparency, predictability and accessibility in criminal enforcement,” they also highlight the Antitrust Division’s increased attention on enforcement and the high burden of cooperation. It remains to be seen whether these additional requirements and forewarnings of increased criminal enforcement will breathe new life into the leniency program, or be viewed as another burden that tips the scales against leniency under the appropriate circumstances.

¹¹ See A. Paul, Victor, Molly Donovan, and Jeffrey Amato, “Declining immunity: Why has the quest for leniency/amnesty lost its way?” *Competition Law Insight* (Jun. 1, 2021), available at <https://www.competitionlawinsight.com/practice-and-procedure/immunity/declining-immunity-147223.htm>.

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