

## Justice Department Policy Changes Limit Avenues of Immunity for Antitrust Crimes

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The United States Department of Justice (DOJ) Antitrust Division offers immunity from prosecution to applicants who are the first to self-report antitrust violations. That immunity carries with it limited protection from damages in civil litigation. Last month, in the final days of the Obama administration, the Antitrust Division released a revised version of its “Frequently Asked Questions about the Antitrust Division’s Leniency Program” (FAQs), the most important published resource for prospective immunity applicants since 2008. Many of the updated FAQs narrow the immunity protections offered under the program. Accordingly, the revised FAQs should be reviewed carefully before making a determination whether to self-disclose to the division as an applicant. It remains to be seen whether these policies will remain in effect under the Trump administration.

### **DOJ Leniency Program**

In 1978, the Antitrust Division created a corporate leniency policy to increase incentives for companies to report criminal activity and cooperate with the Antitrust Division, and in 1994, expanded the program to individuals who approach the division on their own behalf, and not as part of a company proffer or confession, to report anti-competitive activity.

In 2008, the DOJ published FAQs on the Leniency Program. The thirty-three FAQs provided guidance to companies and individuals so that Applicants that are first to report a criminal antitrust violation could avoid criminal convictions, fines and incarceration. The guidance included, among other subjects: confidentiality standards; the process for applying for leniency; the standard for obtaining leniency; and the standards for conditional, unconditional and final leniency letters.

On Jan. 17, 2017, the DOJ issued revised FAQs for the first time since 2008. The revised FAQs have narrowed the pathway for prospective applicants of the Leniency Program

The 2017 Leniency FAQs added and/or revised several aspects of the Leniency program, including:

1. A Corporate Applicant now must disclose its identity when requesting a “marker”, thus raising the risk that an identified business will be required, in effect, to admit its participation in an antitrust violation before it learns whether it has filed first-in-line. In contrast, the 2008 Leniency FAQs set forth a process that allowed for an anonymous request for a marker by the Corporate Applicant’s counsel.
2. The current cooperating directors, officers or employees of a Corporate Applicant for Type A (automatic) leniency will be subject to purportedly stricter, Individual Applicant-like standards requiring “full” cooperation with the investigation, thus not affording them the automatic inclusion that they received under the 2008 Leniency FAQs. The potential carve out of executives is consistent with the Antitrust Division’s efforts to prosecute highly culpable individuals. Type B (discretionary) leniency, which is applicable if the Antitrust Division has already learned about the crime from “an anonymous complainant, a private civil action, or a press report,” may still be available to Corporate Applicant executives and employees if they cooperate fully with the investigation. The new FAQs make clear that Type A leniency is not available if the Antitrust Division has already learned about the action from any such sources.
3. A conditional leniency letter from the Antitrust Division does not protect Applicants from state and/or federal

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prosecutions for other alleged non-antitrust crimes, such as Criminal Division investigations of conspiracy or Foreign Corrupt Practices Act prosecutions. The 2017 FAQs, nevertheless, urge Applicants to disclose all potential crimes when applying for leniency with the Antitrust Division. The Antitrust Division, in the 2017 Leniency FAQs, attempts to reassure Applicants that federal prosecutorial history suggests that “other prosecuting agencies do not use other criminal statutes to do an end-run around leniency.”

4. If an Applicant for leniency fails to report another antitrust violation, the government will seek more severe penalties against the Applicant in connection with other crime for which leniency was not sought or granted. The severity of the penalties for the second crime will depend on the reason an Applicant failed to report it.

5. Fully cooperating current directors, officers and employees may be included in a company’s conditional leniency letter, but former directors, officers and employees are “presumptively” not included.

6. The FAQs provide additional information as to what Applicants need to do to comply with the Antitrust Criminal Penalty Enhancement and Reform Act in order to limit civil damages claims in subsequent antitrust litigation.

Finally, the FAQs provide Model Corporate and Individual Leniency Letters.

## **Conclusion**

It remains to be seen whether the Antitrust Division’s policy changes will remain in effect under the Trump administration. While many of the changes in the revised FAQs only clarify how the policies will be interpreted and applied, they all reflect a trend toward narrowing the immunity protections offered under the program. Accordingly, the revised FAQs should be reviewed carefully before making a determination whether to self-disclose to the Division as an applicant.

We will continue to monitor developments related to new DOJ policies and will update you with any important developments.

If you have questions about antitrust law, please reach out to a Miller Canfield attorney.

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