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# DOJ Antitrust Division Updates Leniency Policy, Highlighting Prompt Reporting Requirement

- The U.S. Department of Justice Antitrust Division leniency policy allows organizations to avoid criminal prosecution for violations of section 1 of the Sherman Act in certain circumstances.
- A recent update to the policy adds a prompt reporting requirement to the list of conditions that an organization must meet in order to qualify for leniency.
- Companies should evaluate whether their antitrust compliance programs facilitate their ability to promptly detect and report potential section 1 violations and consider adjusting their programs accordingly.

The Antitrust Division of the U.S. Department of Justice (DOJ) updated its longstanding leniency policy on April 4. As the DOJ described, the leniency policy "allows the first individual or company to self-report its involvement in an antitrust cartel to avoid prosecution if it cooperates with the Division's investigation and prosecutions, and meets other conditions." A new condition in the updated policy states that the leniency applicant must, "upon its discovery of the illegal activity, promptly report[] it to the Antitrust Division." Thus, timing is of the essence because in order to qualify for immunity an organization must be the first to report the wrongdoing (as has historically been the case) and also must now do so promptly after discovering the wrongdoing. The DOJ specifically noted that a company will not qualify for immunity if it waits too long to contact the DOJ after learning about the offense.

According to a document with frequently asked questions accompanying the updated policy, the DOJ will measure promptness from "the earliest date on which an authoritative representative of the applicant for legal matters—the board of directors, its counsel (either inside or outside), or a compliance officer—was first informed of the conduct at issue." This may allow for only a very brief initial internal investigation and typically a decision will have to be made very early on whether to contact the DOJ for a "marker" to allow an applicant to hold its place in line while more facts are developed. Importantly, according to the DOJ, an "organization will not be eligible for leniency if an authoritative representative learns of potential illegal activity and refrains from investigating further." Similarly, "an organization that confirms its involvement in illegal activity and then chooses not to self-report until later learning that the Division has opened an investigation will not be eligible for leniency." The document notes that "it is the applicant's burden to prove that its self-reporting was prompt" and the DOJ's determination will be "based on the facts and circumstances of the illegal activity and the size and complexity of operations of the corporate applicant."

In addition to being the first organization to promptly self-report, a successful leniency applicant must also report "with candor and completeness," make a "confession of wrongdoing that is truly a corporate act, as opposed to isolated confessions of directors, officers, and employees," provide "timely, truthful, continuing, and complete cooperation," and use "best efforts to make restitution to injured parties" and "remediate the harm caused by the illegal activity." The policy also requires that the

"applicant did not coerce another party to participate in the illegal activity and clearly was not the leader or originator of that activity." These conditions were factors in the earlier iteration of the policy.

In another update, however, the leniency applicant must now endeavor "to improve its compliance program to mitigate the risk of engaging in future illegal activity." The additional attention to antitrust compliance programs is an indication that the DOJ continues to see them as being quite important. During the previous administration, the former head of the Division announced that corporate antitrust compliance programs would factor into prosecutors' charging and sentencing decisions and may allow companies to qualify for deferred prosecution agreements or otherwise mitigate exposure even when they are not the first to self-report criminal conduct. This gives companies an alternative avenue to advocate for the avoidance or mitigation of criminal antitrust charges. Indeed, this earlier-established policy is reflected in the new FAQ document, which states: "In certain circumstances, a disposition short of a criminal conviction may be appropriate even if an organization does not qualify for leniency, especially when it has invested in an effective compliance program that allowed it to identify the misconduct and promptly self-report, despite that it was not the first to seek leniency."

Numerous difficult questions face organizations when they contemplate seeking leniency under the DOJ's program, and the consequences of seeking leniency – and of not seeking leniency – can be far-reaching. The Antitrust Division's updated leniency policy underscores the potential benefits of a robust antitrust compliance program that can detect and nimbly respond to potential wrongdoing and give decision makers the opportunity to evaluate whether to seek leniency.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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