REMEDIATION, COMPLIANCE, AND RESTITUTION UNDER THE NEW LENIENCY POLICY

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In April 2022, the Antitrust Division of the U.S. Department of Justice announced revisions to its leniency policy which incentivizes voluntary self-disclosure of criminal misconduct in order to earn non-prosecution protections. In addition to giving greater context about an applicant's obligations under the policy, the revisions require leniency applicants to *promptly* self-report misconduct, as well as to use best efforts to *remediate* the harm caused by the illegal activity before receiving a conditional leniency letter. These changes come amongst a broader shift in the corporate enforcement landscape and at a time when the Division's aggressive corporate enforcement strategy has been backed with significant resources. This article highlights the leniency policy changes in the context of DOJ-wide changes and offers impressions on what companies and counsel can expect as a result.

Since 1993, the Antitrust Division of the Department of Justice ("the Division") has maintained a leniency policy to incentivize voluntary self-disclosure of criminal misconduct. In exchange for being the first to self-report its involvement in an antitrust conspiracy and meeting the other requirements of the policy, including fully cooperating with the Division's investigation, a company and — depending on the circumstances — its culpable executives can receive significant non-prosecution protections.[2] Last year, the Division revised its leniency policy for the first time in nearly 30 years and, among other changes, added requirements around compliance and remediation. The Division also provided additional guidance on restitution in the revised, publicly available Frequently Asked Questions ("FAQs").[3]

The Division was an active participant in the DAG's Corporate Crime Advisory Group, so it is no surprise that these recent updates to the leniency policy reflect the changing landscape for corporate enforcement at the DOJ more broadly.[4] And these important policy shifts come at a time when the Division has received significant additional resources[5] and is prioritizing a more aggressive corporate enforcement strategy, as demonstrated by the number of investigations and cases in litigation.[6] This article highlights the recent changes to the Division's leniency policy in the context of DOJ-wide changes, what they mean, and offers impressions on what companies and their counsel can expect as a result — especially in heavily regulated sectors.

I. A YEAR OF CHANGE FOR CORPORATE ENFORCEMENT POLICIES

The recent changes to the Division's leniency policy correspond with revisions made to the DOJ's Corporate Criminal Enforcement Polices announced in September 2022 by DAG Monaco, as well as those subsequently made by the Criminal Division to its Corporate Enforcement Policy ("CEP") in January 2023. Among the various revisions, those particularly relevant to antitrust enforcement relate to individual accountability, Department-wide voluntary self-disclosure policies, implementation of an effective compliance program, and utilization of all available remedies to address illegal conduct and prevent future harm — including suspension and debarment.[7] The DOJ also has focused on victims' rights issues with the Attorney General publishing updated guidelines for victim and witness assistance in October 2022.[8]

Several changes to the Division's leniency policy line up with these broader updates from the DOJ. First, the leniency policy mandate for promptly *terminating* cartel conduct was changed to require prompt *self-reporting* of such conduct.[9] This change is consistent with the requirement under the CEP that self-disclosure happen "within a reasonably prompt time after becoming aware of the misconduct,"[10] and the DAG memo explaining that "voluntary self-disclosure only occurs when companies disclose misconduct promptly and voluntarily (*i.e.*, where they have no preexisting obligation to disclose, such as pursuant to regulation, contract, or prior Department resolution) and when they do so prior to an imminent threat of disclosure or government investigation."[11]

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2 For individuals, under Type A of the leniency policy, cooperating current employees automatically receive non-prosecution protections. Under Type B, whether an executive receives non-prosecution protections is at the discretion of the prosecutors. See U.S. Dep't of Justice, *Just. Manual* §7-3.000 (Apr. 2022), https://www.justice.gov/jm/jm-7-3000-organization-division ("Leniency Policy").

3 U.S. Dep't of Justice, Frequently Asked Questions about the Antitrust Division's Leniency Program (Apr. 4, 2022), www.justice.gov/atr/page/file/1490311/download ("DOJ FAQs").

4 See Memorandum, U.S. Dep't of Justice, *Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group* (Sept. 15, 2022), https://www.justice.gov/opa/speech/file/1535301/download ("Sept 2022 CCE Revisions").

5 See Consolidated Appropriations Act, 2023, H.R. 2617, at pg. 3900–02 (2022).

6 In September 2022, the Division stated that it was actively litigating 19 criminal cases, with 18 awaiting trial, and reported that it "ended FY 2021 with 146 pending grand jury investigations, the most in 30 years." See *Oversight of Federal Enforcement of the Antitrust Laws: Hearing before the S. Comm. on the Judiciary Subcomm. on Competition Policy, Antitrust, and Consumer Rights*, 117th Cong., at 2 (Sept. 20, 2022) (Statement of Jonathan Kanter, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div.), https://www.judiciary.senate.gov/imo/media/doc/Testimony%20-%20Kanter%20-%202022-09-20.pdf.

7 See Sept 2022 CCE Revisions, *supra* note 4.

8 U.S. Dep't. of Justice, The Attorney General Guidelines for Victim and Witness Assistance, (2022 Ed.), https://www.justice.gov/d9/pages/attachments/2022/10/21/new_ag_guidlines_for_vwa.pdf ("AG Guidelines"); see also U.S. Dep't. of Justice, An Antitrust Primer for Federal Law Enforcement Personnel, at 9 (updated 2022), https://www.justice.gov/atr/page/file/1091651/download ("AG Guidelines state that Department employees working at each stage of a criminal case must give careful consideration to the need to provide full restitution to the victims of the offenses.")

9 Leniency Policy, *supra* note 2.

10 See U.S. Dep't of Justice, *Just. Manual* § 9-47.120, Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy (updated January 2023), www.justice.gov/opa/speech/file/1562851/download.

11 Sept. 2022 CCE Revisions, *supra* note 4, at 7.

Second, on top of existing restitution requirements, leniency applicants must now undertake compliance and remediation efforts.[12] These undertakings track the voluntary self-disclosure polices laid out in the DAG memo, which says that "the Department will not seek a guilty plea where a corporation has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated the criminal conduct."[13] This change to the leniency policy also accords with the recent CEP updates that seek to "incentivize[] even more robust compliance on the front-end, to prevent misconduct, and require[] even more robust cooperation and remediation on the back-end . . . ."[14]

Finally, the revised FAQs include substantial additional information about restitution and the Division's views on recurring issues faced by leniency applicants seeking protections in related private litigation under the Antitrust Criminal Penalty Enhancement and Reform Act ("ACPERA").[15] Typically, negotiated settlements in these actions satisfy the leniency policy's restitution requirement and serve as the primary means of protecting the interests of victims in Antitrust Division prosecutions. In other situations where there is no ongoing private litigation, such as where the victim is a government entity or where the investigation is not yet public, the Division will require best efforts to make restitution and applicants should be prepared to present a restitution plan as part of its application.[16]

II. REMEDIATION AND RESTITUTION

Leniency applicants now must use best efforts to *remediate* the harm caused by the illegal activity before receiving a conditional leniency letter. This requirement is focused on addressing any harm that restitution cannot cover as well as taking the necessary steps to prevent recidivism.[17] The emphasis on reducing the risk of recidivism falls under the DOJ's broader emphasis on corporate history and the effort to reward companies that take the necessary steps to reduce the "recurrence of criminal misconduct" and punish those that do not.[18] This emphasis also can be seen in the addition of "the applicant's criminal history" to the factors considered when evaluating whether granting Type B leniency would be "unfair to others."[19] Remediation as a function of compliance will be discussed in the next section.

Often, remediating the harm caused by the anticompetitive conduct is coextensive with restitution because the prosecution ends the violation and then facilitates compensating consumers who were overcharged as a result of the conspiracy. There are circumstances, however, where this is not always true — such as in market allocation cases where more might be required to restore the competitive balance. For example, the FAQs point to labor market conspiracies ("no poach" agreements) and reduced worker mobility as a possible harm that will need additional remedial efforts.[20] As a specific case-related example, the Deferred Prosecution Agreement with Florida Cancer Specialists required non-enforcement of non-competes for four years as a remedial measure for the company's participation in a market allocation conspiracy.[21] Looking ahead, prospective applicants should expect the Division to assess the range of harm to competition in the affected market as it considers solutions to help inject competition back into the space and attempts to integrate safeguards against future misconduct.[22]

12 Leniency Policy, *supra* note 2.

13 Sept. 2022 CCE Revisions, *supra* note 4, at 7.

14 Kenneth A. Polite, Jr., Asst. Att'y Gen., U.S. Dep't of Just., Remarks on Revisions to the Criminal Division's Corporate Enforcement Policy (Jan. 17, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-georgetown-university-law.

15 See DOJ FAQs, *supra* note 3, at 13-20.

16 *Id.* at 13.

17 *Id.* at 21.

18 See Memorandum, U.S. Dep't of Justice, *Corporate Criminal Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies* (Oct. 28, 2021), www.justice.gov/d9/pages/attachments/2021/10/28/2021.10.28_dag_memo_re_corporate_enforcement.pdf.

19 Leniency Policy, *supra* note 2.

20 DOJ FAQs, *supra* note 3, at 21.

21 See *United States v.Fla. Cancer Specialists & Rsch. Inst., LLC*, Case No. 20, Deferred Prosecution Agreement ¶¶4, 10 (M.D. Fla., Apr. 30, 2020), https://www.justice.gov/opa/press-release/file/1272561/download. Note that a recently proposed rule by the Federal Trade Commission would ban non-compete agreements outright. See https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking. It is unclear how this rulemaking process will unfold, including subsequent litigation, and it is unlikely that DOJ would forego insisting on these types of provisions until the scope and legality of the proposed rule is final.

22 DOJ FAQs, *supra* note 3, at 20-21 (Question 49 specifically directs an applicant to consider the nature of the illegal activity, the nature of the harm caused, and the applicant's role in it when determining the appropriate remediation.)

For restitution, the FAQs make clear that "applicants must present concrete, reasonably achievable plans about how they will make restitution" in order to receive a conditional leniency letter.[23] What this will look like will depends on the facts of the case. For example, where the government is a victim, the applicant likely will need to self-report and negotiate a financial settlement with the relevant agency.[24] The FAQs caution that federal agency victims should not have "to resort to civil recovery actions seeking damages under Section 4A of the Clayton Act" but clarify that the Division, through its civil enforcement program, "will respect the spirit of ACPERA and will not seek treble damages against qualifying applicants."[25] In a more traditional price fixing case, however, restitution often will be resolved via settlement with private litigants. In those instances where private litigation has been initiated prior to a decision on conditional leniency, an applicant should apprise the Division of the status of the litigation and whether it intends to resolve with the plaintiffs. In that situation, a representation to the Division that the applicant will resolve with victims directly and its anticipated path for doing so likely will suffice — especially given the complexity of those actions.[26]

Finally, for prospective applicants seeking to understand the benefits available under ACPERA — de-trebling of damages and removing joint and several liability — the updated FAQs include five pages of discussion on a number of topics not previously addressed.[27] Among other issues, the FAQs discuss ACPERA's requirement that leniency applicants provide "satisfactory cooperation" to private plaintiffs and the Division's view that "unreasonable" demands by plaintiffs should not prevent an applicant from qualifying for reduced liability.[28] The FAQs also discuss the Division's views on the timing of cooperation under ACPERA, how that relates to the ongoing criminal investigation, and makes clear that "the Division will apprise the court of any [] requests" that an applicant refrain from identifying itself and/or cooperating to protect the integrity of the criminal investigation.[29] Importantly, these questions and answers can serve as the basis for understanding the positions the Division might take in follow-on litigation on these and other recurring issues (or be the basis for a party's representation to the court should the Division opt not to weigh-in).

III. ANTITRUST COMPLIANCE AND ITS MYRIAD BENEFITS

Another requirement added to the leniency policy, and one that goes hand-in-hand with remediation, is that an applicant must improve its compliance program to mitigate the risk of engaging in future illegal activity. The FAQs clarify that the applicant should conduct a "root cause analysis" and undertake remedial efforts to target the root causes and implement measures to reduce the risk of recidivism.[30] Ultimately, the necessary steps required to satisfy the compliance requirement are very fact specific, including whether the applicant's programs are appropriately tailored to its size and line of business.[31]

This change bookends the Division's emphasis on compliance, which has been a focus for several years. In July 2019, the Division announced that it would reverse course on longstanding policy and begin considering compliance programs at the charging stage for non-leniency companies.[32] The Division also published Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations Guidance, which details how the Division will analyze compliance programs.[33] More recently, the DAG Memo issued in September 2022 included guidance on the importance of an effective compliance program and highlighted two areas of emphasis: compensation structures and the use of personal devic-

23 DOJ FAQs, *supra* note 3, at 13.

24 See *U.S. v. Berlitz*,Case No. 21-51 (FLW), Deferred Prosecution Agreement ¶¶ 12-13 (Dist. NJ, Jan. 19, 2021), https://www.justice.gov/opa/press-release/file/1356871/download.

25 DOJ FAQs, *supra* note 3, at 13, 19.

26 This is consistent with the AG Guidelines, which recognize the difficulty in complying with the CVRA when there are many victims. See AG Guidelines, *supra* note 8, at 24. Similarly, the AG Guidelines tacitly acknowledge the complexity of identifying victims and making restitution in antitrust cases by recognizing that "[a]ntitrust jurisprudence concerning direct versus indirect purchasers is relevant to the issue of when a person injured by an antitrust violation has suffered the requisite harm under the VRRA and the CVRA." *Id.* at 16.

27 See DOJ FAQs, *supra* note 3, at 13-20.

28 *Id.* at 16.

29 *Id.* at 17.

30 *Id.* at 21.

31 *Id.* at 21.

32 See Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice, Remarks at the New York University School of Law Program on Corporate Compliance and Enforcement (July 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0.

33 See U.S. Dep't of Justice, Antitrust Div., *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations* (July 2019), https://www.justice.gov/atr/page/file/1182001/download ("CCP Guidance"); DOJ FAQs, *supra* note 3, at 20.

es and third-party applications.[34] Additional guidance on these areas remains forthcoming; however, to the extent not addressed in the current version of the Division's compliance guidance, companies and counsel should assume that compensation structures and the use of personal devices and third-party applications are now part of the analysis.

The Division's compliance guidance advises that the evaluation of a compliance program "is a fact-specific inquiry and there is no checklist or formula."[35] There are few public examples of how this guidance has played out in practice, but an analysis of the corporate compliance program component of the publicly available DPA in *Argos USA* is instructive.[36] The relevant considerations section of the *Argos* DPA provides examples of what the Division considered when evaluating compliance and remediation as it made the decision about the appropriate form of disposition. There, the Division highlighted that the:

> Company has enhanced and has committed to continuing to enhance its compliance program and internal controls, including by ensuring that its compliance program satisfies the minimum elements set forth in Attachment C to this Agreement [and that] the Company has taken certain remedial actions to address the misconduct that is the subject of this investigation, including revising and enhancing its antitrust compliance program to directly address the issues, conducting specific antitrust training for [the relevant] employees, and terminating the employees primarily responsible for the Company's participation in the illegal conduct at issue.[37]

Attachment C of the *Argos* DPA closely tracks the nine factors the Division considers when evaluating a compliance program.[38]

Proactive investment in a corporate compliance program that aligns with the Division's guidance is worthwhile. An effective compliance program not only helps deter misconduct, but it can help with identifying issues quickly, which in turn helps with winning the race for leniency. Strong compliance programs will require less improvement by an applicant after wrongdoing has been discovered and disclosed. Furthermore, recall that if a company voluntarily self-discloses misconduct, then the DOJ will not require a compliance monitor if, at the time of resolution, the company has also implemented and tested an effective compliance program.[39] Although not punitive, corporate compliance monitors are costly and onerous on a business.[40] Finally, DAG Monaco already forecasted the DOJ's concern with compensation structures and the use of personal devices and third-party applications.[41] Companies should heed this concern and update their corporate compliance program as necessary to address these topics in detail.

IV. AVOIDING DEBARMENT

Robust compliance programs are of heightened importance in heavily regulated sectors mainly due to the regulatory consequences that are associated with criminal convictions. DAG Monaco warned that companies should no longer view compliance violations as "the cost of doing business" and stated that the DOJ "will continue to find ways to improve [its] approach to corporate crime, such as by enhancing the effective-

34 Sept 2022 CCE Revisions, *supra* note 4, at 9-11.

35 DOJ FAQs, *supra* note 3, at 20.

36 See *United States v. Argos USA LLC*, Case No. 4:21-CR-0002-RSB-CLR, Deferred Prosecution Agreement (M.D. Fla., Apr. 30, 2020), https://www.justice.gov/atr/case-document/file/1350996/download.

37 *Id.* at 4-5.

38 *Id.* at 33-35 (The company is to include the following elements in its compliance program: (1) Design and Comprehensiveness; (2) Culture of Compliance; (3)Responsibility for the Compliance Program; (4) Periodic Risk-Based Reviews; (5) Training and Communication; (6) Monitoring and Auditing; (7) Reporting and Guidance; (8) Incentives and Discipline; and (9) Remediation."); see also CCP Guidance, *supra* note 32 at 3-14.

39 Lisa O. Monaco, Deputy Att'y Gen., U.S. Dep't of Justice, Remarks on Corporate Criminal Enforcement (Sept. 15, 2022), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement ("DAG Remarks").

40 See e.g. *United States v. Deutsche Bank AG*, 3:15-cr-00061-RNC, Deferred Prosecution Agreement, Attachment C (Dist. Conn.) (Deutsche Bank entered into a DPA to resolve wire fraud and antitrust charges in connection with its role in both manipulating U.S. Dollar LIBOR and engaging in a price-fixing conspiracy to rig Yen LIBOR. One condition was the imposition of a compliance monitor for a period of three years with numerous conditions.), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/23/db_dpa.pdf.

41 Sept 2022 CCE Revisions, *supra* note 3.

ness of the federal government's system for debarment and suspension."[42] Aiming to protect healthcare markets, the Division has already taken up the DAG's call to action by signing a Memorandum of Understanding ("MOU") with the Office of the Inspector General of the Department of Health and Human Services ("HHS") in December 2022.[43]

Notably, the MOU covers how the agencies would work together when the violation involves the provision of healthcare services, which would result in mandatory exclusion from the health benefit programs such as Medicare and Medicaid.[44] For companies whose compliance program does not prevent the violation in the first instance, or allow it to win the race for leniency, this MOU suggests that the Division will not be receptive to collateral consequence arguments that historically have resulted in deferred prosecution agreements. Put differently, the MOU signals that the Division will be unlikely to enter into DPAs in the healthcare sector absent a non-leniency company qualifying under the DAG memo's self-reporting standard (i.e. voluntarily self-disclosure, full cooperation, appropriate remediation, and the absence of aggravating factors).

The Division has shown its willingness to incentivize strong corporate compliance programs, and companies should expect the Division to continue to innovate how it does so. Given the potential benefits, whether preventing anticompetitive misconduct altogether, or, failing that, being able to timely self-report, they should not wait to begin tightening up compliance programs to be in line with what the Division has already clearly telegraphed it wishes to see.

V. CONCLUSION

The recent revisions and updates to the Division's leniency policy are consistent with the overall approach to corporate enforcement at the DOJ. While attempting to preserve the fundamental incentives that encourage self-disclosure — protection from conviction, fines, monitors and, if applicable, debarment — the Division is also seeking to promote good corporate cultures that attempt to prevent unlawful anticompetitive conduct in the first instance and, failing that, remediate the harm caused and take the necessary steps to reduce the risk of reoccurrence. This changing framework for corporate enforcement will guide the Division's enforcement efforts moving forward, and corporate counsel should understand the changed paradigm as it considers minimizing antitrust risk. These efforts are especially relevant in a hyper-aggressive enforcement environment where the Division has been given significant additional resources for its efforts by Congress.

42 DAG Remarks, supra note 39. See also Marshall Miller, Principal Associate Deputy Att'y Gen., U.S. Dep't of Justice, *Remarks at the American Bankers Association Financial Crimes Enforcement Conference*, https://www.justice.gov/opa/speech/principal-associate-deputy-attorney-general-marshall-miller-delivers-remarks-american ("The department is also reviewing the debarment and suspension process, including how to streamline information sharing between agencies.").

43 See Memorandum of Understanding Between the Antitrust Division of the U.S. Department of Justice and the Office of the Inspector General of the U.S. Department of Health and Human Services ("HHS MOU"), https://www.justice.gov/opa/pr/justice-department-s-antitrust-division-and-office-inspector-general-department-health-and.

44 *Id.*

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