To Cooperate Or Not: Obtaining Amnesty Under The DOJ's Corporate Leniency Policy

By Kate Wallace

INTRODUCTION

Since 1993, the U.S. Department of Justice Antitrust Division's (the "DOJ") Corporate Leniency Program has been the cornerstone of the DOJ's criminal enforcement program. Under the DOJ's leniency—or amnesty—program, corporations can avoid criminal prosecution, fines, and prison time for employees by being first to confess participation in a criminal cartel, fully cooperating with the DOJ, and meeting other specified conditions. This program provides a tremendous incentive for corporation's that could otherwise face multi-million dollar fines and possible prison terms for their executives. Since the DOJ revised its leniency program in the early 1990s, cooperation by leniency applicants has resulted in scores of convictions and roughly
$4 billion in criminal fines. This article discusses the procedure and advantages of applying for leniency and the criteria for obtaining corporate leniency for involvement in illegal antitrust activity. Potential drawbacks of applying for leniency are also discussed.

CRITERIA FOR OBTAINING LENIENCY

The Corporate Leniency Policy includes two types of leniency: Type A Leniency and Type B Leniency.

- **Type A Leniency**: Type A Leniency provides automatic amnesty for a company and cooperating employees if no DOJ investigation is pending and the company is the first to report the activity; has terminated its participation in the conspiracy; provides complete, candid, and continuing cooperation to the DOJ; admits its wrongdoing as a corporation; makes restitution where possible; and was not the ringleader and did not coerce participation by others.
- **Type B Leniency**: Type B Leniency creates the possibility of amnesty even if an investigation has already begun. To qualify, companies must meet most of the conditions required for Type A Leniency, including being the first to report the unlawful activity. Also, the DOJ must not yet have evidence against the company that is likely to result in a sustainable conviction; and it must determine that granting leniency would not be unfair to others, considering the nature of the illegal activity, the company's role in it, and the timing of the company's decision to come forward.[1]

The DOJ grants only one corporate leniency application per conspiracy, and in applying for leniency, a company is typically in a race with its co-conspirators and possibly its own employees who may also be preparing to apply for individual leniency. The DOJ has established a marker system where a corporation can preserve its spot at the front of the line by being the first in the DOJ's door to report involvement in criminal conduct. The "marker" is awarded for a finite period of time, typically 30 days, and allows counsel time to gather additional information through an internal investigation to perfect the client's leniency application. While the marker is in effect, no other company can "leapfrog" over the applicant that has the marker. If necessary, the marker may be extended at the DOJ's discretion for an additional finite period as long as the applicant demonstrates it is making a good-faith effort to complete its application in a timely manner.

An individual who approaches the DOJ on his or her own behalf to report illegal antitrust activity may also qualify for leniency under the DOJ's Leniency Policy for Individuals, as long as the DOJ is not aware of the illegal activity at the time of the application. As with a corporate applicant, an individual leniency applicant is required to admit to his or her participation in a criminal antitrust violation and fully cooperate with the DOJ throughout the investigation.

THE REWARDS

With Type A or Type B Leniency, the rewards for the company and its qualifying employees who are "first in" are often very enticing: no criminal convictions, no criminal fines, and no jail sentences. In addition, pursuant to the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (the term of which was recently extended through June 22, 2010), a qualifying corporate leniency applicant may avoid treble damages *and* joint and several liability in a private civil action in exchange for cooperating with civil plaintiffs. Given the exceptional benefits of leniency, companies have a great incentive to make a leniency application as quickly as possible.

All is not lost even if the DOJ has already awarded leniency or accepted an amnesty marker, however. A company implicated in an antitrust cartel can obtain more favorable treatment from the DOJ if it is "second in" the door and pledges cooperation with the investigation. This more favorable treatment can include reduced penalties and fewer prosecutions of company employees, although the rewards for second in companies are not as uniform as those for companies who are first in, because the value of a second in company's cooperation can vary dramatically from case to case.

POTENTIAL DRAWBACKS

While the benefits of the DOJ's Corporate Leniency Policy are remarkable, it is not always in a company's best interest to apply for leniency. For one, while a successful leniency applicant will be saved from criminal prosecution, it could, by virtue of its application, alert potential civil litigants to the corporation's involvement in illegal activity and thus subject itself to potential civil litigation. This could have an adverse impact on the applicant's reputation in the industry and could also open up the leniency applicant to significant civil penalties (although not treble damages) and legal expenses. Moreover, a leniency applicant must ensure it is completely forthcoming about its conduct, not just in the product market under investigation, but as to all products that may be affected by a conspiracy. If the leniency applicant applies for leniency with respect to Product A, but the DOJ subsequently discovers information about the applicant's involvement in a conspiracy in the market for Product B that the applicant failed to disclose, the leniency applicant's application relating to Product A could be denied.

LENIENCY APPLICATION PROCEDURES

The DOJ's Deputy Assistant Attorney General for Criminal Enforcement ("Criminal DAAG") reviews all requests for leniency. To apply for leniency, an applicant's counsel may call the Criminal DAAG directly at (202) 514-3543 or contact any one of the seven DOJ field offices or the DOJ's National Criminal Enforcement Section in Washington D.C.

CONFIRMATION OF LENIENCY

Once a "first in" company successfully applies for leniency, the DOJ will issue a conditional leniency letter. The initial grant of leniency is conditional because a final grant of leniency depends upon the applicant's performance of certain obligations over the course of the criminal investigation and any resulting prosecution of co-conspirators. Among other things, the company must verify its eligibility; provide full, truthful and continuing cooperation; and possibly pay restitution to victims of the illegal conduct. After all of the applicant's obligations have been satisfied (usually after the investigation and any prosecution of co-conspirators have concluded) and the DOJ has verified the applicant's representations regarding eligibility, the DOJ will issue a final leniency letter confirming that the conditions of the conditional leniency letter have been satisfied and that the leniency application has been granted.

REVOCATION OF LENIENCY

Although rarely seen in practice, if the DOJ determines, prior to granting the applicant a final, unconditional leniency letter, that the applicant (1) contrary to its representations, is not eligible for leniency; or (2) has not provided the cooperation required and set forth in the conditional leniency letter, the DOJ may revoke the applicant's conditional acceptance into the leniency program. Before the DOJ makes a final determination to revoke a corporate applicant's conditional leniency, it will notify applicant's counsel in writing of the staff's recommendation to revoke the leniency and provide counsel with an opportunity to meet with the staff and Office of Criminal Enforcement regarding the revocation.

However, companies can take some solace in the fact that the DOJ has, to date, attempted (unsuccessfully) to void only one corporate leniency agreement because the company allegedly violated the terms of the agreement by not taking "prompt and effective action to terminate its part in the activity upon discovery of the activity" and not providing full and truthful cooperation. *Stolt-Nielsen, S.A. v. United States* ("*Stolt-Nielsen*"), 442 F.3d 177, 183-187 (3d Cir. 2006). In *Stolt-Nielsen*, after its amnesty was revoked, Stolt-Nielsen brought a civil action seeking to bar the DOJ from prosecuting the company and its executives. While the district court issued an order that enjoined the DOJ from revoking Stolt-Nielsen's amnesty, the Third Circuit reversed on the ground that separation of powers prevented the district court from enjoining the DOJ from indicting Stolt-Nielsen. The Third Circuit noted, however, that if Stolt-Nielsen asserted the leniency agreement as a defense after indictment, the reviewing court must then: (1) consider the agreement anew; (2) determine the date on which Stolt-Nielsen discovered the anti-competitive activity, if reported; (3) consider Stolt-Nielsen's subsequent actions; and (4) determine whether Stolt-Nielsen fulfilled its obligation to take prompt and effective action to terminate its part in the anticompetitive activity. Pursuant to the Third Circuit's holding, after Stolt-Nielsen and its executives were indicted, the district court held an evidentiary hearing to determine whether Stolt-Nielsen met the four-part test. After considering the leniency agreement anew, the court concluded that the DOJ had no reasonable basis to revoke the agreement and, therefore, ordered the dismissal of the indictments. *United States v. Stolt-Nielsen*, 524 F. Supp. 2d 609 (E.D. Pa. 2007). The DOJ did not appeal.

The Stolt-Nielsen saga should not discourage a corporation from using the Corporate Leniency Program. The District Court's decision should instead reassure a corporate leniency applicant that it will receive the benefit of its bargain and is a strong reminder to the DOJ that "a deal is a deal." Applicants, however, should be aware that the proper avenue to challenge a revocation of a leniency letter is to raise the letter as a defense post-indictment. Nonetheless, even if the DOJ revokes a company's conditional leniency letter (and the protections it provided to individual employees), the DOJ will typically elect not to prosecute the individual employees, so long as they fully cooperated with the DOJ prior to the revocation and, in the DOJ view, were not responsible for the revocation.

SUGGESTED READING MATERIALS

The DOJ has developed a leniency page on its website, available at http://www.usdoj.gov/atr/public/criminal/leniency.htm. The leniency page contains the DOJ's Frequently Asked Questions Regarding The Antitrust Division's Leniency Program and Model Leniency Letters ("FAQs"), dated November 19, 2008, the corporate and individual leniency policies, model leniency letters, leniency application contact information, and prior speeches on the DOJ's Leniency Program.

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1 Additional information concerning how a corporation can qualify for the DOJ's Leniency Program is available at http://www.justice.gov/atr/public/criminal/leniency.htm.