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Memorandum

Updated DOJ Guidance Signals Closer Scrutiny of Antitrust Leniency Program Applicants Going Forward

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On January 26, 2017, the U.S. Department of Justice's Antitrust Division revised its primary guidance document for companies and individuals considering whether to seek immunity for their role in antitrust crimes under the Division's Leniency Program.[1] Originally published in 2008, the Division's "Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters" is a comprehensive resource that explains how companies and individuals can avoid prosecution for criminal antitrust violations. A close look at the updated guidance reveals careful changes that suggest the Division will take a narrower approach when granting immunity going forward. Because the updated guidance was released in the middle of a presidential transition, there is some uncertainty regarding the extent to which the guidance will be followed by the new administration. Historically, both Democratic and Republican administrations have aggressively pursued criminal cartel behavior and, if the past is any prologue, the new guidance may well be implemented by the Trump administration.

Most notably, the updated guidance:

1. Clarifies that leniency protection only applies to antitrust crimes and only binds the Antitrust Division;
2. Adds a new Q&A outlining the Division's "Penalty Plus" framework; and
3. Emphasizes a narrow approach toward leniency protection for individuals.

Each of these developments is explored in more detail below, but potential leniency applicants would be

[1] The Antitrust Division published an earlier version of the updated Leniency Program guidance on January 17, 2017 that inadvertently omitted a footnote concerning the availability of short term "anonymous" markers. To correct this omission, the Division reissued its updated guidance on January 26, 2017, clarifying that anonymous markers remain available to Leniency Program applicants in limited circumstances.

well-advised to seek the advice of qualified counsel and review the updated guidance in full before making any decisions.

1. Leniency protection only applies to antitrust crimes, and only binds the Antitrust Division

The new FAQs rewrite the guidance on non-antitrust crimes, more clearly emphasizing that the Leniency Program does not protect applicants from criminal prosecution by other prosecuting agencies—including other components of the Department of Justice—for offenses other than Sherman Act violations. For example, where the original FAQs noted that no separate prosecuting agencies had elected to prosecute conduct "usually integral" to the antitrust crime (such as mail or wire fraud), the updated FAQs advise applicants to "report all crimes to the relevant prosecuting agencies" while flagging that applicants "should not expect to use the Leniency Program to avoid accountability for non-antitrust crimes." Although nothing in the updated guidance on non-antitrust crimes conflicts with that in the prior version, the shift in tone and emphasis may give would-be applicants pause, and encourages thoughtfulness about how broad an investigation to conduct and vigilance in considering possible exposure for non-antitrust matters.

2. The new guidance formalizes the Antitrust Division's "Penalty Plus" framework

In the years since the original FAQs were published, the Antitrust Division has articulated a "Penalty Plus" framework through which the Division will seek enhanced penalties for companies that plead guilty to one antitrust crime without reporting other antitrust crimes that the company was also involved in. The updated FAQs now include a Q&A specific to Penalty Plus, asserting that the Division will seek stiff fines and external monitors to remedy egregious cases. As a complement to "Leniency Plus" (where companies that report an additional antitrust crime can receive additional credit as a reward for their cooperation), DOJ anticipates that the threat of a more severe punishment for failing to report some antitrust crimes while pleading guilty to others will incentivize companies to conduct thorough internal investigations and be forthcoming with the results. Underscoring the severity of Penalty Plus—and of leniency applicants' obligation to conduct meaningful internal investigations—the updated Q&A explains that the Division may seek enhanced penalties even where the applicant was unaware of the additional antitrust crime at the time of its initial application and even if the applicant did not discover the additional antitrust crime while investigating the notified crime.

3. A narrower approach to leniency protection for individuals

Consistent with DOJ's increasingly aggressive focus on individual accountability, the updated FAQs contain a number of edits that signal a narrower approach toward leniency protection for individuals.

- Under Type A Leniency, where protection is extended to a company that reports illegal antitrust activity before an investigation has begun, protection is automatically granted to all current directors, officers, and employees who admit their involvement as part of the corporate confession. Both the original and

updated FAQs note that such individuals are protected so long as they "admit their wrongdoing with candor and completeness and continue to assist the Division throughout the investigation," but the updated guidance adds a new express warning: current officers, directors, and employees "will be excluded from, or 'carved out' of, the conditional leniency letter" if they do not "fully cooperate" with the Division's investigation. This new language suggests the Antitrust Division may be more aggressive in excluding individuals for noncompliance.

- Where the Division has already received information regarding the antitrust crime from other sources and Type A Leniency is unavailable, companies and individuals may still obtain protection under Type B Leniency. In contrast to Type A Leniency, the Antitrust Division has more discretion over the individuals that receive protection under Type B Leniency. Notwithstanding this discretion, the original FAQs provided that "[i]n practice . . . the Division ordinarily provides leniency to all qualifying current employees of Type B applicants in the same manner that it does for Type A applicants." The updated FAQs, however, set a different tone. Pursuant to the revised guidance, "Leniency must be fully earned" and the Division may exclude "those current directors, officers, and employees who are determined to be highly culpable." This new language further emphasizes an increased willingness to carve out individuals from leniency protection.
- The updated FAQs also suggest the Division may be more aggressive in excluding former directors, officers, and employees from protection. For example, the new guidance provides that these individuals "are presumptively excluded from any grant of corporate leniency," and clarifies that such protections are only offered at the Division's sole discretion "on an individualized, case-by-case basis," when "specific former directors, officers, or employees provide substantial, noncumulative cooperation against remaining potential targets, or when their cooperation is necessary for the leniency applicant to make a confession of criminal antitrust activity sufficient to be eligible for conditional leniency."

4. Other highlights

Although not as prominent as the three changes discussed above, there are a handful of other aspects to the updated FAQs worth highlighting.

- **The Type A and Type B leniency conditions do not appear to have materially changed.** The six conditions prerequisite to Type A leniency, and the seven conditions prerequisite to Type B leniency, go almost untouched in the update. That said, one clarifying edit may create some new uncertainty. In both the original and updated FAQs, the Division provides that Type A Leniency will only attach where an applicant reports the illegal activity before the Division has received "any information about the illegal activity . . . from any other source." But in the updated FAQs, the Division adds new language clarifying that Type A Leniency is unavailable where the Division has received information from "an anonymous complainant, a private civil action, or a press report" prior to the applicant's notice. To the extent this new language departs from the prior understanding of "any information about the illegal activity . . . from

any other source," the updated guidance could be read as narrowing the availability of Type A Leniency.

- **The updated FAQs centralize the contact points for submitting marker requests.** The original FAQs encouraged applicants to consider submitting leniency applications to staff in one of the Division's five criminal investigative offices, especially where there was an existing investigation involving the same subject matter. But the updated guidance deletes this language, encouraging applicants to contact the Deputy Assistant Attorney General for Criminal Enforcement ("Criminal DAAG") or the Director of Criminal Enforcement. The updated guidance also clarifies that the Criminal DAAG is responsible for reviewing and evaluating *all* requests for leniency, "including the scope of any leniency marker extended" and the determination about the availability of a marker.
- **New language clarifies limits on successful applicants' restitution liability.** The Division's revised guidance clarifies that private claimants cannot recover damages from a qualifying leniency applicant "exceeding the portion of the actual damages sustained by such claimant which is attributable to the commerce done by the applicant in the goods or services affected by the violation," consistent with Section 213(a) of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004. To qualify for this limitation, however, the guidance notes that the applicant must cooperate fully with the Division's investigation, satisfy all the other conditions of the Corporate Leniency Policy, and meet certain requirements related to the claimant's civil action (such as "providing the claimant with a full account of all potentially relevant facts known to the corporation or cooperating individual").

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