

The Race for Leniency Just Got Tighter: Updated DOJ Antitrust Policy Requires Prompt Reporting and Remediation

The U.S. Department of Justice, Antitrust Division (Antitrust Division) [announced](#) several significant updates to its [Leniency Policy](#) on April 4, 2022. Under that policy, the first company or individual to report a criminal antitrust violation and cooperate with the Antitrust Division's investigation can obtain immunity from prosecution. Over the years, the Antitrust Division has modified (and, in general, increased) the requirements for obtaining leniency.

Significant Changes

First, the applicant must now "promptly report" the illegal activity upon discovering it. Previously, the Antitrust Division merely relied on the incentive to report quickly; because leniency is available only to the first to report, those who uncover price-fixing or bid-bidding conspiracies risk losing the "race for leniency" if they wait too long. Now, the Antitrust Division appears to be requiring, and not just incentivizing, prompt reporting.

In its [Frequently Asked Questions](#) (FAQ) guidance about its leniency program, the Antitrust Division makes clear that a company can conduct an internal investigation to confirm its participation in an antitrust cartel before self-reporting. But it also emphasizes that time is of the essence. A company involved in a cartel is in a race to report against its co-conspirators and even against its own employees (because the Antitrust Division has long had a separate leniency policy for individuals as well).

Second, a leniency applicant must now use "best efforts" both to "remediate the harm caused by the illegal activity" and to "improve its compliance program to mitigate the risk of engaging in future illegal activity." Previously, applicants were required only to terminate their participation in the activity promptly and to eventually make restitution to injured parties. The FAQs give more detail on these added requirements. Applicants may need to conduct a "root cause" analysis and act to address those underlying causes. They will also need to closely examine their compliance programs and consider the questions and factors set forth in the Antitrust Division's [previous guidance](#) on such programs.

Third, the FAQs now include answers to nearly 50 new questions, including on topics such as how an applicant can both comply with its cooperation obligations here in the United States as well as with requirements and requests in other jurisdictions. For example, the privacy laws in foreign jurisdictions often impose significant restrictions on the ability to produce emails and other documents containing personal identifying information (PII). Yet the leniency policy requires an applicant to "produce to the Division all potentially relevant documents, wherever located." Helpfully, the latest guidance states that applicants will generally be "able to comply with privacy laws and regulations in other jurisdictions while fully cooperating with the Division's investigation."

Key Takeaways

The Antitrust Division has, once again, substantially modified its leniency policy requirements and its FAQs guidance. Now more than ever, it is critical to ensure that antitrust training and compliance programs are up to date and that any suspected evidence of antitrust cartel activity is promptly investigated and reported to the Antitrust Division. Significant remediation and improvements in compliance programs to lessen the risk of future violations are also now required.

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