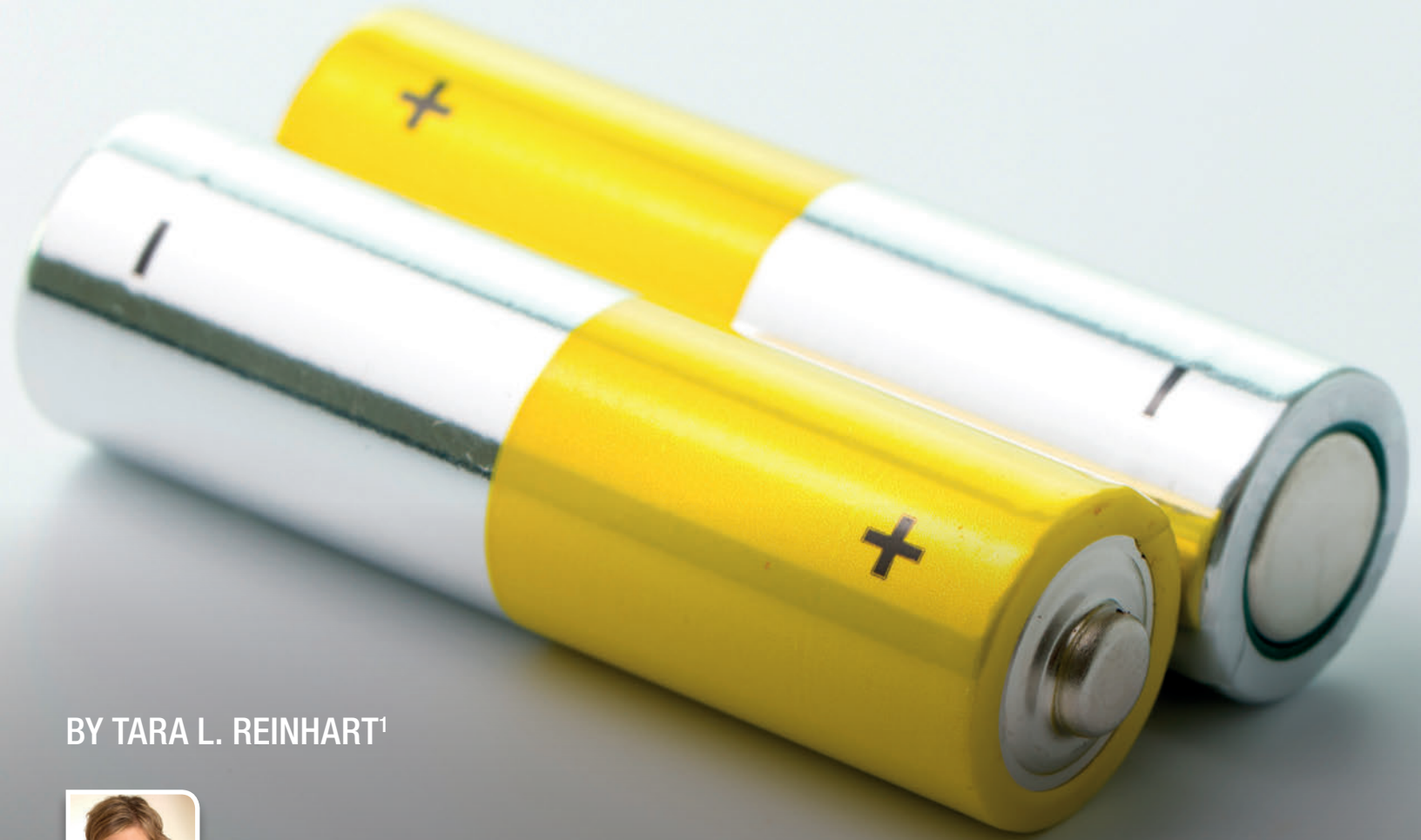
“LENIENCY PLUS” AND ITS POTENTIAL MINUSES



BY TARA L. REINHART[1]

1 Head of the Antitrust/Competition Group in Skadden’s Washington, D.C. office.

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I. INTRODUCTION

The Department of Justice ("DOJ") Antitrust Division leniency program can provide significant benefits to a company that discovers its employees are price-fixing and self-reports the crime, if it is the first among co-conspirators to make a corporate confession and agree to cooperate. If it satisfies DOJ's requirements, the company receives complete immunity for the conduct, which means no guilty plea and no fine. The employees — even the most culpable — also walk free. The leniency program is unique in federal white-collar enforcement. If a company discovers its employees are engaged in other white-collar crimes, it can self-report to DOJ and cooperate fully, but in all likelihood the cooperation will end with a corporate guilty plea. The most culpable employees will be fired and prosecuted. Not so under the Antitrust Division leniency policy.

Under the current iteration of the leniency policy, which has been in effect since 1993, companies can qualify even where the Antitrust Division already has an ongoing investigation, as long as DOJ has not yet collected sufficient evidence to indict. No wonder the Antitrust Division considers leniency to be its most important investigative tool.[2] In the last 10 years, the Antitrust Division has collected more than $10 billion in fines and sent more than 260 individuals to jail.[3] The incentives of the leniency program to self-report crimes and cooperate are largely responsible.

One factor can greatly complicate a company's efforts to get and keep leniency: the potential for exposure on other products. Of course, when a company discovers price-fixing in one product line and its internal investigation confirms the conduct did not spill over into other products, then leniency typically can be secured and kept. But, many investigations spread from product to product, engulfing entire industries, because companies discover price-fixing in more than one product line. This frequently happens to companies that are implicated in a price-fixing conspiracy by a leniency recipient. They conduct their own internal investigation and — surprise! — discover employees are involved in additional conspiracies.

In fact, about half of the Antitrust Division's criminal cases arise from an investigation of a completely separate market.[4] This means that one or more companies cooperating in an investigation into price-fixing in

2 Leniency Program, https://www.justice.gov/atr/leniency-program.

3 Antitrust Division Workload Statistics FY 2008-2017, https://www.justice.gov/atr/file/788426/download.

4 See, e.g. Remarks of Gary Spratling, Deputy Assistant Attorney General for Criminal Enforcement, U.S. Dept. of Justice, *Making Companies An Offer They Shouldn't Refuse, The Antitrust Division's Corporate Leniency Policy—An Update*, presented at the Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust (Feb. 16, 1999); remarks of Scott D. Hammond, Director of Criminal Enforcement Antitrust Division, U.S. Dep't of Justice, *A Summary Overview of the Antitrust Division's Criminal Enforcement Program*, presented at the New York State Bar Association Annual Meeting (Jan. 23, 2003); Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, U.S. Dept. of Justice, *An Update of the Antitrust Division's Criminal Enforcement Program*, presented at the ABA Section of Antitrust Law Cartel Enforcement Roundtable, 2005 Fall Forum (Nov. 16, 2005).

one product line discover and disclose to the DOJ conduct relating to price-fixing in one or more additional products. In that circumstance, the company and its employees may qualify for leniency plus. And that's where it gets tricky.

II. WHAT IS LENIENCY PLUS?

The 1993 leniency policy does not mention leniency plus, also known as amnesty plus. Then-Deputy Assistant Attorney General Gary Spratling first articulated the policy in a 1999 speech.[5] He provided a hypothetical, which is repeated in the Antitrust Division's *Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters* (originally published on November 19, 2008; update published on January 26, 2017). The hypothetical is straightforward:

> As a result of cooperation received pursuant to an amnesty application in the widgets market, a grand jury is investigating the other four producers in that market, including XYZ, Inc., for their participation in an international cartel. As part of its internal investigation, XYZ, Inc. uncovers the information of its executives' participation not only in a widgets cartel but also in a separate conspiracy in the sprockets market. The government has not detected the sprockets cartel, because the amnesty applicant was not a competitor in that market and no other investigation has disclosed the cartel activity. XYZ, Inc. is interested in cooperating with the Division's widgets investigation and seeking leniency by reporting its participation in the sprockets conspiracy.

In other words, when a co-conspirator tags a company for price-fixing in one product line, that company may tag co-conspirators for price-fixing in additional products. The company benefits by obtaining a reduced fine related to the original product and complete immunity for price-fixing in the additional products.

To secure leniency for the additional products, the same procedure as for ordinary leniency applications applies and the same requirements must be met. The applicant must be the first to report the conduct, take prompt and effective action to stop the conduct, make a corporate confession, and cooperate fully with the DOJ's investigation of others.[6] If the company obtains leniency, then it can negotiate a guilty plea for price-fixing in the original product line that includes a substantially reduced fine.

III. MORE SCRUTINY, MORE WORK

By the time a company discovers employees engaged in not one, but two or more, price-fixing conspiracies, Antitrust Division staff will have already heard an earful about the company, its exposed employees, and the conduct related to the original product from the co-conspirator cooperating in the investigation related to the original product line. Witnesses will have painted a picture of the role of individuals. The company may have been surveilled. Employees of the cooperating co-conspirator may have worn wires. Antitrust Division staff may have phone records. Business records provided by the cooperator may have provided DOJ a roadmap to what happened before and after any calls or meetings between the competitors. So, when company counsel make the call to the DOJ to put a marker down on the additional products, staff likely have composed a comprehensive picture of the company's role in the original conspiracy. Staff may view the culpable employees as enthusiastic, active participants in the conduct. If so, their going-in assumption upon hearing that the company uncovered conduct in other products will be that the employees engaged in similar conduct wherever they could. And, if the employees involved in the additional conduct are different from those involved in the original conspiracy, staff will wonder whether such conduct is endemic to the company.

When a company seeks leniency plus, the Antitrust Division staff expects counsel to have conducted — or be in the process of conducting — a wide internal investigation. It may be that one bad apple has been engaging in conduct that violates company policy as well as the law, and that the company determines that the conduct is limited following a review of the products handled by the bad apple. The DOJ staff, however, may insist that, as part of the company's cooperation, the company conduct a more expansive investigation and present the results. The DOJ requires extensive assistance from its cooperators, and the burden on companies and their employees can be staggering. As for business records, Antitrust Division staff often seek broad document productions from cooperators, even though they also expect the company to isolate and separately provide the most probative documents. Staff will question cooperating employees about all of the products they handle and all of their interactions with competitors. Cooperation may span years. The risk is real that a company enters the leniency plus program with a plan to satisfy its obligations through relatively narrow cooperation, and then, because the DOJ staff go where the evidence takes them, the breadth of

5 Spratling, *Making Companies an Offer They Shouldn't Refuse, The Antitrust Division's Corporate Leniency Policy—An Update.*

6 Department of Justice, *Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters* at 4-5 (Jan. 26, 2017).

cooperation balloons. Before the company decides to take advantage of leniency plus, company counsel should anticipate the potential scope of the investigation and cooperation and estimate the associated burdens.

IV. AVOIDING THE FLIP-SIDE: PENALTY PLUS

Another scope-related danger exists, for the company and individuals alike. No matter how much conduct related to how many products the company discloses, there may be more. Sometimes this is inadvertent. Companies may not investigate broadly enough, and, after the DOJ has begun investigating and receiving subpoena responses from other companies, troubling conduct related to even more products is revealed. Sometimes employees decline to disclose all of their conduct to company counsel. They stay silent about relationships with competitors if they are not asked specifically about them, or they choose to confirm only facts or conduct observable in business records or phone logs, often believing that what they do not reveal will remain hidden away.

Once a company has accepted the benefits of leniency plus, the risk remains that DOJ will uncover even more conduct on other products that the company inadvertently failed to unearth and report. If the DOJ uncovers more conduct after the company pleads guilty to the original conspiracy, then the DOJ will seek a sentencing enhancement in connection with prosecuting the company for the additional conduct, and will also strip the company of its leniency plus benefits on the products it did report. The sentencing enhancement will be more severe if the DOJ concludes the company did not sufficiently investigate its employees' conduct, or if the company knew about the conduct but declined to report it. This is the flip-side of leniency plus, called "penalty plus." In the same 1999 speech in which he described leniency plus, Spratling laid out the penalty plus policy, and incorporated it into the Antitrust Division's leniency FAQs. The risks of penalty plus incentivize companies to go to great lengths to root out wrongdoing and disclose all of it.

Clearly the DOJ expects companies taking advantage of leniency plus to investigate broadly and do what they can to uncover any and all price-fixing. But companies in that situation often are racing co-conspirators to qualify for leniency as they uncover new conduct. Companies need not complete their internal investigations before seeking leniency plus out of fear of not reporting all additional conduct at once. Once counsel reach out to DOJ to put down a marker for leniency for additional products, the key is to be candid with Antitrust Division staff about the company's internal investigation. Ensure that staff know that the investigation is continuing and the company is committed to uncovering, disclosing, and seeking leniency for any additional conduct that comes to light. Tell staff explicitly that the ongoing internal investigation may lead to more leniency applications. They will react by noting that they cannot promise that leniency for any given product will still be available in the future, but they will not reject additional applications for leniency just because they come later.

V. EMPLOYEE-RELATED COMPLICATIONS

The factor that most complicates a company's ability to get and keep leniency plus, and to avoid the flip-side of penalty plus, is the reality that key employees may receive the benefits of leniency on some products and face exposure to prosecution on others. This occurs when the same individuals are involved in both the original conspiracy and the price-fixing related to additional products. The company needs their cooperation to get and keep leniency, but the most culpable employees face prosecution for conduct related to the original product for which leniency is not available.

Complications arise immediately. The company is under investigation for price-fixing in the original product line, and needs quickly to review business records and interview employees to determine the extent of the potential exposure. At the outset, counsel may interview employees after providing an *Upjohn* warning[7]—advising that counsel represent the company, not the employee; that the interview is confidential and may be privileged, but the company holds the privilege; and that at its discretion the company may waive its privilege and disclose what it learns from the employee to the DOJ. But because counsel for the company may not represent employees, and key employees need legal advice to navigate the investigation, individual representation for many employees is inevitable.

Once retained, individual counsel necessarily act as gatekeepers for their clients, doing what they can to prevent employees from incriminating themselves. They often resist requests by company counsel to interview the individuals directly, and may refrain from disclosing details their clients provide them. Company counsel may react by threatening termination of employees for failure to cooperate fully in the internal investigation. But if the company fires key employees, it loses access to them and runs the risk that they will decide separately to cooperate with the DOJ and ruin the company's chance at leniency plus.

7 *Upjohn Co. v. United States,* 449 U.S. 383, 394-95 (1981).

In some investigations, key employees may not be necessary to the company's investigation. Lower-level employees may have knowledge of key employees' conduct but may not be exposed to prosecution because they played a tangential role. In that instance, company counsel may gather sufficient facts to secure leniency, even if key employees do not contribute to the story. And at that point, key employees, with advice of individual counsel, may decide to cooperate with the company to reap the benefits of leniency for conduct related to the additional products, even though they face prosecution for conduct related to the original product. Employees, especially those in the United States who easily can be indicted, tried, and imprisoned, often do opt for that route. They believe that, by cooperating together with the company in the DOJ investigation, they have the best chance of receiving a lenient plea deal, even though a prison sentence is likely. The Antitrust Division insists on jail time for individual pleas.[8]

VI. CONCLUSION

Given that half of the Antitrust Division's criminal cases arise out of investigations in completely separate markets, we know that companies avail themselves of the leniency plus policy. Companies facing the prospect of leniency plus must be prepared to investigate broadly and disclose all of the illegal conduct it uncovers. The DOJ will then require extensive and often drawn-out cooperation across all of the products the company discloses. Dealing with employees whose cooperation is crucial but who face exposure themselves is a significant challenge, and may be the factor that determines most significantly a company's ability to reap the benefits of leniency plus.

8 Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, U.S. Dep't of Justice, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, presented at the 24th Annual National Institute on White Collar Crime, (Feb. 25, 2010).

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