

U.S. DOJ Antitrust Division Updates Leniency Program FAQs.

For the first time in almost a decade, the U.S. Department of Justice Antitrust Division (“DOJ”) updated its *Frequently Asked Questions Regarding the Antitrust Division’s Leniency Program and Model Leniency Letters* (the “FAQs”).<sup>1</sup> The updated FAQs, issued January 17, 2017, change or clarify the DOJ’s Leniency Program with respect to markers, the scope of leniency, applicability to non-antitrust crimes, penalty plus, applicability and scope of protection for current and former employees, and protection under ACPERA. Most significantly, the DOJ will no longer entertain “anonymous markers,” and current employees will no longer automatically be granted leniency under certain circumstances. In practice, the changes may make it more difficult for companies and individuals to qualify for leniency, and may discourage some from coming forward at all.

DOJ Leniency FAQs - Overview

In a nutshell, the DOJ’s Leniency Program offers amnesty from criminal prosecution to the first company or individual to agree to provide evidence and cooperate with the DOJ in an investigation of a price-fixing, bid-rigging, or allocation conspiracy, and also significantly reduces damages exposure in parallel civil class actions. The FAQs are designed to help interested parties understand how the Leniency Program works in practice.

Key Developments under the Updated DOJ Leniency FAQs

Markers now must go only to the DAAG or Director of Criminal Enforcement

A leniency applicant may request the Division to provide a “marker” which holds its place at the front of the line while counsel gathers additional information through an internal investigation. Applicants previously could go to anyone in the Antitrust Division to request such a marker, but now must make the request to the

Contents

DOJ Leniency FAQs - Overview ..... 1

Key Developments under the Updated DOJ Leniency FAQs..... 1

    Markers now must go only to the DAAG or Director of Criminal Enforcement..... 1

    No more anonymous markers ..... 2

    No application of leniency for non-antitrust crimes . 2

    Adjusting scope of markers and leniency .... 3

    Penalty Plus ..... 3

    Directors/Officers/Employees (“Employees”)..... 3

        Current Employees.... 3

        Former Employees .... 3

    ACPERA ..... 4

Conclusion ..... 4

<sup>1</sup> U.S. Department of Justice, Antitrust Division, Updated FAQs (January 17, 2017) available at: <https://www.justice.gov/atr/page/file/926521/download>

Deputy Assistant Attorney General for Criminal Enforcement (“**DAAG**”) or the Director of Criminal Enforcement. Only the DAAG can determine the availability of a marker.

## **No more anonymous markers**

Previously, an applicant could contact the Antitrust Division and identify only the industry and ask if leniency was available. This provided the applicant with a great amount of information because the applicant could learn whether anyone else was already cooperating, even if the applicant had no intention of cooperating itself.

However, under the updated FAQs, anonymous markers are no longer available. Instead, to seek leniency, the applicant must identify the name of the company/individual and provide the DOJ with a certain level of detailed information, although the evidentiary standard for obtaining a marker is still relatively low.

The level of information required to obtain a marker depends on whether the Division already has knowledge of the potential wrongdoing. In some cases, an identification of the industry may be sufficient, but for many cases, identifying specific products or services, other involved companies, and affected customers is necessary for the Division to determine the availability of leniency. Since these determinations are made on a case-by-case basis, counsel should request a marker as soon as possible so that they can discuss with the DOJ whether more detailed information is needed to secure a marker.

## **No application of leniency for non-antitrust crimes**

The updated FAQs clarify that the Leniency Program will protect a qualified leniency applicant only for antitrust crimes or for acts integral to the antitrust violation, and not for non-antitrust crimes, unless the conduct is integral to the antitrust offense. Furthermore, leniency binds only the Antitrust Division and does not bind other federal or state prosecuting agencies, including other divisions of the U.S. Department of Justice. The updated FAQs emphasize that leniency applicants should not expect to use the Leniency Program to avoid accountability for non-antitrust crimes. For instance, a leniency applicant in violation of the U.S. Foreign Corrupt Practices Act is not protected from prosecution by any other prosecuting agency, even if it paid bribes in furtherance of a reported antitrust violation. It is important to keep in mind that if a leniency applicant’s conduct includes a non-antitrust violation, the applicant should consider self-reporting to all relevant prosecuting agencies. For example, a leniency applicant involved in a price-fixing conspiracy in a foreign exchange market should consider self-reporting to other relevant agencies such as the Criminal Division’s Fraud Section, the Commodities Futures Trading Commission, the U.S. Federal Reserve, the U.S. Treasury Department and any other relevant agencies depending on the case.

### **Adjusting scope of markers and leniency**

Leniency applicants often request markers before completing their internal investigation. If a leniency applicant discovers that anticompetitive activity was broader or narrower than originally reported, the Applicant should report to the DOJ accordingly so that the scope of leniency can be adjusted.

### **Penalty Plus**

The updated FAQs now address “Penalty Plus,” under which the DOJ will seek a more severe punishment for a company that pleads guilty to an antitrust offense but fails to report additional antitrust crimes in which it is also involved. The severity of the enhancement will depend on the reasons for the company’s failure to report. The DOJ may recommend that the sentencing court impose fines beyond the statutory range and appoint an independent corporate monitor.

### **Directors/Officers/Employees (“Employees”)**

#### ***Current Employees***

Current employees must fully cooperate with the DOJ’s investigation for the entire period (i.e., before and after issuance of the conditional leniency letter) in order to be protected under the Leniency Program. If an employee stops cooperating with the investigation, then that individual’s protection under the Leniency Program would be void.

The updated FAQs also clarify the conditions for leniency protection for current employees by type of leniency. For Type A Leniency, which is available only if the applicant applies for leniency before the DOJ has obtained information on the potential illegal antitrust activity from any other source, all current employees are generally automatically included in the scope of the leniency as long as they fully cooperate. However, the DOJ may exercise its discretion to exclude a current employee if he or she is not fully cooperative.

On the other hand, for Type B Leniency, which is available even after the DOJ has received information on the potential illegal antitrust activity, so long as it does not have sufficient evidence to sustain a conviction, the DOJ has more discretion on the scope of employees being protected. For Type B Leniency, the DOJ may exercise its discretion to exclude highly culpable employees.

#### ***Former Employees***

Former employees are presumptively excluded from any grant of corporate leniency. The DOJ may exercise its discretion to offer the inclusion of former employees in the scope of leniency if the former employees provide substantial, noncumulative cooperation against the remaining potential targets, or if their cooperation is necessary for the leniency applicant to make a confession of criminal antitrust activity sufficient to be eligible for conditional leniency. The criteria for covering former employees depends on a number of factors, such as the applicant’s interest in protecting those former employees and its ability to secure the cooperation of key former employees. The former employees must

provide full cooperation to the DOJ throughout its investigation and resulting prosecutions in order to be protected under the Leniency Program.

## **ACPERA**

The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (“**ACPERA**”) limits a qualifying leniency applicant’s liability for civil damages claims in private state or federal antitrust actions to single damages based on its own sales. In order for a company and individuals to be protected under ACPERA, the corporation or cooperating individuals must meet certain conditions, including providing the claimant with a full account of all potentially relevant facts known to the corporation or cooperating individual and all potentially relevant documents.

## **Conclusion**

The release of the updated FAQs in the final week of the Obama administration may indicate a desire to impose continuity on the incoming Trump administration. In practice, the updated FAQs impose several requirements that may make it more difficult to qualify for leniency, and may prevent some culpable companies and individuals from coming forward at all.

## Contacts

For further information  
please contact:

**Douglas Tween**  
Partner

(+1) 212 903 9072

[douglas.tween@linklaters.com](mailto:douglas.tween@linklaters.com)

**Thomas McGrath**  
Partner

(+1) 212 903 9140

[thomas.mcgrath@linklaters.com](mailto:thomas.mcgrath@linklaters.com)

**Antonia Sherman**  
Counsel

(+1) 212 903 9153

[antonia.sherman@linklaters.com](mailto:antonia.sherman@linklaters.com)

**Yumiko Kato**  
Foreign Legal Advisor

(+1) 212 903 9233

[yumiko.kato@linklaters.com](mailto:yumiko.kato@linklaters.com)

Authors: Douglas Tween, Thomas McGrath, Yumiko Kato

This publication is intended merely to highlight issues and not to be comprehensive, nor to provide legal advice. Should you have any questions on issues reported here or on other areas of law, please contact one of your regular contacts, or contact the editors.

© Linklaters LLP. All Rights reserved 2017

Linklaters LLP is a limited liability partnership registered in England and Wales with registered number OC326345. It is a law firm authorised and regulated by the Solicitors Regulation Authority. The term partner in relation to Linklaters LLP is used to refer to a member of Linklaters LLP or an employee or consultant of Linklaters LLP or any of its affiliated firms or entities with equivalent standing and qualifications. A list of the names of the members of Linklaters LLP and of the non-members who are designated as partners and their professional qualifications is open to inspection at its registered office, One Silk Street, London EC2Y 8HQ, England or on [www.linklaters.com](http://www.linklaters.com).

Please refer to [www.linklaters.com/regulation](http://www.linklaters.com/regulation) for important information on Linklaters LLP's regulatory position.

We currently hold your contact details, which we use to send you newsletters such as this and for other marketing and business communications.

We use your contact details for our own internal purposes only. This information is available to our offices worldwide and to those of our associated firms.

If any of your details are incorrect or have recently changed, or if you no longer wish to receive this newsletter or other marketing communications, please let us know by emailing us at [marketing.database@linklaters.com](mailto:marketing.database@linklaters.com).

Linklaters LLP  
1345 Avenue of the Americas  
New York, NY 10105

Telephone (+1) 212 903 9000  
Facsimile (+1) 212 903 9100

[Linklaters.com](http://Linklaters.com)