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"RECENT DEVELOPMENTS RELATING TO THE ANTITRUST DIVISION'S CORPORATE LENIENCY PROGRAM"

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RECENT DEVELOPMENTS RELATING TO THE ANTITRUST DIVISION'S CORPORATE LENIENCY PROGRAM

On November 19, 2008, the Division issued a policy paper entitled Frequently Asked Questions Regarding The Antitrust Division's Leniency Program and Model Leniency Letters ("FAQs"). The paper is a comprehensive and updated resource on recurring issues in the implementation of the Division's leniency program. The paper, in large part, restates information from prior leniency policy statements, but also addresses issues that have arisen since those prior statements were issued. As new issues arise in the future, the paper will be updated to address those issues.

The Division also issued revised model conditional leniency letters for corporations and individuals, and a model conditional leniency letter to be used when a leniency applicant is the subject of another investigation in addition to the leniency matter. None of the revisions to the letters represent changes in the leniency program, but rather the revisions clarify requirements of the program and remove any perceived ambiguities in the letters. The Division has also developed a leniency page on its website, available at http://www.usdoj.gov/ atr/public/criminal/leniency.htm. The leniency page contains the FAQs, the corporate and individual leniency policies, model leniency letters, leniency application contact information, and prior speeches on the Division's leniency program.

The FAQs provide guidance for potential leniency applicants on a variety of topics. Selected topics covered in the FAQs are highlighted below, such as the specific Division contact information to be used by leniency applicants, the Division's marker system, the type of violations covered by the conditional leniency letter, the non-prosecution period contained in a conditional leniency letter, the conditions for leniency protection, the role in the offense condition, the Division's policy on the production of attorney-client privileged information, the leniency applicant's restitution obligations for foreign effects, and the dual investigations leniency letter.

LENIENCY APPLICATION CONTACT INFORMATION

As noted in the FAQs, the Division's Deputy Assistant Attorney General for Criminal Enforcement ("Criminal DAAG") reviews all applications for leniency and may be contacted directly at the telephone number listed in the FAQs in order to make a leniency application. Applicants may also contact one of the Division's eight criminal sections to apply for leniency. The FAQs contain the telephone number to be used for leniency applications made to one of those sections. If the Division is already investigating the subject matter of the application, it likely would be more expeditious to make the leniency application with the section conducting the investigation rather than the Criminal DAAG.[1]

MARKER SYSTEM

The FAQs contain the first extensive discussion of the Division's marker system for leniency applications.[2] As the Division has frequently noted in speeches, time is of the essence in making a leniency application. On a number of occasions, the second company to apply for leniency has been beaten by a prior applicant by only a number of hours. The Division, however, understands that when corporate counsel first obtains indications of the client's possible participation in a cartel, authoritative personnel for a company may not know definitively whether the company has participated in a criminal violation of the antitrust laws. Under the marker system, a potential applicant may hold its position in line for leniency for a finite period of time while its counsel gathers more information to support its leniency application. While an applicant holds a marker, no other potential applicant can "leapfrog" over

the applicant with the marker.

The FAQs list the information counsel must provide in order to obtain a marker, namely (1) an indication that the client has participated in a criminal antitrust violation; (2) the general nature of the conduct discovered; (3) an identification of the industry, product, or service involved; and (4) an identification of the client. The FAQs also discuss the limited circumstances in which an anonymous marker may be granted for a very limited period of time.[3] As discussed below, confirmation that the client has participated in a criminal antitrust violation is required in order to obtain a conditional leniency letter, but such confirmation is not required at the marker stage. Rather, in order to obtain a marker, counsel must state that his client has uncovered some information or evidence suggesting that it may have engaged in a criminal antitrust violation.

VIOLATIONS COVERED

The Division's leniency program protects applicants from criminal conviction for a violation of the U.S. antitrust laws. Thus, as discussed in the FAQs, an admission of participation in a criminal antitrust violation is required in order to obtain a conditional leniency letter.[4] A company or individual who has participated in a civil antitrust violation has no need for leniency protection from a criminal violation and, thus, will receive no benefit from the leniency program. The revised corporate and individual conditional leniency letters clarify this requirement. Previously the model conditional leniency letters referred to the conduct being reported as "*possible* [. . . price fixing, bid rigging, market allocation] or other conduct violative of Section 1 of the Sherman Act." (emphasis added). The revised letters remove the word "possible" in this phrase and insert "constituting a criminal violation" before "of Section 1 of the Sherman Act" in reference to the type of cartel conduct reported by the applicant.[5]

When the Division first introduced a model corporate conditional leniency letter in the late 1990s, the Division did not use a marker system. Companies received a conditional letter far earlier in the process, sometimes before the company had the opportunity to conduct an internal investigation and before it was able to confirm definitively that it had committed a criminal antitrust violation. Now, with the use of the marker system, which allows a company to investigate its conduct more thoroughly before receiving a conditional leniency letter, a company should be in a position to admit its participation in a criminal antitrust violation before receiving a conditional leniency letter.

The bar has sometimes questioned whether related, non-antitrust crimes are covered by a conditional leniency letter. The conditional leniency letter provides protection for "any act or offense [the applicant] may have committed [during the time period covered] *in connection with* the anticompetitive activity being reported."[6] (emphasis added). Thus, as the FAQs explain, this language provides leniency protection from the Antitrust Division for the criminal antitrust violation as well as other offenses committed in connection with the criminal antitrust violation. However, the conditional leniency letter binds only the Antitrust Division and not other prosecuting agencies. Thus, other prosecuting agencies could prosecute the leniency applicant for additional offenses, whether or not the offenses were committed in connection with the criminal antitrust violation. Since the Division introduced a leniency program in 1978 (and subsequently revised the program in 1993), there have been no instances in which another prosecuting agency has prosecuted a leniency applicant for offenses consisting of conduct that is integral to the commission of an antitrust violation, such as mail or wire fraud or conspiracy to defraud resulting from the mailing or wire transmission of the announcement of fixed prices.[7]

NON-PROSECUTION PERIOD

The grant of conditional leniency usually applies to "any act or offense [the applicant] may have committed *prior to the date of [the conditional leniency] letter* in connection with the anticompetitive activity being reported."[8] (emphasis added). The grant of leniency usually covers activity prior to the date of the letter because in the vast majority of cases applicants apply for leniency promptly after discovery of the anticompetitive activity in an attempt to ensure they are the first applicant and are not beaten to the Division by a co-conspirator. As explained in the FAQs, however, in rare cases in which there is a significant lapse of time between the date the corporate applicant discovered the anticompetitive activity and the date the applicant reported the activity to the Division, and hence a significant lapse of time between the date the applicant was required to take prompt and effective action to terminate its participation in the activity and the date the applicant reported the activity to the Division, the Division reserves the right to grant conditional leniency only up to the date the applicant represents it terminated its participation in the activity.[9] For individual leniency applicants, if there is a significant lapse in time between the date the applicant terminated his participation in the anticompetitive activity and the date the applicant reported the activity to the Division, the Division reserves the right to grant conditional leniency only up to the date the applicant terminated his participation in the activity.[10]

CONDITIONS FOR LENIENCY PROTECTION

The FAQs and revised model conditional letters do much to make as transparent as possible the conditions of the letters and the process for any potential revocation of the letters.[11] The "representations" paragraph of the letters has been renamed the "eligibility" paragraph because, as has always been the case, these representations must be accurate in order for the applicant to be eligible to receive leniency.[12] Moreover, it has always been the applicant's burden to prove the accuracy of these representations, as it logically should be since the applicant is the party seeking leniency and representing that it is eligible.[13] Therefore, paragraph #1 of the conditional leniency letters now explicitly states that the applicant "agrees that [it/he/she] bears the burden of proving [its/his/her] eligibility to receive leniency, including the accuracy of the representations made in this paragraph."

The revised model conditional letters state in the introductory paragraph that the conditional leniency agreement depends on the applicant first establishing that it is eligible for leniency as it represents in paragraph #1, and second, cooperating in the Division's investigation as required by paragraph #2. The introductory paragraph then states that after the applicant has established its eligibility and provided the required cooperation, the Division will notify the applicant in writing that it has been granted unconditional leniency. This is consistent with paragraph #3 of the model letters, which states that the Division conditionally accepts the applicant into the leniency program subject to verification of the applicant's representations and the applicant's cooperation.[14]

Similarly, the conditions for revocation of leniency in paragraph #3 state that the Division may revoke an applicant's conditional acceptance into the leniency program if the Division determines that the applicant, contrary to its representations, is not eligible for leniency or that the applicant has not provided the required cooperation. The revised model corporate conditional leniency letter gives applicants explicit assurances regarding notice of potential revocation. The corporate conditional leniency letter states that, before making a final decision to revoke a corporate applicant's conditional leniency, the Division will provide notice to counsel for the applicant of the recommendation of Division staff to revoke the applicant's conditional leniency and will provide counsel an opportunity to meet with the Division regarding the potential revocation. The revised model individual conditional leniency letter

states that the Division will also provide such notice to an individual leniency applicant, absent exigent circumstances, such as risk of flight.[15]

The conditional leniency letters now also contain an acknowledgement by the applicant that the applicant "understands that the Antitrust Division's Leniency Program is an exercise of the Division's prosecutorial discretion," and an agreement by the applicant "not [to] seek judicial review of any Division decision to revoke [its/his/her] conditional leniency unless and until [it/he/she] has been charged by indictment or information."[16] This language does not represent a change in Division policy and is consistent with how the Division has always interpreted the ability to challenge a revocation of conditional leniency. The Antitrust Division has developed its leniency program to assist it in the exercise of its prosecutorial discretion and to make the exercise of that prosecutorial discretion in a leniency context as transparent as possible. As explained above, the Division's leniency program has always been conditional, it has always been the applicant's burden to show that it has met the conditions for leniency, and if the applicant doesn't meet the conditions, the Division may revoke its conditional leniency. Moreover, the Division's policy regarding judicial challenge of a leniency revocation is consistent with caselaw regarding attempts to obtain injunctions against indictments and revocation of plea agreements and non-prosecution agreements. Hence, this explicit acknowledgement in the revised leniency letter regarding the lack of pre-indictment review of a leniency revocation is not a diminution of an applicant's rights. The Supreme Court has expressly recognized, based on separation of powers principles, that the "Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."[17] And since no defendant has the right to seek judicial review of a Division decision to indict prior to indictment, a leniency applicant's agreement not to seek pre-indictment judicial review of a Division decision to revoke its leniency simply reflects well established caselaw.[18]

If a corporation's conditional leniency is revoked, its conditional leniency letter is "void."[19] Thus, the protection provided to the applicant's employees pursuant to the letter no longer exists. Accordingly, paragraph #4 of the revised corporate conditional leniency letter states that the leniency protection for corporate employees who admit their knowledge of, or participation in, and fully and truthfully cooperate with the Division in its investigation of, the anticompetitive activity is "[s]ubject to verification of [the applicant's] representations in paragraph 1 above, and subject to [the applicant's] full, continuing, and complete cooperation as described in paragraph 2." However, as noted in the FAQs, if a corporation's conditional leniency is revoked, as a matter of prosecutorial discretion, the Division would elect not to prosecute individual employees, as long as they had fully cooperated with the Division prior to the corporate revocation and were not responsible for the revocation.[20] In addition, as noted in paragraph #4 of the corporate conditional leniency letter, the Division reserves the right to revoke the conditional protection given under a corporate leniency letter to any director, officer, or employee "who the Division determines caused [the applicant] to be ineligible for leniency . . . , who continued to participate in the anticompetitive activity being reported after [the applicant] took action to terminate its participation in the activity and notified the individual to cease his or her participation in the activity, or who obstructed or attempted to obstruct an investigation of the anticompetitive activity."[21]

ROLE IN THE OFFENSE

One of the eligibility representations that is a condition for receiving leniency is that the applicant "was not the leader in, or the originator of" the anticompetitive activity being reported.[22] Members of the bar have reported that their clients often assume that they will be disqualified on this ground if they are the largest company in an industry or if they have the largest market share. As the Division has explained before, however, applicants will be disqualified from receiving leniency on this ground only if they were the clearly the single organizer or single ringleader of a conspiracy. Thus, as stated in the FAQs, the fact

that a company is the largest in the industry or has the greatest market share will not disqualify it from receiving leniency on this ground.[23]

PRIVILEGED INFORMATION

The FAQs reiterate the Division policy that, as a part of a leniency applicant's cooperation obligations, the applicant is not required to provide documents or communications protected by the attorney-client privilege or work-product privilege.[24] This policy is also made explicit in the paragraphs #2 and 4 of the model corporate conditional leniency letters and paragraph #2 of the model individual conditional leniency letter.

RESTITUTION BASED ON FOREIGN EFFECTS

Restitution, of course, has always been a requirement of a leniency applicant's cooperation obligations. In recent years, civil litigation has focused on the extent to which a cartelist is liable under U.S. law for damages relating to foreign effects of its cartel conduct. As noted in the FAQs, the revised model corporate conditional leniency letter reflects the holdings of *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) and *Empagran S.A. v. F. Hoffmann-La Roche Ltd.*, 417 F.3d 1267 (D.C. Cir. 2005) that damages for violations of the Sherman Antitrust Act do not encompass foreign effects independent of and not proximately caused by any adverse domestic effect.[25] Specifically, paragraph #2(g) of the model corporate conditional leniency letter states that the applicant "is not required to pay restitution to victims whose antitrust injuries are independent of any effects on United States domestic commerce proximately caused by the anticompetitive activity being reported."

THE MODEL DUAL INVESTIGATIONS LENIENCY LETTER

As the Division has often noted before, a large percentage of the Division's cartel investigations are spin-offs from an investigation of another conspiracy. Thus, it is not uncommon for a company to be a subject of more than one Division investigation. As explained in the FAQs, where a leniency applicant is the subject or target of, or a defendant in, a separate Division investigation, the corporate conditional leniency letter will include an additional paragraph to account for issues raised by the additional investigation.[26] The resulting letter is referred to as the Model Dual Investigations Leniency Letter, which is available on the Division's leniency web page. The additional paragraph, which is paragraph #5 in the letter, makes clear that the protections provided to the applicant and its employees under the leniency letter apply only to the activity reported pursuant to the leniency application and not to the separate investigation. In this paragraph, the applicant acknowledges its status in the additional investigation and the status of some of its current and former directors, officers, or employees as subjects, targets, or defendants in the additional investigation; the lack of effect of the leniency letter on the potential prosecution of the applicant or its directors, officers, or employees in the separate investigation; and the lack of effect of the separate investigation on the cooperation obligations of the applicant and its directors, officers, and employees under the leniency letter. Directors, officers, and employees who are subjects, targets, or defendants in the additional investigation and who are interviewed by the Division in connection with the leniency matter will be given a separate letter in which the individual acknowledges his status in the additional investigation and that his employer's conditional leniency letter governs the conditions of his eligibility for leniency protection in the investigation of the leniency product.[27]

CONCLUSION

The FAQs and revised model leniency letters are part of the Division's continuing effort to maintain the transparency of its leniency program. The FAQs and letters do not represent changes in the Division's leniency program, but serve to clarify various aspects of the program and to remove any possible ambiguity for potential applicants and their counsel. As noted above, as new issues arise in the Division's leniency program, the FAQs will be updated to reflect those new issues.

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[1] FAQs, question 1.

[2] FAQs, p. 2-4.

[3] FAQs, n.6.

[4] FAQs, question 5.

[5] Model Corporate Conditional Leniency Letter, introductory paragraph; Model Individual Conditional Leniency Letter, introductory paragraph. *See also* Model Corporate Conditional Leniency Letter, paragraph #1; Model Individual Conditional Leniency Letter, paragraph #1.

[6] Model Corporate Conditional Leniency Letter, paragraph #3; Model Individual Conditional Leniency Letter, paragraph #3.

[7] FAQs, question 6.

[8] Model Corporate Conditional Leniency Letter, paragraph #3; Model Individual Conditional Leniency Letter, paragraph #3.

[9] FAQs, question 12; Model Corporate Conditional Leniency Letter, n.4.

[10] Model Individual Conditional Leniency Letter, n.2.

[11] In the fifteen years since the Division's modern leniency program was introduced in 1993 and, out of the more than 100 conditional leniency letters entered in that time, the Division has only revoked an applicant's conditional leniency once.

[12] *See* Model Corporate Conditional Leniency Letter, paragraph #1 (representation regarding prompt and effective action to terminate the applicant's participation in the anticompetitive activity being reported and representation regarding leadership role); Model Individual Conditional Leniency Letter, paragraph #1 (representation regarding leadership role).

[13] *See* FAQs, n.15 and related discussion.

[14] FAQs, question 25.

[15] Model Corporate Conditional Leniency Letter, paragraph #3; Model Individual Conditional Leniency Letter, paragraph #3; FAQs, question 27.

[16] Model Corporate Conditional Leniency Letter, paragraph #3; Model Individual Conditional Leniency Letter, paragraph #3.

[17] *United States v. Nixon*, 418 U.S. 683, 693 (1974). *See also Wayte v. United States*, 470 U.S. 598, 607 (1985).

[18] *In re Sawyer*, 124 U.S. 200, 210 (1888) (court has "no jurisdiction" to enjoin a criminal prosecution); *Stolt-Nielsen, S.A. v. United States*, 442 F.3d 177 (3d Cir. 2006) (upholding Division's right to indict leniency applicant whose conditional leniency agreement had been revoked after Division discovered evidence indicating that applicant had not taken prompt and effective action upon discovery to terminate its involvement in the anticompetitive activity being reported); *Deaver v. Seymour*, 822 F.2d 66, 68-69 (D.C. Cir. 1987) (potential defendant has "no right to an injunction restraining a pending indictment in a federal court").

[19] Model Corporate Conditional Leniency Letter, paragraph #3.

[20] FAQs, question 29.

[21] FAQs, question 30.

[22] Model Corporate Conditional Leniency Letter, paragraph #1(b); Model Individual Conditional Leniency Letter, paragraph #1.

[23] FAQs, p.15-16.

[24] FAQs, question 16.

[25] FAQs, question 22.

[26] FAQs, question 10; Model Dual Investigations Leniency Letter, paragraph #5.

[27] FAQs, question 10; Model Dual Investigations Acknowledgement Letter for Employees.