

DOJ Policy Changes Raise Antitrust Leniency Questions

By **Andre Geverola, Valarie Hays and Elizabeth Porfido** (October 18, 2022)

In a speech last month,[1] U.S. Deputy Attorney General Lisa Monaco emphasized the importance of incentivizing companies to voluntarily self-disclose potential criminal conduct by their personnel.

Monaco announced several new policies in the speech and an accompanying memorandum,[2] including requiring each U.S. Department of Justice component that prosecutes corporate crime to create a formal written policy on voluntary self-disclosure.

As Monaco noted in her speech, these policies are already in effect at the DOJ's Antitrust Division, as well as other DOJ components.

The Antitrust Division's corporate leniency policy has been in place since 1993 and has been revised and updated periodically over the years — most recently in April.[3]

The leniency policy has been incredibly successful over the last three decades uncovering cartels in a variety of industries, and, according to the program website, the Antitrust Division considers it the "most important investigative tool for detecting cartel activity." [4]

In recent years, other DOJ components have adopted their own self-disclosure programs following the leniency model.[5] In 2016, the Criminal Division adopted a pilot program[6] for Foreign Corrupt Practices Act offenses, and made it permanent in 2017 as its corporate enforcement policy.[7] The National Security Division followed in 2019 with its policy regarding voluntary self-disclosure of export control and sanctions violations.[8]

Both programs allow companies to escape prosecution by voluntarily self-reporting a violation before an imminent threat of disclosure or government investigation, along with meeting other requirements.

The leniency model now will be applied across the DOJ, and Monaco set forth two foundational principles for how these policies must operate.

First, absent aggravating factors, DOJ components will not seek a guilty plea when a company has self-disclosed, cooperated and remediated misconduct. Second, DOJ components will not require an independent compliance monitor for a self-disclosing company if it also has implemented an effective compliance program.

By providing a pathway for avoiding prosecution across various federal offenses, this announcement is positive news for companies overall. But a closer look at Monaco's comments suggests it may not all be good news for potential antitrust leniency applicants.

Current Leniency Benefits

Leniency is available to the first company to self-report its participation in a criminal



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antitrust violation under Section 1 of the Sherman Antitrust Act.

Qualifying companies receive nonprosecution agreements that provide immunity from prosecution for the company and, in Type A leniency applications, for current directors, officers and employees.[9]

According to the DOJ's Justice Manual, Type A applications involve self-disclosures "before the Antitrust Division has begun an investigation" as long as "[a]t the time the applicant reports the illegal activity, the Antitrust Division has not received information about the illegal activity from any other source." [10]

Companies that fail to qualify for Type A leniency may still qualify for Type B leniency. To qualify for Type B leniency, a company must self-disclose before the Antitrust Division has evidence that, "in the Antitrust Division's sole discretion, is likely to result in a sustainable conviction against" the company, and "granting leniency to the applicant would not be unfair to others." [11]

In its April updates, the Antitrust Division added new requirements for obtaining leniency. First, the division added a timeliness requirement that the applicant must promptly report the violation after discovery. [12] Second, the division added a remediation requirement that the applicant must remediate the harm caused by the violation and bolster its compliance program to prevent repeated wrongdoing. [13]

Additionally, the division revised Type B leniency so that it would no longer presumptively protect current directors, officers and employees. [14]

These updates brought the Antitrust Division in line with the practices of other DOJ components. For example, the Criminal Division's and the National Security Division's self-disclosure policies require prompt reporting and remediation, and do not provide for the protection of employees.

But the cost of this convergence was to make leniency more difficult to obtain and to make its protections more limited — leading to questions about its continued attractiveness.

Leniency Questions Going Forward

Unfortunately, Monaco's speech raises more questions, because some of the other policies she announced may conflict with incentivizing companies to self-report under the leniency policy.

Monaco announced that the "number one priority" for corporate criminal enforcement is "going after individuals who commit and profit from corporate crime." [15] As a result, a Type B corporate leniency applicant can expect that its cooperation will be focused against its own employees in addition to other corporate conspirators.

This complicates the leniency decision for a company, since self-reporting is likely to lead to the prosecution of its own employees — including senior executives — who played a role in the unlawful agreement for which the company is receiving leniency.

This is in stark contrast to pre-2022 leniency practice, where the company's interests were aligned with its employees in receiving full immunity from prosecution.

Of course, companies can avoid this conflict by obtaining Type A leniency. But, given

Monaco's comments and practices at other DOJ components, Type A leniency's protection of individuals soon will be an outlier within the DOJ. And since prosecuting individuals is the number one priority, it remains to be seen whether this approach will affect the availability of Type A leniency.

For example, the Antitrust Division could broadly construe the Type A leniency requirement that "[a]t the time the applicant reports the illegal activity, the Antitrust Division has not received information about the illegal activity from any other source."^[16]

Doing so could push leniency applicants to Type B leniency even if the applicant self-reported before the division initiated an investigation, and employees would not be protected and thus open to prosecution. Will the Antitrust Division look for reasons to render an applicant ineligible for Type A leniency?

In addition, Monaco announced that "[c]ompanies cannot assume that they are entitled to [a nonprosecution agreement] or a [deferred prosecution agreement]," and that DOJ "will disfavor multiple, successive non-prosecution or deferred prosecution agreements with the same company."^[17]

A hallmark of the leniency policy is its predictability — if a company meets the requirements stated in the policy and explained in the FAQ,^[18] the company will receive a nonprosecution agreement.

In contrast, both the Criminal Division and National Security Division polices allow for prosecution of self-reporting companies if there are aggravating circumstances.

Monaco's comments thus raise questions about whether the benefits of leniency remain for companies with prior violations — antitrust and otherwise — that wish to self-report under the leniency policy.

Notably, Monaco warned that "[b]efore a prosecution team extends an offer for a successive [nonprosecution agreement] or [deferred prosecution agreement], Department leadership will scrutinize the proposal." Will department leadership overrule staff in extending leniency protections to a company that has prior violations?

According to Monaco, the DOJ's goal is "to reward those companies whose historical investments in compliance enable voluntary self-disclosure and to incentivize other companies to make the same investments going forward."^[19]

For its part, the Antitrust Division can meet this goal by making clear that the leniency policy's benefits remain available to all applicants that meet its stated requirements and, to the extent there are close calls under the policy, that the Antitrust Division will construe good faith ambiguities in favor of the leniency applicant.

Through these measures, the Antitrust Division can demonstrate its continued commitment to rewarding companies that invest in compliance and take responsibility by self-reporting violations.

Conclusion

The Antitrust Division's unparalleled success with its leniency policy now serves as a model for the entire DOJ, but the rhetoric from DOJ leadership creates mixed messages regarding the benefits of self-reporting under the policy. As a result, companies considering leniency

applications now walk a more unpredictable path.

Of course, the best way to mitigate this uncertainty is to ensure that a company has a robust antitrust compliance program. A program that includes measures not only to prevent violations, but also to timely detect and report violations, remains a company's best chance at avoiding prosecution.

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[1] Deputy Attorney General Lisa O. Monaco Delivers 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>.

[2] 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>.

[3] U.S. Dep't of Justice, Justice Manual § 7-3.300 (2022), available at <https://www.justice.gov/jm/jm-7-3000-organization-division#7-3.300>.

[4] Leniency Program, U.S. Dep't of Justice, <https://www.justice.gov/atr/leniency-program> (last visited Oct. 3, 2022).

[5] Robert W. Tarun & Peter P. Tomczak, A Proposal for a United States Department of Justice Foreign Corrupt Practices Act Leniency Policy, 47 Am. Crim. L. Rev. 153 (2010), available at <https://files.lbr.cloud/public/340-2-Proposal-for-FCPA-Leniency-Policy---Law-Review-Article.pdf?VersionId=ttz.Rpvpi1wX3oHGCCpMxZF76OyFZ8DX>.

[6] Press Release, U.S. Dep't of Justice, Criminal Division Launches New FCPA Pilot Program (Apr. 5, 2016), <https://www.justice.gov/archives/opa/blog/criminal-division-launches-new-fcpa-pilot-program>.

[7] U.S. Dep't of Justice, Justice Manual § 9-47.120 (2022), available at <https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.120>.

[8] U.S. Dep't of Justice, Export Control and Sanctions Enforcement Policy for Business Organizations (Dec. 13, 2019), available at https://www.justice.gov/nsd/ces_vsd_policy_2019/download.

[9] U.S. Dep't of Justice, Justice Manual § 7-3.310 (2022), available at <https://www.justice.gov/jm/jm-7-3000-organization-division#7-3.310>.

[10] U.S. Dep't of Justice, Justice Manual § 7-3.310 (2022), available at <https://www.justice.gov/jm/jm-7-3000-organization-division#7-3.310>.

[11] In evaluating whether granting leniency to the applicant would be unfair to others, the Antitrust Division will consider the nature of the illegal activity, the applicant's role in it, the applicant's criminal history, and the timing of the leniency application. U.S. Dep't of Justice, Justice Manual § 7-3.320 (2022), available at <https://www.justice.gov/jm/jm-7-3000-organization-division#7-3.320>.

[12] U.S. Dep't of Justice, Justice Manual § 7-3.310 (2022), available at <https://www.justice.gov/jm/jm-7-3000-organization-division#7-3.310>.

[13] U.S. Dep't of Justice, Justice Manual § 7-3.310 (2022), available at <https://www.justice.gov/jm/jm-7-3000-organization-division#7-3.310>.

[14] U.S. Dep't of Justice, Justice Manual § 7-3.320 (2022), available at <https://www.justice.gov/jm/jm-7-3000-organization-division#7-3.320>.

[15] Deputy Attorney General Lisa O. Monaco Delivers 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>.

[16] U.S. Dep't of Justice, Justice Manual § 7-3.310 (2022), available at <https://www.justice.gov/jm/jm-7-3000-organization-division#7-3.310>.

[17] Deputy Attorney General Lisa O. Monaco Delivers 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>.

[18] U.S. Dep't of Justice, Revised Leniency Policy FAQs (Apr. 4, 2022), available at <https://www.justice.gov/atr/page/file/1490311/download>.

[19] Deputy Attorney General Lisa O. Monaco Delivers 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>.