



The Role Of Markers In Leniency Programs

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October 16, 2012

Marker Systems Fuel Race For Leniency

- h Markers allow companies to secure place at front of line before leniency application perfected
- h Compels companies to report conduct at the first hint of wrongdoing
- h Discourages a “wait-and-see” corporate strategy for reporting wrongdoing to authorities. No “leap frogging” allowed.



The Evidentiary Threshold For Obtaining A Marker

h Obtaining sufficient information to secure a spot at the front of the line, including the identity of the applicant and the market/industry involved.

h Benefits of establishing a low evidentiary threshold for extending a marker to the first company to report.

h Early reporting provides authorities with opportunity for early involvement in the applicant's internal investigation.



The Process of Perfecting A Marker

h Providing an applicant with a finite time period for perfecting its marker.

h The importance of maintaining agency discretion over whether to extend the period for perfecting a marker if the applicant is demonstrating good faith and diligence.

h Resisting the temptation to establish hard deadlines that eliminate agency discretion.



The Process of Perfecting A Marker II

h Authorities vary with regard to how they obtain the applicant's information during the marker process (e.g., documents and witness statements)

h Ensuring that applicants who self report are not treated worse than their co-conspirators in terms of how their evidence is treated.

h The “paperless” application process.



The Evidentiary Threshold For Perfecting A Marker

- h Establishing a high threshold for perfecting a marker.
- h Insisting on a full corporate confession before awarding immunity.
- h The important difference between requiring a full corporate confession and establishing a subjective standard of proof for eligibility into an immunity program.
- h Corporate confessions rarely improve once an applicant perfects its marker and obtains a grant of immunity.

