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In April of this year, the Antitrust Division announced changes to its Corporate Leniency Policy as well as updates to that policy's FAQs. The changes to the policy were the first to be made since its inception in 1993. The new FAQs update the FAQs previously issued in 2017 and include a number of FAQs addressing issues not previously discussed. A key goal of the changes was to enhance accessibility to the policy and FAQs for everyone, including members of the public, to ensure equal access to justice. To further this goal, the Leniency Policy and other important information concerning the Division's criminal practice were clearly and accurately reflected in writing, discussed in plain English, and added to the Department's Justice Manual, which is readily available on the internet. Key updates which are discussed include changes to both Type A and Type B of the policy with respect to reporting the illegal conduct, ensuring that any harm is remediated, and improving the company's compliance program. Changes to the way coverage of individuals is assessed under Type A and B is also discussed. Other topics include: coverage of individuals with respect to corporate resolutions, pre-indictment meetings, and sentencing.

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I. INTRODUCTION

Corporate crime is an age-old problem — and one that antitrust law was expressly designed to address. As long ago as 1776, Adam Smith observed that conversations among people in the same trade often end in “a conspiracy against the public, or in some contrivance to raise prices.”² But it was not until 1890, well after the Industrial Revolution and at a time when markets had been fundamentally altered by the problems foreseen by Adam Smith, that Congress responded.

In enacting the Sherman Antitrust Act, Congress made it a crime to conspire to restrain trade and to monopolize markets.³ And Congress expressly had corporate criminal liability in mind: the statute provides criminal penalties not only for individuals but also for the corporate entities through which individuals commit those crimes. The Sherman Act was enacted during the Gilded Age⁴ to tackle the pressing problems of the day. But those fundamental problems — and resulting harm to the public — persist in today’s Information Age, just with different markets and in different contexts. Executives who should be competing with each other for the sale of the same products or services still fix prices today, but often through the use of emails or texts without meeting or even speaking. And executives who conspire to fix prices have already been prosecuted for using algorithms as a tool for implementing their anticompetitive schemes, raising the specter that someday bots may collude on prices even without human intervention.⁵

As Adam Smith knew, protecting the public from conspiracies to manipulate markets is essential — and that important function is the core of the Antitrust Division’s mandate. To protect American consumers and the benefits derived from free markets, the Antitrust Division looks both backward — to make sure we are learning the lessons of the past and using all the tools available to us — and forward, to make sure we are appropriately calibrating our criminal enforcement practices and priorities to reflect modern-day realities and best deter anticompetitive conduct.

One recent product of this self-reflection is the Antitrust Division’s emphasis on equal access to justice. Just as a cathedral has only one true cornerstone — the first stone laid, with all other stones laid by reference, orienting the building in a specific direction — the Division’s criminal enforcement program has one fundamental guiding principle: accessibility. To the extent the public does not, or cannot, understand our policies’ incentive structures to invest in compliance to deter crime in the first instance and to reward self-disclosure when crime does occur, criminal antitrust enforcement inevitably suffers. Accessibility is the central guiding principal at the core of any successful enforcement regime, for without it, policies and procedures — however well meaning — will never be truly effective.

But over the years, conflicting public statements and divergent practices may have obscured our written policies and procedures. As a result, in April 2022 we announced a number of changes to the Leniency Policy, updated the accompanying FAQs, and made updates and clarifications to a variety of our criminal enforcement policies and procedures. Further, to increase accessibility and make it clear that these changes are enduring, the Leniency Policy — as well as a number of clarifications to other criminal antitrust policies and procedures — can now be found in the Department’s Justice Manual.⁶ The Justice Manual is a public-facing document that is the most accessible and reliable source for the policies and procedures that guide all of the Department’s prosecutors, from Assistant United States Attorneys in 94 United States Attorney’s Offices nationwide to Department components headquartered in Washington, DC.⁷ The FAQs, because they will be more frequently revised than the policy, are readily available on the Division’s website (Chapter 7 of the Justice Manual has a link to this location).⁸

2 “People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.” Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*.

3 15 U.S.C. § 1 and 2 state (as amended in 1974 to make violations a felony instead of a misdemeanor and in 2004 to further increase penalties): Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

4 The term “Gilded Age,” coined by Mark Twain & Charles Dudley Warner in their 1873 book, *The Gilded Age: A Tale of Today* connoted the corruption beneath the glittering surface of prosperity in the robber baron era.

5 *United States v. Topkins*, cr-15-201 (N.D. Cal. 2015); Jill Priluck, *When Bots Collude*, *The New Yorker* (April 25, 2015).

6 Justice Manual 7-3.300, available at: <https://www.justice.gov/jm/jm-7-3000-organization-division#7-3.300>.

7 The Justice Manual provides internal guidance only and does not create enforceable rights.

8 Frequently Asked Questions About the Antitrust Division’s Leniency Program (April 4, 2022), available at: <https://www.justice.gov/atr/page/file/1490311/download>.

II. LENIENCY POLICY

Since its creation in 1993, the Antitrust Division's Leniency Policy has been the subject of countless public remarks, published speeches, and articles, and over a quarter-century of enforcement. Public statements over many years created confusion as to how the written policy would be enforced — and our experiences with the policy in light of the changing enforcement landscape demonstrated that updates would improve our enforcement.

Our policies and procedures are now clearly and accurately reflected in writing, discussed in plain English, and easily accessible to all: attorneys who don't typically handle criminal antitrust matters, members of the business community, and interested members of the public, in addition to attorneys who specialize in criminal antitrust investigations and prosecutions. Before now, the only place the written policy could be found was buried in the Antitrust Division's website, making it difficult to find for non-antitrust specialists and certainly for non-lawyers. The more the policy is known to the public — and specifically to workers, executives, and businesses — the more it will be used.

The recent updates brought the written policy into line with how it is implemented — and the updated FAQs provide current, real-world guidance. There are now two definitive sources of information about leniency: the policy itself and the FAQs. The FAQs are a “living document” that the Division will examine regularly and update as needed to keep them in line with current practice and address real-world issues. As a result, it will no longer be necessary — or even advisable — to parse the words of Division officials' speeches to determine how the policy works.

The changes preserve and enhance the Leniency Program's core incentive structure, which means that a company seeking leniency in good faith is never made worse off. To ensure that result, the Division generally interprets the Leniency Policy in favor of the applicant. And out of the over 570 markers the Division has issued, it has subsequently prosecuted an applicant just once — which occurred only because the Division discovered that the applicant had continued its criminal activity instead of terminating it, as the applicant had claimed.

A. Key Corporate Leniency Updates

The Antitrust Division made two key changes to both Type A and Type B of the Corporate Leniency Policy. Type A is the part of the policy that applies when the Division has not yet received information about the illegal conduct; Type B is the part of the policy that applies after the Division has already obtained that information.

The first change concerns what an applicant must do upon discovery of the illegal conduct. While the prior policy had a requirement that the applicant “promptly and effectively terminate its involvement in the conspiracy,” that requirement has been changed to require “promptly reporting the illegal conduct” to the Division upon its discovery.

FAQ 22 discusses this new requirement and explains that in determining what constitutes “promptly” reporting, the Division's prosecutors will consider all of the facts and circumstances of the illegal activity as well as the size and complexity of the applicant's operations. The FAQ makes clear that the Division understands that the applicant will need to conduct some due diligence to confirm that it has been involved in the commission of an antitrust crime. That's reasonable and understandable. However, what is not acceptable is for the company to confirm its involvement in the illegal activity and then decide not to self-report to the government, but instead wait for the government to make the first move by initiating an investigation. This approach — as FAQ 22 makes very clear — will not be tolerated and will result in the applicant being ineligible to obtain leniency, Type A or B.

The Division made this change for two reasons. First, sound public policy and good corporate citizenship require a company to self-disclose corporate crime promptly after it is discovered. Second, one of the Division's most effective investigative tools is the use of cooperating witnesses — including individuals cooperating pursuant to a grant of leniency — to record conspirators' communications. This tool is much more effective when the company does not terminate its involvement in the conspiracy, but instead reports that conduct promptly to the Division.⁹

Another change (which also applies equally to Type A and B) is the addition of a requirement that the company use its best efforts to remediate the harm caused by the conduct and to improve its compliance program. Since 1993, a corporate leniency applicant has been required to make restitution to the victims, and that is still a requirement. But over the years, the Division learned that restitution on its own may

⁹ Reporting criminal conduct to the law enforcement authorities clearly constitutes withdrawal from the conspiracy, so by self-reporting to the Division the applicant has also legally terminated its involvement in the illegal conduct. *United States v. Eppolito*, 543 F.3d 25, 41 (2008) (“By way of an example, a defendant may withdraw from the conspiracy by giving a timely warning to the proper law enforcement officials . . .”).

be insufficient — it can adequately address past harm but does not address possible future harm, and, importantly, does not reform corporate culture to prevent recidivism.¹⁰

Improving corporate compliance is an obvious step that — given the severe sanctions accompanying antitrust crimes and the benefits of winning the leniency race — all companies that discover their involvement in antitrust crimes should immediately take. The Division has made available the document that its prosecutors use to assess a company's compliance efforts, which can assist companies in evaluating the strength of their own compliance programs.¹¹ Including this requirement in the policy enshrines the expectation that companies will create a culture of compliance with effective corporate compliance programs.

The remediation requirement is also a critical improvement to the Leniency Policy. While restitution may address much of the harm already caused by a criminal antitrust violation, remediation may be necessary to address the risk of ongoing or future harm from the same violation. The type of remediation required will depend on the facts of the case, the nature of the violation, and the results of the company's analysis of the root causes of the illegal conduct.

B. Individual Coverage Under Type A and Type B

Another important change relates to how Division prosecutors will determine coverage for individuals — with respect to both Type A and B applications. For Type A leniency, the policy now makes clear that no current employees will be charged so long as they cooperate in the investigation — versus the prior version of the policy, which called for coverage only for employees who participated in the crime. The Division now guarantees coverage for all Type A cooperating employees — regardless of whether they were aware of or participated in the crime themselves. This provision eliminates any confusion applicants and their employees might have about whether they will be covered if they cooperate fully and truthfully but did not personally participate in the crime — and they will be covered even if they were not aware of the criminal conduct. Type A leniency is the only mechanism to obtain such exceptional coverage.

In contrast, the updated policy retains essentially the same language as in the 1993 version which clearly states that as to Type B: “If a corporation does not qualify for leniency under Part A, above, the directors, officers, and employees who come forward with the corporation will be considered for immunity from criminal prosecution on the same basis as if they had approached the Division individually.” But over the years, the Division's public statements and its practice led the defense bar to believe that Type B was functionally no different from Type A in this regard, and that all cooperating employees should and would receive coverage.

As a result, although the language in the 2022 Leniency Policy with respect to this issue is substantially the same as in the 1993 policy, the new FAQs make clear that Division prosecutors will follow a procedure for Type B individuals consistent with the original policy's statement that they would be considered for immunity on the same basis as if they had approached the Division individually. This means that as a threshold matter to be eligible for non-prosecution protection with respect to a Type B leniency application, current directors, officers, and employees must: “admit their wrongdoing with candor and provide timely, truthful, continuing, and complete cooperation throughout the investigation (see FAQ 52).

Importantly, FAQ 52 discusses the specific procedure that Division prosecutors will follow with respect to an individualized assessment for Type B individuals. And that procedure is the same procedure that all Department prosecutors must follow in determining whether to grant an individual non-prosecution protection in exchange for cooperation. That process is clearly explained in the Justice Manual in Chapter 9, concerning criminal investigations and prosecutions, sections 27.600, 620, and 630. This involves an individualized assessment for each individual, considering the importance of the matter, the value of the individual's cooperation and timing, the individual's relative culpability and criminal history, and the interests of any victims.

FAQ 53 discusses the importance of timing with respect to the results of the individualized determination. In conducting the individualized assessment, the Division prosecutor must determine whether obtaining the individual's cooperation pursuant to a grant of non-prosecution protection is in the public interest. One of the determinants of whether the cooperation would be in the public interest is the timing of that cooperation. Early in the investigation, before subpoenas have been served, search warrants have been executed, or the investigation has otherwise become publicly known, it is more likely that the investigation will not yet have developed significant evidence of the illegal activity, likely making the individual's cooperation particularly valuable. However, as Division prosecutors utilize the various investigative tools at their disposal, the indi-

¹⁰ U.S.S.G. §8B1.2 (policy statement) (“The purposes of a remedial order are to remedy harm that has already occurred and to prevent future harm. A remedial order requiring corrective action by the organization may be necessary to prevent future injury from the instant offense . . .”).

¹¹ The Antitrust Division's “Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations” is available at: <https://www.justice.gov/atr/page/file/1182001/download>.

vidual's cooperation may no longer be necessary to the public interest. The bottom line: as always, early self-reporting — and early cooperation — make leniency and non-prosecution protection more likely.

C. Additional FAQ Updates

Finally, the new FAQs are a valuable source of helpful information, including information that does not directly concern the operation of the Division's leniency program. For example, FAQs 38 through 46 concern ACPERA and contain a number of Division comments about its effective and efficient operation. FAQ 39 notes that the Division is willing to advise a court of the timeliness, nature, extent, and significance of the applicant's cooperation under the Leniency Policy, as well as its commitment to prospective cooperation with the Division's investigations and prosecutions, in response to a request to do so by the applicant or a court, so long as this disclosure does not compromise law enforcement activity.

III. CRIMINAL PRACTICE UPDATES

In addition to the changes to leniency, the Justice Manual updates to other criminal policies and procedures serve the same ultimate goal of accessibility. They bring our practices into line with the rest of the Department, ensure that our policies as written reflect our practices, guarantee individual accountability, and maximize transparency, predictability, and equal access to justice.

A. Individual Coverage in Corporate Resolutions

One important change is memorialized in section 7-3.430 of the Justice Manual. This section concerns individual releases of criminal liability in corporate resolutions. It emphasizes that other than as part of a leniency letter, the Division will include non-prosecution protections (so-called "carve-ins") as part of a corporate resolution only in extraordinary circumstances and only with written approval of the Division's Assistant Attorney General. This approach emphasizes the importance of prompt self-reporting so that a company can obtain the benefits of leniency, which for a Type A applicant includes non-prosecution protections for fully cooperating current directors, officers, and employees, and for a Type B applicant may include such non-prosecution protections for its current directors, officers, and employees, based on an individualized assessment.

As a result, decisions to provide non-prosecution protections for individuals will typically be made separately from the corporate resolution, on an individualized basis in accord with the Principles of Federal Prosecution (9-27.00), and under the standard for individual non-prosecution agreements (9-27.600) discussed previously with respect to non-prosecution protections for Type B individuals.

B. Pre-Indictment Meetings

Section 7-3.200 of the Justice Manual discusses the current procedures with respect to pre-indictment meetings. It notes that the Division follows the Department's practice of notifying targets — under certain circumstances — in a reasonable time before seeking indictment, although notifying targets is not appropriate in routine clear cases or when notification would be inconsistent with the ends of justice. The Division considers requests for meetings on a case-by-case basis, considering whether the meeting will assist the Division in effectively evaluating a putative defendant's evidentiary, legal, and policy arguments against prosecution. And the Justice Manual emphasizes that a meeting is not warranted "if the target and counsel have declined to engage with staff or it is otherwise apparent to the Division that further engagement will not be productive."

C. Sentencing

Finally, the Justice Manual discusses the Division's approach to sentencing. Most importantly, Division prosecutors should conduct an individualized assessment under the Principles of Federal Prosecution, 9-27.730, and any other applicable Department policies. Because of the importance of general deterrence in criminal antitrust cases and because these cases typically cause serious economic harm, an individualized assessment will typically result in a recommendation of incarceration for individual defendants. But as the United States Sentencing Guidelines note, in a very few number of cases the guidelines will not require that some confinement be imposed. In antitrust cases as in all other criminal cases, the ultimate goal of sentencing is to achieve a just result.

IV. CONCLUSION

In conclusion, the Division's changes discussed above have been part of a conscious effort, informed by experience, to achieve two objectives: ensure that our enforcement efforts are robust, comprehensive, and effective, while also ensuring that companies and individuals who self report

reap the benefits of that decision. Fundamentally, our enforcement works only to the extent that our policies and procedures are truly accessible to everyone — which is why we see accessibility as the key cornerstone of the program and why the recent changes ensure that we continue to achieve those critical objectives.



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