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Axinn Antitrust Insight: DOJ Updates Antitrust Leniency Program and Agencies Continue Shift to Increase Merger Enforcement

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PRACTICE AREAS

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During the week of the ABA Section of Antitrust's annual Spring Meeting conference, DOJ and FTC officials made a number of announcements and remarks which continued the Biden Administration's steady shift toward unconventional and more aggressive antitrust enforcement. First, DOJ announced updates to its flagship criminal Leniency Program that increase the burdens for obtaining leniency. Second, government officials made a number of remarks signaling more hostility to mergers.

New, Stricter Requirements for Criminal Leniency Program

On April 5, 2022, Assistant Attorney General Jonathan Kanter unveiled substantial new changes to the DOJ Antitrust Division's criminal Leniency Program while speaking at the joint DOJ and FTC Spring Enforcers Summit. The Leniency Program encourages self-reporting of criminal antitrust violations by providing non-prosecution protection in exchange for being the first entity to self-report the violation and full cooperation. Kanter said the updates are intended to make the Leniency Policy more "transparent, predictable, and accessible to the public" by aligning written policy with current practice and using more "plain language" for the benefit of the public. Other DOJ officials speaking at the Spring Meeting similarly downplayed the magnitude of the changes.

But these revisions – the first changes to the Leniency Policy since the 1990's – do include some significant changes and may affect incentives for companies and individuals to self-report conduct. The changes also fit into the backdrop of the DOJ's broader, more aggressive approach to criminal enforcement, exemplified by expansion into labor markets and potentially even monopolization conduct, despite DOJ's recent failures in criminal enforcement.

The most significant substantive changes are found in the updates to the Division's "Frequently Asked Questions" (FAQs) document, which describes the way that the Antitrust Division implements the Leniency Policy. The new FAQs revise answers to questions in prior editions, and add nearly 50 more questions and answers to the policy document. Some of the key updates are as follows:

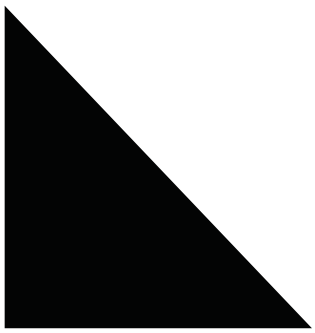
- ***Prompt Self-Reporting***: The new FAQs emphasize the importance of seeking a leniency marker "at the first indication of possible wrongdoing," and places the burden on the leniency applicant to prove that its self-reporting was prompt. An organization is found to have discovered the illegal conduct at the earliest date that an "authoritative representative" of the company for legal matters – including at least members of the board of directors, inside or outside counsel, or a compliance officer – was first informed of the conduct. While ultimate determinations on promptness are fact-bound, companies that confirm illegal conduct and wait until the DOJ opens an investigation will be ineligible for leniency coverage. Of course, the leniency program itself already creates a race among co-conspirators to report as early as possible. In practical terms, this change generates additional uncertainty for potential applicants, as the government reserves new discretion to refuse a grant of leniency based on information (e.g. knowledge of any potential, undefined "authoritative representative") that may not be available to an applicant at the time it needs to decide whether to seek leniency.
- ***Earlier Restitution Payments, Remediation and Compliance Improvements***: Prior DOJ policy required leniency applicants to make restitution, where possible, primarily through civil actions with private plaintiffs entirely separate from the DOJ leniency process. The new policy requires that, even before receiving a conditional leniency letter, applicants must remediate any harm from the violation and improve its corporate compliance policies. Perhaps more importantly, applicants must "present concrete, reasonably achievable plans" for making restitution before receiving a conditional leniency letter, and must "actually pay restitution" prior to obtaining a final leniency letter. The FAQs now include several new questions and answers related to the Antitrust Division's position on a leniency applicant's use of the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA), which limits a leniency applicant's civil damages in exchange for cooperation with civil plaintiffs. While the implementation, and practical impact, of

these changes is not yet fully clear, civil plaintiffs may gain additional negotiation leverage as leniency applicants must make earlier settlement decisions, and cannot receive the certainty of a final leniency determination until restitution has been achieved.

- ***Differentiation of Type A and Type B Leniency***. The Leniency Program includes two types of leniency: (i) Type A, for which unlawful activity is self-reported before DOJ has opened an investigation of the conduct; and (ii) Type B, for which the self-reporting follows an open investigation. While the revised FAQs reaffirm that all directors, officers, and employees of Type A applicants receive non-prosecution protection (if Leniency Program requirements are met), the new FAQs highlight the disparate treatment of those persons under a Type B application. In Type B situations, non-prosecution treatment is not automatic, and the DOJ retains "broad discretion" on whether to provide coverage on a case-by-case basis. Among other factors, like the individual's admission of wrongdoing and completeness of cooperation, the DOJ will weigh public-interest factors regarding whether to provide non-prosecution protection, including the importance of the investigation, the value of the individual's cooperation, relative culpability, and the interests of victims. The practical impact of these changes is that corporate Type B applicants can no longer assure potentially knowledgeable employees that cooperation with an investigation will lead to certain inclusion in a company's non-prosecution protection as the government expands its discretion.

The Antitrust Division also updated its model corporate and individual leniency letters to, among other things, prohibit the applicant from making any public statement, including in litigation, that could contradict the acceptance of responsibility. This could take particular significance if a leniency applicant faces civil litigation with a scope that is broader or different from the conduct admitted as part of its application—causing leniency applicants to walk a tightrope to avoid losing leniency protection.

On the whole, the recent changes provide a measure of clarity as to the DOJ's current Leniency Program practices. But they also highlight the heightened burdens, challenges, and new potential pitfalls facing leniency applicants under the current leadership, which may result in a change to a company's calculus regarding whether to self-report and seek leniency coverage.



Continued Shift to Increase Merger Enforcement

At various Spring Meeting events, government officials made remarks, including the following, which continue this Administration's hostility to mergers.

- ***Growing Resistance to Merger Remedies.*** Principal Deputy Assistant Attorney General Doha G. Mekki warned that DOJ expects to litigate more cases that might have previously been resolved through a remedy. She added that they are especially skeptical of complicated remedy packages.

- ***DOJ Will Now Consider Challenging Mergers Before Response to Second Request Completed.*** DOJ is now willing to file merger challenges earlier in the merger review process, before substantial compliance with a Second Request or the end of statutory waiting periods, according to Principal Deputy Assistant Attorney General Doha G. Mekki. She added that DOJ had nearly filed such a suit recently but that the parties chose to abandon their transaction after being told of the plan to litigate. These earlier challenges are most likely in cases with issues that can be seen "from outer space," Mekki said. She noted that competition is sometimes harmed while a merger is pending, for example if the target has a reduced incentive to compete or ability to pursue certain transformative strategies during the interim period. Merging companies should consider how to protect against early merger challenges in negotiating timing agreements – or in not consenting to a timing agreement. In addition, an early merger challenge might undermine DOJ efforts to obtain additional discovery in litigation as a judge might not be sympathetic to a party that did not take advantage of pre-litigation discovery opportunities.

While the antitrust agencies have significant discretion in managing their pre-litigation investigations and making enforcement decisions, ultimately, for parties willing to litigate, the agencies must convince a federal court in order to enjoin a transaction. Merging companies should prepare for greater friction during merger investigations and potentially earlier litigation preparation.