

DOJ-Antitrust Revises Guidance on Coverage of "Current" Employees in Company Leniency Agreements

IN SHORT

The Background: DOJ has historically offered protection to the current employees of companies that have applied for Type B leniency, even if those employees were very involved with the cartel activity.

The Situation: DOJ recently revised its Leniency Frequently Asked Questions to suggest that in some cases, current employees deemed "highly culpable" for the cartel activity may be excluded from leniency agreements.

Looking Ahead: Companies considering seeking Type B leniency applications may want to proactively seek to protect as many employees as possible through their application.

The U.S. Department of Justice's ("DOJ") Antitrust Division historically has extended leniency to cooperating companies and their current employees, even "highly culpable" employees who were very involved in the price-fixing cartel activity. However, recent revised guidance by DOJ takes the position that DOJ may in its discretion exclude those highly culpable current employees from leniency. Although a senior official has stated that will not be the norm, the new guidance suggests companies should have a clear understanding of the circumstances in which leniency may not be extended to all cooperating current employees of a company seeking leniency.

DOJ Revised Guidance

In January 2017, DOJ revised its Leniency Frequently Asked Questions ("Revised FAQs"), which explain the requirements for admission into the Antitrust Division's corporate leniency program. One of those revisions concerns the circumstances under which current executives of the leniency applicant are excluded from the company's leniency agreement in so-called Type "B" leniency situations (where the applicant applies for leniency only after the Division has begun its cartel investigation). Specifically, the Revised FAQ on coverage of current employees reads:

The Division often chooses to include protection for current directors, officers, and employees of Type B Leniency applicants. However, the Division may exercise its discretion to exclude from the protections that the conditional leniency letter offers those current directors, officers, and employees who are determined to be highly culpable. (Leniency FAQs, Q&A #22)

While it has always been DOJ policy that in Type B leniency, coverage of employees—current and former—is discretionary, it has also been longstanding DOJ practice to extend leniency to any current employee willing to cooperate in a criminal investigation, even those employees who are deemed "highly culpable" in the cartel activity. The revision caused many to ask whether DOJ was changing its practice to restrict current employees who may be covered by leniency agreements.

DOJ Recent Comments



In public comments in March 2017, Brent Snyder, the current Deputy Assistant Attorney General for Criminal Enforcement, attempted to allay concerns that the Revised FAQs signaled a more restrictive standard for including current employees in corporate leniency agreements. Snyder stated that it will continue to be the norm for the Antitrust Division to extend coverage to all current cooperating employees in Type B leniency agreements. He suggested that the Revised FAQ on coverage of current employees was merely addressing the limited circumstance where DOJ would consider denying leniency to current employees—namely, when DOJ already has sufficient evidence to prosecute current employees at the time the company first applies for leniency.

Implications

Based on Snyder's comments, DOJ likely will continue to provide broad nonprosecution protection to current company employees under Type B leniency agreements. That is because DOJ rarely possesses

sufficient evidence to prosecute the company's culpable employees when a company initiates its leniency application, typically at the early stage of its cartel investigation. But if DOJ seeks to exclude the company's most culpable current employees from leniency protections, it may be possible to persuade the Antitrust Division to expand its leniency coverage:

- First, in a few situations, a highly culpable employee is also the only current employee who can provide a firsthand account of the company's participation in the cartel. If that is the case, company counsel may be able to argue that the company needs that employee's full and immediate cooperation (ensured only by his or her leniency coverage) to meet the company's own cooperation conditions for leniency.
- Second, in other situations, the most culpable employee may be the individual chiefly responsible for convincing the company to apply for leniency and encouraging other employees to cooperate in the company's internal investigation. In this circumstance, company counsel could argue that it is only fair, and necessary to the company's leniency application, for the Division to extend leniency to the individual most responsible for encouraging the company to self-report its cartel conduct to the Division.

 **If DOJ seeks to exclude the company's most culpable current employees from leniency protections, it may be possible to persuade the Antitrust Division to expand its leniency coverage.** 

In the end, companies considering whether to seek Type B leniency must weigh the costs of self-reporting against the rewards it will reap as a leniency candidate. One of those benefits is the protection of current employees against prosecution. While it is likely that DOJ will continue to extend leniency to all cooperating current employees, an evaluation of who will be protected by a leniency application must be performed by the company and its counsel. If there are questions about who may be protected, the company and its counsel can be proactive in seeking to protect as many employees as possible, thereby increasing the likelihood that the rewards of seeking leniency outweigh the cost of failing to self-report cartel activity to the Antitrust Division.

THREE KEY TAKEAWAYS

1. DOJ is most likely to deny leniency to highly culpable current employees when it already has sufficient evidence to prosecute them at the time of the leniency application.
2. Since companies usually apply for Type B Leniency at the beginning of a cartel investigation, DOJ is likely to continue to grant leniency even to highly culpable current employees in exchange for assistance with the investigation.
3. If DOJ indicates that leniency may not be extended to highly culpable current employees, companies may be able to persuade DOJ to reconsider, particularly when the cooperation of those employees is vital to the company's ability to meet its own cooperation conditions for leniency.

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