



U.S. Department of Justice

Antitrust Division

FREQUENTLY ASKED QUESTIONS ABOUT THE ANTITRUST DIVISION'S LENIENCY PROGRAM

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**To apply for leniency, contact the Antitrust Division at
antitrust.leniency@usdoj.gov or (312) 256-6810**

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To apply for leniency, contact the Antitrust Division at antitrust.leniency@usdoj.gov or (312) 256-6810

I. INTRODUCTION AND PURPOSE

The Antitrust Division Leniency Policy, U.S. Dep't of Justice, Just. Manual §7-3.300, provides non-prosecution protection to the first organization or individual to self-report its participation in a criminal conspiracy in violation of Section 1 or 3(a) of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 3(a) ("illegal activity"), and meet enumerated criteria. This document answers Frequently Asked Questions on the application of the Leniency Policy¹ and provides illustrative hypothetical examples accessible to all.² The Division updates the FAQs regularly to provide transparency, predictability, and practical guidance to the public. If the FAQs conflict with Division statements, the FAQs control.

The FAQs have no force or effect of law. They are not intended to be, and may not be, relied upon to create any rights, substantive or procedural, enforceable at law by any party. Nothing in this document should be construed as mandating a particular outcome in any specific case, and nothing in this document limits the discretion of the U.S. Department of Justice or any U.S. government agency to take any action, or not to take any action, with respect to matters under its jurisdiction.

1. What are the principles of the Antitrust Division's Leniency Policy?

The Leniency Policy is most effective when antitrust offenders face credible threats of detection and substantial penalties, and when, at the same time, the process for self-reporting is transparent and predictable, with tangible benefits in the form of immunity from criminal prosecution. While leniency imposes significant cooperation obligations on applicants, the benefits are such that an organization or individual involved in illegal activity should always seek leniency.

Credible Threat of Detection and Severe Penalties

Leniency is not a stand-alone tool; it works in tandem with the full complement of enforcement tools. The Division deploys a range of criminal enforcement tools, including informants, search warrants, subpoenas, consensual monitoring, undercover agents, and wiretaps. The Division also prioritizes developing and strengthening relationships with law enforcement partners to detect suspicious behavior. For example, the Division-led Procurement Collusion Strike Force, an interagency partnership to detect and prosecute antitrust crimes impacting taxpayer dollars, educates federal, state, and local contracting officials on the red flags of collusion.

Organizations and individuals that fail to seek leniency and are convicted of violating the Sherman Act face substantial penalties. Individuals face significant jail time. Organizations face substantial fines—the highest to date is \$925 million. And they may

¹ The Division will review leniency applications under the version of the policy and model conditional letter in effect at the time the applicant received a marker.

² These examples are not exhaustive.

be placed on probation, with terms potentially including a court-ordered monitor to ensure adequate compliance in the future.

Transparency, Predictability, and Tangible Benefits

From the initial contact with an applicant seeking a marker to the grant of leniency, the Division adheres to the Leniency Policy, as explained in the FAQs. The Division's model conditional leniency letters are publicly available.³ The policy provides the criteria for eligibility and applicants' obligations. The policy has no unwritten rules or hidden caveats. Leniency's benefits are substantial: successful applicants receive immunity from criminal prosecution for the illegal activity reported. In exchange, applicants must in good faith provide timely, truthful, complete, and continuing cooperation in the Division's investigation and any resulting prosecutions.

II. LENIENCY APPLICATION (MARKER) PROCEDURES

2. Does an applicant need a lawyer to seek leniency?

No.

3. When should an applicant ask for a marker?

An organization should seek a leniency marker at the first sign of potential wrongdoing even if it is not certain that the wrongdoing occurred. Only one organization or individual can receive leniency per conspiracy, so time is of the essence. Organizations are in a race with their co-conspirators—including their own employees, who may seek individual leniency and have whistleblower protections if they report to the Division—to secure a marker. Organizations have lost the race for leniency by a matter of hours and faced significant fines, and prosecution of their senior executives, as a result.

Meanwhile, individuals are in a race with one another—both others at their employer and those at other organizations participating in the conspiracy. If any of those individuals applies for leniency, other participants that lose the race will face criminal prosecution for their unlawful conduct.

4. What information must an applicant provide to secure a marker?

An applicant must: (1) report that it uncovered information or evidence indicating that it engaged in a criminal antitrust violation and disclose the general nature of the conduct; (2) identify the industry, product, or service involved specifically enough to allow the Division to determine whether leniency is available and to protect the marker for the applicant; and (3) identify itself.

³ The Division's Model Leniency Letters are available here: *Leniency Program*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/atr/leniency-program>.

When an applicant discovers indications of potential illegal activity, it may not know enough to enable it to admit definitively to the violation. But confirmation of the violation is not required for a marker. Rather, an applicant must report that it has uncovered information or evidence suggesting possible illegal activity. Applicants cannot obtain a marker by merely stating that they received a grand jury subpoena or were searched during a Division investigation and want a marker to investigate whether a violation has occurred. They must be willing to admit that they have some separate indication of illegal activity. While the applicant may not be able to confirm that it committed a violation when it seeks a marker, it must admit to participating in the illegal activity to receive a conditional leniency letter. *See* FAQ 23.

To obtain a marker, an applicant must identify the relevant industry, product, or service. In some cases, the industry alone may be enough for the Division to know whether leniency is available. In most cases, however, an applicant must specify the products or services, co-conspirators, and the identity or location of affected customers for the Division to know whether a marker is available and its proper scope.

5. What is the threshold for securing a marker?

The threshold for obtaining a marker is low, especially when the Division has no information about the illegal activity. Organizations and individuals should seek leniency at the first indication of wrongdoing no matter how slight.

For example, if after an attorney's compliance presentation an employee reports to the attorney a conversation the employee overheard about their employer's potential price fixing, this information is sufficient. Similarly, if an applicant uncovers evidence of potential illegal activity but is not certain whether the conspiracy occurred within the statute of limitations, affected U.S. commerce, or is immunized by U.S. law, it should nevertheless request a marker.

When the Division already has information about the illegal activity or has an active investigation in the industry, it may require a more detailed report of the illegal activity. But regardless, an applicant should request a marker as soon as possible. Once an applicant seeks a marker, the Division will discuss with the applicant whether more detailed information is needed to secure a marker. An applicant may be given a "marker for a marker" to hold its place in line while the Division determines whether to grant a marker.

6. How is the scope of the initial marker determined?

The scope of the initial marker is tailored to the facts that the applicant proffers at the time the applicant requests the marker. It is coextensive with the scope of the conspiracy that the applicant reports.

7. *Can the scope of a marker change as the applicant discovers and reports additional information?*

Yes. A marker can be expanded or narrowed based on additional information the applicant provides. For example, after obtaining a marker, an applicant might learn that the illegal activity was broader in terms of its geographic scope or the number of products involved in the conspiracy than originally reported. So long as the applicant has not tried to conceal the conduct and is providing timely, truthful, continuing, and complete cooperation, the Division will expand the scope of the marker to be coextensive with the scope of the facts the applicant proffers.

Likewise, when the Division or applicant learns that the illegal activity is narrower than what the applicant originally reported, the scope of the marker will be narrowed to correspond with the scope of the conspiracy that the evidence supports. Ultimately, if an applicant perfects its marker, the conditional leniency letter will be tailored to the scope of the conspiracy.

8. *Can an applicant obtain multiple markers to cover different conspiracies?*

Yes. For example, if while attempting to perfect a marker for price fixing of product A, an applicant discovers territorial allocation for sales of product B, it may seek an additional marker for this separate conspiracy. If a marker is available and the applicant provides sufficient information (*see* FAQ 5), the Division will give the applicant a marker covering the separate conspiracy.

9. *How long are markers granted for?*

A marker is provided for a limited period. That period varies based on factors such as the location and number of employees that the applicant's counsel needs to interview, the volume, location, and format of records counsel needs to review, and whether the Division already has an ongoing investigation at the time the marker is requested. Thirty or 45-day periods for initial markers are common, particularly in situations where the Division is not yet investigating the conduct.

10. *Can markers be extended?*

Yes. When needed, markers may be extended at the Division's discretion for additional limited periods if the applicant demonstrates it is making a good-faith effort to complete its application promptly.

11. *What other information will the Division require an applicant to provide while a marker is pending?*

While its marker is pending, the applicant must provide enough information to demonstrate that it has satisfied the criteria in the Leniency Policy. As part of the cooperation criterion, this information will include all potentially relevant facts about the

illegal activity. The applicant must timely preserve, collect, and produce to the Division all potentially relevant records, wherever located (*see* FAQ 30), including translations if requested. The applicant must use its best efforts to secure the cooperation of its current and former personnel. The Division will interview the personnel of the applicant who were involved in the violation during the marker stage.

During the marker stage and before receiving a conditional leniency letter, the applicant must remediate the harm caused and improve or develop its corporate compliance to mitigate the risk of engaging in future illegal activity. *See* FAQs 48-50. At this marker stage, the Division will also require the applicant to provide its plan for making restitution to injured parties. *See* FAQ 35.

III. CONDUCT NOT COVERED BY THE LENIENCY POLICY

12. *How does the Leniency Policy apply to other offenses?*

The Division will not prosecute a qualifying applicant for the antitrust violation it reports or acts or offenses that are “in furtherance of” that violation. For example, conduct integral to the illegal activity may itself constitute another offense, such as mail or wire fraud when conspiratorially set bids are mailed or emailed, or a violation of Section 2 of the Sherman Act when the applicant also conspired to monopolize markets. The Division’s model conditional leniency letters provide that the Division will not prosecute a qualifying applicant for these additional offenses “committed in furtherance of the illegal activity before the date the Antitrust Division executes this letter.”⁴

13. *Does the Leniency Policy protect applicants from prosecution by other Department of Justice components or agencies?*

The Leniency Policy does not bind other federal or state prosecuting agencies, including other Department of Justice components. Therefore, the conditional leniency letter does not protect applicants from criminal prosecution by other prosecuting agencies for offenses other than Sherman Act violations. For example, an applicant that bribed foreign public officials in violation of the Foreign Corrupt Practices Act receives no protection from prosecution by any other prosecuting agency, regardless of whether the bribes were also made in furtherance of the reported antitrust violation. In addition, a leniency application does not discharge existing reporting obligations to other prosecuting agencies, nor does it insulate the applicant from the consequences of violating earlier agreements not to commit crimes.

It has been the Division’s experience that other prosecuting agencies do not use other criminal statutes to do an end-run around grants of leniency. At the same time, applicants should not expect to use the Leniency Policy to avoid accountability for other

⁴ MODEL CORP. CONDITIONAL LENIENCY LETTER, U.S. DEP’T OF JUSTICE ¶ 2; MODEL INDIVIDUAL CONDITIONAL LENIENCY LETTER, U.S. DEP’T OF JUSTICE ¶ 2.

crimes.

Applicants with exposure for both antitrust and non-antitrust crimes should report all crimes to the relevant prosecuting agencies. Under the Department's [Principles of Federal Prosecution of Business Organizations](#), self-reporting is one factor that federal prosecuting agencies consider when making charging decisions. Factors weighed in deciding whether to prosecute an organization can be found in [JM 9-28.300](#).⁵

IV. INDIVIDUAL LENIENCY AND ALTERNATIVES

14. Can an individual receive leniency?

Yes. Individual leniency is available for individuals who approach the Division on their own and not in concert with or on behalf of an organization. An individual may seek a marker *before* their employer comes forward. But the window for individual leniency closes as soon as an organization requests a marker and provides the Division with information about the illegal activity.

No current or former directors, officers, or employees of an organization that has already applied for leniency may be considered for individual leniency. Such individuals who come forward and admit their involvement in the criminal antitrust violation as part of the corporate confession will be considered for non-prosecution protection under their employer's leniency.

In the event a corporate applicant later declines to move forward with its marker, an individual may choose to continue cooperating with the Division's investigation. Such individuals who provide substantial, non-cumulative cooperation may still be granted non-prosecution protections, at the Division's sole discretion.

15. What are an individual applicant's cooperation obligations?

The model individual conditional leniency letter describes specific cooperation obligations of the individual applicant. These obligations include the production of documents, records, and other materials and information; participation in interviews; and provision of testimony.

16. How does the Division evaluate the individual leniency requirement that the applicant did not coerce another party to participate in the activity and clearly was not the leader or originator of the activity?

This criterion is evaluated the same way as the same requirement for corporate leniency. As with a corporate applicant, wherever possible, the Division has construed

⁵ U.S. Dep't of Justice, Just. Manual § 9-28.800, available at <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations>.

and interpreted this condition in favor of accepting an applicant into the leniency program. *See* FAQ 27.

17. *Can an individual who self-reports their own criminal antitrust activity, but does not qualify for individual leniency, avoid criminal prosecution?*

The decision whether an individual qualifies for leniency is distinct from whether the Division will pursue criminal charges. Any individual who does not qualify for individual leniency may still be considered for a declination or non-prosecution agreement.

18. *Are there whistleblower protections for someone who reports illegal activity but is not personally involved in it?*

An individual who has knowledge of illegal activity, but no personal involvement in that activity, may still report it to the Division and is encouraged to do so. Such an individual does not qualify for or need the protections of individual leniency, but may qualify for whistleblower protections under the Criminal Antitrust Anti-Retaliation Act of 2019 (“CAARA”). CAARA prohibits employers from retaliating against employees who report potential antitrust crimes or assist a federal government investigation.

Individuals who believe that they have suffered retaliation in violation of CAARA may file a retaliation complaint with the Occupational Safety and Health Administration. For information on filing a complaint, visit: www.whistleblowers.gov.

V. CORPORATE LENIENCY

19. *Is corporate leniency available both before and after the Division opens an investigation?*

Yes. There are two types of corporate leniency: Type A and Type B. Type A is available before the Division has opened an investigation, provided the Division has not received information about the illegal activity from any other source and the other criteria for Type A Leniency are met. *See* FAQ 20. Type B is available even after the Division has opened an investigation into the illegal activity, so long as the corporate applicant satisfies Type B’s criteria.

20. *For Type A Leniency, what does it mean that the Division has “not received information about the illegal activity being reported from any other source?”*

It means that the Division has not received any information about the alleged illegal activity from any source, including but not limited to other government investigations, anonymous or identified citizen complainants, whistleblowers, customers, private civil actions, or press reports. These other sources of information must alert the Division to the potential existence of underlying illegal activity and not simply describe the consequences of it, such as price increases in an industry.

For example, if a newspaper article describes significant price increases in an industry, but does not attribute them to illegal activity, then the Division will not consider the news report to be information about the illegal activity, and Type A Leniency is available. By contrast, if the newspaper report describes illegal activity, such as an agreement among members of a trade association to impose surcharges, then the Division will have received information about the illegal activity, and Type A Leniency is not available.

While potential applicants may not know whether the Division has an open investigation, applicants should recognize that they are in a race against their co-conspirators. Delays may mean missing out on the benefits of leniency.

21. *What does “discovery of the illegal activity” being reported mean?*

The Division generally considers an organization to have discovered the illegal activity at the earliest date on which an authoritative representative of the applicant for legal matters—the board of directors, its counsel (either inside or outside), or a compliance officer—was first informed of the conduct at issue. An organization will not be eligible for leniency if an authoritative representative learns of potential illegal activity and refrains from investigating further.

Leniency may still be available if top executives, individual board members, or owners participated in the conspiracy. When the board of directors of a small, closely held company is never formally advised of the activity because all board members are conspirators, the applicant still may qualify if it promptly reported the conduct after its counsel or a compliance officer was first informed of the activity.

22. *What does it mean to report the illegal activity “promptly”?*

The Division makes this assessment based on the facts and circumstances of the illegal activity and the size and complexity of operations of the corporate applicant. It is the applicant’s burden to prove that its self-reporting was prompt.

For example, while the Division encourages applicants to seek a marker at the first indication of possible wrongdoing, an organization may still be eligible for leniency if it conducts a preliminary internal investigation in a timely fashion to confirm that it committed a violation *before* self-reporting. But an organization that confirms its involvement in illegal activity and then chooses not to self-report until later learning that the Division has opened an investigation will not be eligible for leniency.

An applicant that fails to appreciate that its conduct could be criminal is not absolved of the prompt self-reporting requirement. Potential applicants that are uncertain whether particular conduct is criminal should seek a marker as soon as possible.

23. *What wrongdoing must an applicant confess?*

Applicants need not have information sufficient to make a corporate confession to secure a marker. *See* FAQ 5. But to obtain a conditional leniency letter, the applicant must confess to its involvement in the illegal activity.

To make this confession, applicants (through their employees and corporate representative) must admit that they came to an agreement or understanding with co-conspirators to fix prices, rig bids, or allocate markets, customers, products, territories, or employees. The agreement need not be express, formal, or written. It need not be spoken at all; it may be understood or inferred from the applicant's and co-conspirators' actions.

The applicant must also admit that the illegal activity either occurred in the flow of or substantially affected trade or commerce among the states or with foreign nations, that it continued into the limitations period, and that it is not immunized by U.S. law.⁶ When the illegal activity involves foreign conduct or foreign commerce, the applicant must admit a sufficient connection to the United States such that U.S. law applies.⁷

24. *What does it mean for the confession to be “truly a corporate act”?*

To be eligible for leniency, the applicant must admit its participation in illegal activity. For a corporate applicant, a corporate representative must admit to the wrongdoing on its behalf, and the applicant's involved personnel must admit to the applicant's participation in the illegal activity unless they are not cooperating or are otherwise unavailable. An organization unable or unwilling to admit to participating in the illegal activity is ineligible for leniency regardless of the reason.

25. *Can an organization obtain leniency if none of its personnel admit to the illegal activity?*

Yes. In rare circumstances, an applicant may report its involvement in the illegal activity, but be unable to produce a current director, officer, or employee with firsthand knowledge of the conduct. In that situation, an applicant may still qualify for leniency if it otherwise satisfies the criteria and makes a corporate confession of wrongdoing.

For example, an organization may seek a marker based on communications between former employees and their counterparts at competing firms exchanging confidential bid information for purposes of rigging bids. If none of the former employees involved in the wrongdoing are willing to cooperate, the applicant may still be

⁶ *See, e.g., United Mine Workers v. Pennington*, 381 U.S. 657, 669-670 (1965); *E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 142-143 (1961).

⁷ *See generally* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT Ch. 3 (Jan. 13, 2017).

able to make a corporate confession based on the communications and any other evidence uncovered during its internal investigation.

The Division expects a corporate applicant to take all legal, reasonable steps to secure the cooperation of its personnel with the Division's investigation. Additionally, a corporate representative must be willing to admit to the wrongdoing on behalf of the applicant even if they were not personally aware of or involved in the crime.

26. *What does it mean for an applicant to “report[] its participation in the illegal activity with candor and completeness”?*

An applicant must admit its participation in the conspiracy without qualification and in its entirety. An applicant willing to confess to only some, but not all, of the self-reported conspiracy it participated in will not be able to meet the requirement for candor and completeness.

27. *What does it mean to be a “leader or originator of the activity”?*

A leader or originator of the illegal activity refers to a participant that, in the totality of circumstances, is uniquely situated from its co-conspirators and appears to be the driving force behind the cartel by virtue of its relative economic power or influence.

An applicant will not be disqualified from leniency merely because it is the largest organization in the industry or has the greatest market share. Similarly, an applicant will not be disqualified merely because it initiated the first invitation to participate in the cartel. Instead, the Division will consider the applicant's particular conduct and culpability relative to other participants.

In a two-firm conspiracy, for example, if each firm played a decisive role in the operation of the cartel, actively contributed to further the cartel's objectives, and benefitted from the cartel, either firm may be eligible for leniency, regardless of whether one firm was larger than the other. On the other hand, if, in a bid-rigging scheme, one firm with large market share extracts agreements from its much smaller rivals that enable it to win all bids in exchange for relatively small payments, the Division may disqualify that large firm. In this example, the Division will, again, consider the relative culpability of the conspirators, including each firm's particular conduct, its role in creating and operating the cartel, and the relative benefits each firm received.

Wherever possible, the Division has construed and interpreted this criterion in favor of granting leniency, and exclusion under this criterion is rare. This provides the maximum incentive and opportunity for organizations to self-report their illegal activity.

28. *For Type B Leniency, how does the Division assess whether it has evidence “likely to result in a sustainable conviction”?*

The Division analyzes all evidence available to it when the marker is sought. This may include any kind of admissible evidence gathered from subjects or victims of the conspiracy, third parties, or public or non-public sources. The Division’s investigations regularly gather evidence from sources other than subjects. Its analysis of available evidence—and whether Type B Leniency is available—may change quickly. The Division does not notify subjects that its analysis has changed or is expected to change.

VI. COOPERATION OBLIGATIONS

29. *How far do the cooperation obligations extend?*

Cooperation obligations extend as far as the investigation requires. An applicant should be prepared to provide all facts known that relate to the illegal activity. An applicant must timely preserve, collect, and produce to the Antitrust Division all records related to that activity, regardless of where those records are located, and provide translations if requested.

A corporate applicant must use its best efforts to secure the timely, truthful, continuing, and complete cooperation of all current and former employees. This includes facilitating the interview or testimony of such employees. It also includes removing any impediments within the applicant’s control to its current or former employees’ complete and truthful responses to all questions asked in interviews, grand jury appearances, or trial. Such efforts may also include providing any separate counsel to current or former employees with access to information and documents necessary to facilitate their clients’ cooperation with the Division’s investigation.

30. *What does the Division do when cooperation obligations conflict with other legal reporting requirements/requests from other jurisdictions?*

The Division is aware that antitrust enforcers outside the United States often investigate the same conduct as the Division and that simultaneous investigations may present challenges for applicants. The Division has longstanding relationships with other antitrust enforcers and extensive experience coordinating cross-border investigations to ensure that applicants are not overburdened. Any potential conflicts that could arise from an applicant’s providing simultaneous cooperation to multiple jurisdictions are typically handled between the enforcers in discussion with the applicant.

The Division’s efficient engagement with other enforcers is often facilitated by confidentiality waivers granted by the applicants. *See* FAQ 77. As a result of engagement with other antitrust enforcers, the Division has not had a case in which an applicant was not ultimately able to fulfill its cooperation obligations to the Division because of obligations in other jurisdictions.

The Division is also aware that certain jurisdictions have laws or rules, for example, privacy laws or “blocking statutes,” that may, in certain circumstances, prohibit the processing or transfer of protected records to other jurisdictions. The applicant bears the burden of establishing the existence of any restriction on production and identifying reasonable alternatives to provide these records to the Division. The applicant must work diligently to identify all available legal bases to provide such records to the Division. In the Division’s experience, applicants are generally able to comply with privacy laws and regulations in other jurisdictions while fully cooperating with the Division’s investigation.

31. *How long do an applicant’s cooperation obligations last?*

An applicant’s cooperation obligations last through the Division’s investigation and related prosecutions. Normally, the Division does not issue a final leniency letter until its investigation and any resulting prosecutions are completed.

32. *Must an applicant waive attorney-client privilege or work-product protections?*

No. An applicant must cooperate by disclosing the relevant facts concerning the illegal activity. But the Division does not require an applicant to provide communications or records protected by the attorney-client privilege or the work-product doctrine, and eligibility for leniency is not predicated on the waiver of attorney-client privilege or work product protection. See [JM 9-28.710](#), [9-28.720](#) for more information on the types of communications and records covered by attorney-client privilege and the work product doctrine. As stated in the model corporate conditional leniency letter, the Division does not consider disclosures made by counsel as part of a leniency application to be a waiver of attorney-client privilege or work-product protections.

An applicant may waive attorney-client privilege or work product protections—only if they voluntarily choose to—but the Division will not ask for such waivers.

33. *How does a current employee’s refusal to cooperate impact an applicant?*

A corporate applicant must use its best efforts to secure the employee’s cooperation, but its failure to secure that cooperation does not necessarily prevent it from receiving leniency. An organization may still confess its wrongdoing with candor and completeness even without a specific employee’s confession.

When determining whether the applicant is making a candid and complete confession of wrongdoing and is providing timely, truthful, continuing, and complete cooperation, the Division considers the number and significance of the individuals who fail to cooperate and the steps taken to secure their cooperation. Of course, non-cooperating individuals will not be protected under the corporate conditional leniency letter, and the Division is free to prosecute them for the illegal activity and any other offenses.

VII. RESTITUTION AND ACPERA

Restitution

34. *How does the Division determine whether a corporate applicant has used “best efforts” to make restitution to injured parties “where possible”?*

Applicants are required to make restitution to their victims. The “best efforts” qualifier covers situations when providing full restitution is impossible in the specific circumstances of the applicant or the victim. For example, full restitution may be impossible when the applicant is in bankruptcy and prohibited by court order from making payments; where such payments would likely cause the applicant to cease operations or declare bankruptcy; or if the sole victim is defunct.

In most cases, restitution can be satisfied through settlements negotiated directly with victims or in parallel private civil actions. FAQs 38-46 provide further information about the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, which provides applicants with certain protections in private actions.

When restitution is owed to federal agencies, applicants should make restitution to federal victims without these agencies having to resort to civil recovery actions seeking damages under Section 4A of the Clayton Act, 15 U.S.C. § 15a.

35. *When must applicants complete the requirement to make restitution?*

To receive a conditional leniency letter, applicants must present concrete, reasonably achievable plans about how they will make restitution. Before receiving a final leniency letter, applicants must actually pay restitution.

36. *What are the applicant’s restitution obligations for injuries caused by the effects of the illegal activity on foreign commerce?*

U.S. federal antitrust laws do not provide redress for every economic harm around the world related to an antitrust violation.⁸ So an applicant is not required to make restitution to victims whose antitrust injuries are independent of, and not proximately caused by, any effect on:

- 1) trade or commerce within the United States;
- 2) import trade or commerce; or

⁸ See 15 U.S.C. § 6a; *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004); *Lotes Co., v. Hon Hai Precision Indus.*, 753 F.3d 395 (2d Cir. 2014); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981 (9th Cir. 2008); *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535 (8th Cir. 2007); *Empagran S.A. v. F. Hoffmann-La Roche Ltd.*, 417 F.3d 1267 (D.C. Cir. 2005).

- 3) the export trade or commerce of a person engaged in such trade or commerce in the United States, which effect was proximately caused by the antitrust activity being reported.

An applicant may be required to substantiate a claim that the injury of a victim or set of victims was independent of, and not proximately caused by, such an effect. This approach to restitution ensures that the obligations of a successful applicant are not greater than the exposure its co-conspirators face.

37. *What are the applicant’s restitution obligations if the Division ultimately brings no criminal case?*

An applicant’s restitution obligations are independent of whether the Division chooses to prosecute the applicant’s co-conspirators. If the Division closes an investigation without bringing charges, the Division will typically notify the applicant that the investigation has been closed. If on receipt of this information, the applicant chooses to withdraw its leniency application after receiving a conditional leniency letter, it will be relieved of the obligations in the conditional leniency letter, including the requirement to pay restitution. If the applicant has already made restitution or is in the process of doing so before withdrawing from its leniency application, the applicant must resolve the matter with the victims.

An applicant that withdraws its leniency application will no longer benefit from non-prosecution protection and will not qualify for de-trebling of civil damages under the Antitrust Criminal Penalty Enhancement and Reform Act.

ACPERA

38. *What is the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA), and how does it affect a qualifying applicant’s civil liability?*

Congress recognized the serious harm that antitrust cartels pose to businesses and consumers, passing ACPERA in 2004 and making it permanent in 2020 to provide greater incentives to self-report criminal antitrust violations. “Conspiracies among competitors to fix prices, rig bids, and allocate markets are categorically and irredeemably anticompetitive and contravene the competition policy in the United States,” and “[c]ooperation incentives are important to the efforts of the Antitrust Division of the Department of Justice to prosecute and deter” antitrust violations.⁹

⁹ Continuing Appropriations Act, 2021 & Other Extensions Act, Pub. L. No. 116-159, § 4302, 134 Stat. 709, 742 (2020).

ACPERA provides that in exchange for timely¹⁰ and “satisfactory cooperation” with civil plaintiffs (who the statute refers to as “claimants”), an applicant will receive two benefits: (1) the applicant will only be liable for “actual damages sustained by [a] claimant”—in lieu of treble damages that otherwise may be awarded, and (2) the applicant will only be liable for damages “attributable to the commerce done by the [leniency] applicant in the goods or services affected by the violation”—in lieu of jointly and severally liable for damages attributable to the commerce done by other co-conspirators. 15 U.S.C. § 7a.¹¹

ACPERA’s limitation on recovery serves two purposes. First, it strengthens criminal antitrust enforcement by addressing the concern that the threat of treble damages and joint and several liability serve as “a disincentive to self to repor[t]” criminal antitrust violations and by providing “increased incentives for participants in illegal cartels to blow the whistle on their coconspirators and cooperate with the [Division].”¹²

Second, it strengthens private, civil antitrust enforcement by encouraging cooperation with plaintiffs in private lawsuits, which can increase compensation to victims of antitrust crimes.¹³ Typically, applicants satisfy their restitution obligations in the Leniency Policy through negotiated settlements in civil actions with private plaintiffs.

Applicants are encouraged to work with civil plaintiffs and the court to streamline damages determinations so that restitution to victims happens as swiftly as possible. ACPERA limits damages for both federal and state law claims “based on conduct covered by a currently effective antitrust leniency agreement.” 15 U.S.C. § 7a–1(a); *see also* FAQ 44. The Division understands that “courts have demonstrated the ability to competently review expert damages analyses and any damages issues that may arise” in order to appropriately compensate all victims.¹⁴

39. *How does an applicant seek ACPERA benefits?*

To obtain ACPERA benefits, the applicant must meet the criteria of the Leniency Policy, including cooperating fully with the Division’s investigation. The applicant also must meet ACPERA’s requirements in connection with a plaintiff’s (or “claimant’s”) civil lawsuit.

¹⁰ 15 U.S.C. §§ 7a-7a-2; In 2010, ACEPRA was reauthorized and amended to require courts to consider the timeliness of the applicant’s cooperation with the civil plaintiffs.

¹¹ 150 Cong. Rec. S. 6327 (Apr. 2, 2004) (Statement of Sen. Hatch) (explaining “the applicant would only be liable for the actual damages attributable to its own conduct, rather than being liable for three times the damages caused by the entire unlawful conspiracy”); 150 Cong. Rec. S. 6328 (Statement of Sen. Leahy) (explaining applicant is liable for the portion of the damages actually caused by its own actions).

¹² 150 Cong. Rec. S. 6327.

¹³ *Id.*

¹⁴ COMM. TO SUPPORT ANTITRUST LAWS, SUBMISSION BY COSAL ON THE EFFICACY OF THE ANTITRUST CRIMINAL PENALTY ENHANCEMENT AND REFORM ACT at 18 (May 31, 2019), <https://www.justice.gov/atr/page/file/1168671/download>.

If requested by the applicant or a court, the Division will fully advise a court of the timeliness, nature, extent, and significance of the applicant's cooperation under the Leniency Policy and its commitment to prospective cooperation with the Division's investigation and prosecutions, so long as such disclosure does not compromise law enforcement activity.

ACPERA benefits are available if the applicant provides civil plaintiffs with timely and "satisfactory cooperation," which includes providing the plaintiff with "a full account" of all potentially relevant facts known to the applicant or cooperating individual and all potentially relevant records. *See* 15 U.S.C. §7a-1(b).

The Division does not determine ACPERA benefits beyond assessing whether an applicant meets the requirements of the Leniency Policy and issuing markers, conditional leniency letters, and final leniency letters. The Division's issuance of a marker does not qualify as a "currently effective antitrust leniency agreement" necessary for an applicant to obtain ACPERA benefits. 15 U.S.C. §7a-1(a).

An applicant seeking ACPERA benefits must have either a conditional or final leniency letter. An applicant must seek ACPERA benefits from the court presiding over the relevant civil action. Specifically, a court must determine whether the applicant has provided timely and "satisfactory cooperation" to the civil plaintiff after considering "any appropriate pleadings from the [plaintiff]." 15 U.S.C. §7a-1(b).

40. *What is "satisfactory cooperation"?*

Satisfactory cooperation is addressed by 15 U.S.C. §§7a-1(b)(1)-(3). An applicant must provide the civil plaintiff with "a full account" of all potentially relevant facts known to it and all potentially relevant records.

A cooperating individual includes "a current or former director, officer, or employee of the antitrust leniency applicant who is covered by the agreement." 15 U.S.C. §7a(5). A cooperating individual may be asked to make themselves available for "interviews, depositions, or testimony" and must respond "completely and truthfully" to the plaintiff's questions and requests for information. 15 U.S.C. §7a-1(3)(A). Requests directed at the cooperating individual must be reasonable, and the applicant must use its "best efforts" to secure cooperation from the cooperating individual. 15 U.S.C. §7a-1(3)(B).

An applicant should not be disqualified from ACPERA benefits when a plaintiff makes unreasonable requests of a cooperating individual or the applicant itself. Disqualifying an applicant for failing to respond to an unreasonable request undermines the effectiveness of ACPERA, which is a critical part of the Leniency Policy's incentive structure. Whether a request is reasonable depends on the facts.

For example, a civil action may allege conduct beyond the scope of the conspiracy that the applicant admitted to, and the applicant or cooperating individual

should not be expected to provide “a full account to the claimant of all facts” about this larger conspiracy unless such facts are “known to the applicant or cooperating individual.” 15 U.S.C. §7a-1(b)(1). Nor does an applicant need to provide information not relevant to the conspiracy identified in the leniency letter.¹⁵

41. *When must an ACPERA applicant provide satisfactory cooperation?*

A court will assess the timeliness of the applicant’s cooperation in every case. 15 U.S.C. §7a-1(c). Whether an applicant’s cooperation is timely depends on the facts, including the stage of the Division’s criminal investigation and the procedural posture of the civil litigation. Although an applicant may choose not to identify itself until later in a civil litigation, the circumstances surrounding its decision to delay will be relevant to whether a court will grant ACPERA benefits.¹⁶ When necessary to protect the integrity of an ongoing criminal investigation, the Division may ask an applicant to refrain from identifying itself or cooperating (either fully or in part) with civil plaintiffs. At the applicant’s request, the Division will apprise the court of any such requests.

42. *How can an ACPERA applicant comply with its cooperation obligations to the Division and its cooperation obligations to civil plaintiffs if the Division seeks a stay of discovery?*

Congress recognized when it made ACPERA’s protections permanent that “[c]ooperation incentives are important to the efforts of the Antitrust Division . . . to prosecute and deter [cartel] offenses.”¹⁷ ACPERA specifically states that its protections do not affect the right of the Division “to seek a stay or protective order in a civil action based on conduct covered by an antitrust leniency agreement,” to prevent the applicant’s cooperation “from impairing or impeding” a Division investigation.¹⁸ When discovery is stayed in a civil action, an applicant’s cooperation obligations to civil plaintiffs are correspondingly stayed without prejudice to its qualification for ACPERA benefits.

An applicant has a continuing obligation to cooperate with the Division’s investigation. The Division acknowledges that criminal enforcement interests and timing may limit how quickly civil litigation proceeds. Notwithstanding, the Division will work with the applicant to ensure that as much civil discovery as possible can proceed without harming the Division’s ongoing criminal investigation or prosecutions.

¹⁵ See 150 Cong. Rec. 6328 (Statement of Sen. Leahy) (explaining that the applicant “must provide substantial cooperation not only in any criminal case brought against the other cartel members, but also in any civil case brought by private parties that is based on the same unlawful conduct.”).

¹⁶ See *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 618 F. Supp. 2d 1194 (N.D. Cal. 2009).

¹⁷ Continuing Appropriations Act, Pub. Law. No. 116-159, § 4302(a).

¹⁸ 15 U.S.C. § 7a-2(1); see also 150 Cong. Rec. H3658.

Ultimately the applicant must follow a court's orders with respect to any discovery stays and provide as much information as possible to the civil plaintiffs, within the parameters of ACPERA and any court orders, to qualify for ACPERA benefits.¹⁹ Once a stay or protective order expires, an applicant must provide satisfactory cooperation "without unreasonable delay."²⁰

43. *When are ACPERA benefits determined?*

ACPERA requires the court to "determin[e], after considering any appropriate pleadings from the [plaintiffs], that [the leniency applicant][...] has provided satisfactory cooperation" in the plaintiffs' civil action.²¹ This cooperation includes disclosing potentially relevant facts, furnishing potentially relevant records, and ensuring that cooperating individuals participate fully in interviews, depositions, and testimony at trial.²² ACPERA does not establish a specific time for this determination. Parties may agree on timing, which may occur before trial,²³ and the Division encourages the applicant and civil plaintiffs to agree on a time for the ACPERA determination.

Determining ACPERA benefits before trial may increase the efficiency of civil litigation, including by narrowing the damages presentation to only the "actual damages" caused by the applicant. An early ACPERA determination may also encourage resolution of the case because there is greater certainty regarding the scope of damages. Thus, an agreement between the parties may expedite the litigation and restitution to the victims.

Further, increasing the efficiency of civil litigation and the timeliness of a resolution for a fully cooperating applicant bolsters transparency and predictability, thereby incentivizing organizations to apply for leniency.

44. *Does ACPERA apply to actions by States or its subdivisions?*

ACPERA excepts from its damages limitations any State bringing a civil action to recover damages sustained by itself or its subdivisions. Such damages would include overcharges paid by state agencies including schools, hospitals, or prisons.²⁴ The legislative history makes clear that this exclusion applies, however, only to the states and

¹⁹ See generally *In re Aftermarket Auto. Lighting Prod. Antitrust Litig.*, No. 09 MDL 2007-GW PJWX, 32013 WL 4536569 (C.D. Cal. Aug. 26, 2013).

²⁰ 15 U.S.C. §7a-1(d).

²¹ 15 U.S.C. §7a-1(b).

²² *Id.*

²³ *In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 320, 329 (N.D. Ill. 2005).

²⁴ ACPERA applies to claims in a "civil action alleging a violation of section 1 or 3 of [the Sherman Act] or any similar State law." 15 U.S.C. § 7a-1(4). A State can be a "claimant" under the statute; however, ACPERA is defined to exclude "a State or a subdivision of a State with respect to a civil action brought to recover damages sustained by the State or subdivision." *Id.*

subdivisions and not to *parens patriae* claims where the state, standing in the shoes of its citizens, brings suit.²⁵

45. *Does ACPERA apply to actions by the United States or its agencies under Section 4a of the Clayton Act, 15 USC § 15a?*

No. The federal government is not a “person” subject to ACPERA’s damages limitations. Section 4A of the Clayton Act, 15 U.S.C. §15a, allows the government to recover treble damages for antitrust violations when the government itself is the victim. Notwithstanding, to incentivize the reporting of illegal activity that harms taxpayers, the Division’s civil enforcement program—when bringing actions to recover damages under Section 4A for federal victims—will respect the spirit of ACPERA and will not seek treble damages against qualifying applicants.

46. *Does ACPERA apply to other violations arising from the illegal activity?*

Yes. Applicants may seek ACPERA protections for misconduct that occurred “in furtherance of” the illegal activity, including state law claims based on substantially the same conduct.²⁶ ACPERA’s scope is consistent with the Division’s commitment not to prosecute acts or offenses in furtherance of the illegal activity. *See* FAQ 12. ACPERA does not apply to antitrust violations that are not “based on conduct covered by a currently effective antitrust leniency agreement.”²⁷

47. *Can an applicant take positions in civil litigation that conflict with the corporate admission of wrongdoing made as part of its leniency application?*

No. As specified in the model conditional letter, an applicant must refrain from taking positions in the civil litigation that contravene the corporate confession of wrongdoing made as part of its leniency application. For example, if in a parallel civil action, an applicant denies participating in the illegal activity that it reported, then it has either made a false statement in that litigation or failed to meet the Leniency Policy’s requirements for a corporate confession of wrongdoing. Further, making inconsistent statements about its participation in the conspiracy may hinder the applicant’s ability to meet its cooperation obligations under the Leniency Policy.

²⁵ 150 Cong. Rec. H3654-01, H3658 (daily ed. June 4, 2004) (“[the definition of claimant] specifically excludes plaintiffs who are states or subdivisions of states with respect to civil actions brought to recover damages sustained by the state or subdivision (i.e., civil actions not brought as *parens patriae*.”)).

²⁶ *See Morning Star Packing Co. v. S.K. Foods*, 2015 WL 3797774 *7 (E.D. Cal. June 18, 2015) (interpreting ACPERA to apply to bribery, money laundering, mail fraud, wire fraud, RICO, and other violations covered by ACPERA’s damages limitation because “the actions were committed in furtherance of anticompetitive behavior”).

²⁷ 15 U.S.C. § 7a-1(a). *See also* 150 Cong. Rec. 6327 (Statement of Senator Hatch) (explaining that ACPERA protections apply only if an applicant provides “adequate and timely cooperation to both the Government investigators as well as any subsequent private plaintiffs bringing a civil suit based on the covered criminal conduct”).

Nothing in this answer should prevent applicants from raising valid defenses in parallel civil proceedings consistent with its confession of wrongdoing.

VII. REMEDIATION AND COMPLIANCE

- 48. *When must an applicant satisfy the requirement that it “uses best efforts . . . to remediate the harm caused by the illegal activity” and “improve its compliance program to mitigate the risk of engaging in future illegal activity”?***

The applicant must demonstrate to the Division that it has satisfied its obligation to address its future antitrust risk and remediate its criminal conduct before it will be granted a conditional leniency letter.

- 49. *How does an applicant satisfy the requirement that it “uses best efforts . . . to remediate the harm caused by the illegal activity” and “improve its compliance program to mitigate the risk of engaging in future illegal activity”?***

An applicant may satisfy this requirement in a variety of ways.

Compliance

Some applicants may need to implement new or improved formal compliance programs. Others may require less formal solutions. Ultimately, corporate compliance should be appropriately tailored to the applicant’s size and line of business. *See* FAQ 50.

The Division will assess an applicant’s antitrust compliance, including its culture of compliance and risk assessment, considering the questions and factors laid out in the [Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations Guidance](#).²⁸ This is a fact-specific inquiry and there is no checklist or formula for determining whether a compliance policy or program is effective.

The Division will consider the applicant’s compliance program at the time of the antitrust violation and when it makes subsequent improvements. The Division will consider the actions that the organization has taken since the reported antitrust violation to prevent similar illegal activity from reoccurring, and what methods the organization will use to assess its antitrust risks to prevent future violations.

Remediation

In addition to improving its compliance program and committing to pay restitution, the applicant may be required to undertake additional remedial measures to

²⁸ EVALUATION OF CORPORATE COMPLIANCE PROGRAMS IN CRIMINAL ANTITRUST INVESTIGATIONS, U.S. DEP’T OF JUSTICE (July 2019), <https://www.justice.gov/atr/page/file/1181891/download>.

obtain a conditional leniency letter. This requirement ensures that that the applicant fully remedies the harm caused by the offense, to the extent not covered by restitution, and eliminates or reduces the risk of recidivism.

Whether and what remediation is appropriate depends on the nature of the illegal activity, the nature of any harm caused (*e.g.*, reduced worker mobility from a “no-poach” agreement), and the applicant’s role in it. With respect to the risk of recidivism, the applicant will be expected to conduct a thorough analysis of causes of underlying conduct (*i.e.*, a root cause analysis) and undertake remedial efforts tailored to address the root causes. This may include additional steps demonstrating recognition of the seriousness of the illegal activity, acceptance of responsibility for it, and the implementation of measures to reduce the risk of repetition of the illegal activity, including measures to identify future risks. The Division may also consider the applicant’s efforts to discipline or remove its culpable, non-cooperating personnel.

50. *How does the size of the organization affect the assessment of its compliance program?*

“[T]he Division recognizes that a company’s size affects the resources allocated to antitrust compliance and the breadth of [the applicant’s] compliance program.”²⁹ All applicants—no matter the size—must demonstrate that they have taken reasonable measures—appropriately tailored to their size and risk profile—that will address and remediate the applicant’s criminal conduct and prevent future antitrust violations.

Any measures taken by the applicant should be directed at improving antitrust compliance in the organization’s line of business, accounting for risks discovered as a result of the reported illegal activity.³⁰ Large and small applicants will not be expected to have identical responses to violations, but effective antitrust compliance is important for all organizations seeking to remediate harm and prevent future antitrust violations.

**VIII. NON-PROSECUTION PROTECTION
FOR CURRENT OR FORMER EMPLOYEES**

51. *What are the conditions for non-prosecution protection for a Type A applicant’s current directors, officers, and employees?*

No current directors, officers, and employees of a Type A Leniency recipient will be charged criminally for the illegal activity if they provide timely, truthful, continuing, and complete cooperation to the Division throughout its investigation.

²⁹ *Id.* at 2.

³⁰ *Id.* at 7-8.

If a current director, officer, or employee does not fully cooperate with the Division's investigation, however, they will be excluded, or "carved out," from the non-prosecution protections in the conditional leniency letter. If an individual stops cooperating with the Division's investigation, then that individual's protections are void. In those circumstances the Division will notify the individual that their non-prosecution protection has been revoked.

The Division may also exercise its discretion to include specific former personnel of the applicant in the non-prosecution protections in the conditional leniency letter. *See* FAQ 58.

52. *How does the Division decide whether to grant non-prosecution protection for a Type B applicant's current directors, officers, and employees?*

The Leniency Policy provides that current directors, officers, and employees of Type B applicants will be considered for non-prosecution protection. This means that the Division has broad discretion on whether to provide non-prosecution coverage for those persons compared to similarly situated directors, officers, and employees of a Type A applicant, for whom non-prosecution protection is guaranteed so long as they provide timely, truthful, continuing and complete cooperation. In Type B applications, non-prosecution protection for directors, officers, and employees is not guaranteed. Rather, the Division assesses non-prosecution protection for current directors, officers, and employees of a Type B applicant on a case-by-case basis considering the following:

To be eligible for non-prosecution protection under the corporate leniency letter, Type B applicants' personnel must admit their wrongdoing with candor and provide timely, truthful, continuing and complete cooperation throughout the investigation. Moreover, the Division will consider Type B applicants' personnel under the [Principles of Federal Prosecution](#) and following the standard for individual non-prosecution agreements in exchange for cooperation, [JM 9-27.600](#), [620](#), and [630](#).³¹

As these sections reflect, the Division will extend non-prosecution protection to personnel of Type B applicants—whether through the organization's leniency letter or through agreements directly with individual employees—if the cooperation appears to be necessary to the public interest and other means of obtaining the cooperation are unavailable or ineffective. In making this determination, the Division will consider the importance of the matter, the value of the individual's cooperation as well as its timing, the individual's relative culpability and criminal history, and the interests of any victims.

53. *How does the timing of a Type B applicant influence whether the Division grants immunity to current directors, officers, and employees?*

Timing is crucial. When an organization seeks a Type B marker before the Division has served subpoenas, executed search warrants, or otherwise made the

³¹ U.S. Dep't of Justice, Just. Manual §§ 9-27.600, 9-27.620, 9-27.630.

investigation publicly known, it is more likely that the Division will not yet have developed significant evidence of the illegal activity. In those circumstances, cooperation from the applicant's personnel may be particularly valuable, and the applicant will have a higher likelihood of receiving non-prosecution protection for its personnel under the corporate leniency letter. As the Division obtains significant evidence from subpoenas, search warrants, or other investigative tools, the cooperation of the applicant's personnel may no longer be necessary to the public interest.

54. *When will current directors, officers, and employees of Type B applicants know whether they will receive non-prosecution protection?*

The timing of the Division's non-prosecution decisions depends on the facts and circumstances of the particular matter. At the time a corporate applicant seeks a marker, if the Division's evidence against certain individuals is sufficiently developed to make a non-prosecution agreement with them unwarranted, the Division will notify the applicant that those individuals will be excluded from the non-prosecution protections of the corporate leniency letter. For all other personnel, the Division will work with the applicant to make individualized assessments using the standard for individual non-prosecution agreements in [JM 9-27.600](#).³² If at any point individuals decline to provide timely, truthful, continuing, and complete cooperation, they will not receive non-prosecution protection under the corporate leniency letter.

Depending on the outcome and timing of the decision concerning whether particular individuals will receive non-prosecution protection under a Type B Leniency, individuals involved in the conspiracy may require separate counsel. Once the Division determines whether a particular individual should or should not receive non-prosecution protection, the Division will typically notify the applicant and counsel for the individual.

55. *What cooperation must an applicant's current personnel provide?*

The cooperation obligations for current directors, officers, and employees are significant. Individuals who receive non-prosecution protection under a corporate leniency letter must provide timely, truthful, continuing, and complete cooperation with the Division's investigation. This means that the individual must admit any knowledge of or participation in the illegal activity and that of all other persons and organizations. The individual must produce records and information to the Division and must agree to be interviewed or provide testimony on request. Further, at the request of the Division, the individual must participate in affirmative investigative techniques, such as making telephone calls, recording conversations, and introducing law enforcement officials to other individuals.

³² U.S. Dep't of Justice, Just. Manual §§ 9-27.600.

The Division may revoke non-prosecution protection for any individual who fails to provide timely, truthful, continuing and complete cooperation or otherwise fails to meet their obligations set forth in the corporate conditional leniency letter. *See* FAQ 74.

56. *How is “current director, officer, or employee” defined for purposes of the cooperation obligations and non-prosecution protection of the corporate conditional leniency letter?*

Status as a “current director, officer, or employee” is defined at the time the corporate conditional leniency letter is signed by the Division. Thus, the non-prosecution protections offered to individuals who are directors, officers, and employees of the applicant at the time the letter is signed by the Division will continue after they leave their employment so long as they satisfy their obligations under the corporate conditional leniency letter.

For an individual employed by a corporate applicant at the time it secures a marker, but who leaves that employment before the applicant receives a conditional leniency letter, the Division may provide non-prosecution protection to the individual by carving them in to the applicant’s conditional leniency letter or by executing a separate non-prosecution agreement with the individual so long as they satisfy their obligations to provide timely, truthful, continuing, and complete cooperation.

57. *How are a corporate applicant’s contractors treated under leniency?*

Neither Type A nor Type B Leniency guarantee non-prosecution protection to an applicant’s contractors. On rare occasions, an applicant will identify a contractor who participated in the illegal activity as the organization’s agent or representative.

In those situations, the applicant should identify the specific contractor(s) to the Division as early as possible in the process and discuss whether the individual(s) should be included in the leniency application. The Division will evaluate such individuals for inclusion based on the same criteria applied to former directors, officers, and employees. *See* FAQ 58. Any individual included in the corporate conditional leniency letter through this process is required to meet the same cooperation obligations as other individuals who receive non-prosecution protection through the conditional leniency letter.

58. *Can an applicant’s former directors, officers, and employees be included in the scope of the conditional leniency letter?*

Former directors, officers, and employees are presumptively excluded from any grant of corporate leniency. The Leniency Policy does not refer to former directors, officers, or employees. The Division is under no obligation to extend leniency to former directors, officers, or employees.

At the Division’s sole discretion, specific named former directors, officers, or employees may receive non-prosecution protection under a corporate conditional

leniency letter or by a separate non-prosecution agreement. Such protections are offered only for individuals who provide substantial, noncumulative cooperation against remaining potential targets, or when the cooperation is necessary for the applicant to make a corporate confession. *See* FAQ 25.

When assessing whether to provide immunity to former directors, officers, and employees, the Division will consider the factors in the Principles of Federal Prosecution at [9-27.600](#), [9-27.620](#), and [9-27.630](#).³³ Covered former directors, officers, and employees must provide timely, truthful, continuing, and complete cooperation to the Division throughout its investigation and resulting prosecutions.

59. *May individual directors, officers, and employees that are covered by a leniency letter be required to execute a separate non-prosecution agreement?*

Yes. Sometimes the Division will require that certain individuals covered by a conditional leniency letter (whether current or former directors, officers, and employees) execute a separate non-prosecution agreement or sign an addendum to the conditional letter. Whether the Division executes a separate non-prosecution letter with an individual will depend on the circumstances of the case. One situation in which the Division may decide to execute a separate non-prosecution letter with an individual is when the scope of the individual's involvement in the conspiracy differs from the scope of the corporate applicant's involvement.

For example, consider the following: an individual currently employed by XYZ (the leniency applicant) previously worked for ABC, which was also involved in the conspiracy. XYZ did not join the conspiracy until after hiring the individual. The individual, however, while employed by ABC, was involved in the conspiracy. Accordingly, the scope of the individual's involvement in the conspiracy is broader than the scope of the applicant's (XYZ).

In these circumstances, the Division may execute a non-prosecution agreement that specifies the individual's lengthier involvement in the conspiracy. And in some cases, the Division may require separate non-prosecution agreements with an applicant's employees to ensure that they are available for the trial of fugitive defendants.

60. *Do protections offered through the Leniency Policy extend to corporate affiliates of the leniency applicant such as parents or subsidiaries?*

It depends. Parent companies, subsidiaries, and other affiliates of a corporate applicant may be considered for non-prosecution protection as part of the leniency application. Considerations that affect that decision include:

³³ U.S. Dep't of Justice, Just. Manual §§ 9-27.600, 27.620, 27.630.

- the ownership share and other indicia of corporate control exercised by (or on) the applicant by the affiliate;
- the affiliate's involvement in the illegal activity; and
- the affiliate's ability to satisfy the conditions for receipt of leniency, including providing timely, truthful, continuing, and complete cooperation with the Division's investigation.

Corporate affiliates that were not involved in the illegal activity and do not have meaningful cooperation to provide will not be included in the conditional leniency letter. By contrast, if those affiliates were involved in the illegal activity and provide cooperation along with the applicant, the leniency letter may specifically name the parents, subsidiaries, or other corporate affiliates of the applicant.

An applicant that has questions about whether a corporate affiliate will be included in its leniency application should raise those issues as early as possible with the Division and be prepared to provide information that addresses the considerations described above.

IX. MODEL LENIENCY LETTERS

61. Why is the conditional leniency letter “conditional”?

The letter is conditional because the applicant must meet certain obligations before it receives a final leniency letter. Those obligations are defined in the [model conditional leniency letters](#) and explained in the FAQs.³⁴

Although many of these obligations are fulfilled during the investigation and any resulting prosecutions, the Division understands that applicants want assurances up front, even if conditional, that they will receive non-prosecution protection at the conclusion of the investigation if they fulfill the requirements of the Leniency Policy. The conditional leniency letters address that need and provide organizations and individuals with a transparent and predictable process from the initial marker request through the final leniency letter.

Typically, conditional leniency protects the applicant for its acts and offenses in furtherance of the illegal activity before the Division executes the conditional letter.

62. What is the final leniency letter?

An applicant receives a final leniency letter after it satisfies its obligations under the conditional leniency letter, and the Division verifies the applicant's representations

³⁴ *Leniency Program*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/atr/leniency-program>.

regarding eligibility. Normally, the Division issues the final leniency letter after the completion of the investigation and any resulting prosecutions.

63. *If a corporate applicant is the subject or target of a separate investigation, will this also be reflected in its corporate conditional leniency letter?*

Yes. To enhance transparency and predictability, the Division has also published a model corporate conditional leniency letter for dual investigations.³⁵ A corporate applicant in this situation can expect its letter to make clear that the protections afforded to it and its directors, officers, and employees, as well as their cooperation obligations, extend only to the activity reported in the leniency application, and not to the separate investigation. Specifically, the letter will detail:

- the status of the applicant and any of its personnel as subjects, targets, or defendants in the separate investigation;
- that the conditional leniency letter does not prohibit the Division from prosecuting the applicant or its personnel in the separate investigation; and
- that the separate investigation has no effect on the applicant's cooperation obligations in connection with its request for leniency.

In addition, personnel of the applicant who are subjects, targets, or defendants in the separate investigation, but who are interviewed by the Division as part of the leniency application, will receive a separate Dual Investigations Acknowledgement Letter.³⁶ This letter notes the individual's status as a subject or target in the separate investigation and acknowledges that the corporate applicant's conditional leniency letter governs the conditions of the individual's eligibility for leniency protection.

X. WITHDRAWAL, REVOCATION, AND EXPULSION

Withdrawal After Issuance of a Marker

64. *Can a leniency applicant withdraw its application after it receives a marker?*

Yes. If, after receiving a marker, an applicant concludes that it cannot satisfy the criteria for leniency, or determines that it no longer wants to pursue leniency, it may withdraw its application or let its marker expire. The Division may continue its investigation after an applicant withdraws its application or the marker expires, in which case the former applicant will not have any protection against prosecution. Once the Division issues a final leniency letter, the applicant cannot withdraw its application.

³⁵ MODEL DUAL INVESTIGATIONS CONDITIONAL LENIENCY LETTER, U.S. DEP'T OF JUSTICE.

³⁶ MODEL DUAL INVESTIGATIONS ACKNOWLEDGEMENT LETTER FOR EMPLOYEES, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/sites/default/files/atr/legacy/2008/11/24/239512.pdf>.

65. *Can the Division withdraw an applicant's marker?*

Yes. The Division can withdraw or let expire the marker of an applicant if the Division concludes that the applicant cannot meet the criteria for leniency. Generally, the Division will extend an applicant's marker so long as the applicant demonstrates it is making a good-faith effort to complete its application promptly. If, after an appropriately tailored inquiry by the applicant or the Division, the Division determines that the applicant cannot meet the leniency criteria, the Division will withdraw the applicant's marker, or let it expire, without granting leniency.

66. *What process does an applicant receive before its marker is withdrawn?*

If staff determines an applicant cannot meet the criteria for leniency, they will notify the applicant in writing that it does not appear to qualify for leniency and thus, they intend to recommend that the Division withdraw the applicant's marker or let it expire.

The Deputy Assistant Attorney General for Criminal Enforcement and Director of Criminal Enforcement will evaluate any recommendations that the Division withdraw a marker or let it expire without the applicant's consent. The applicant will also typically have the opportunity to meet with Division leadership regarding the determination that it does not qualify for leniency. The applicant has the burden of persuading the Division of its eligibility for leniency.

67. *What protections does an applicant retain after its marker is withdrawn?*

If an applicant or the Division withdraws a marker, the applicant does not have any protection from prosecution. As a practical matter, if after conducting a thorough investigation, the Division withdraws a marker because the Division determines that the applicant was not involved in illegal activity, the applicant does not need the protections of leniency.

Withdrawal After Issuance of the Conditional Leniency Letter

68. *Can an applicant voluntarily withdraw its leniency application after it receives a conditional leniency letter?*

Yes. Because, at this stage, the grant of leniency is conditional and contingent on the applicant's satisfying the criteria for leniency, the applicant can withdraw its application. If an applicant withdraws its leniency application after receiving a conditional leniency letter, it will be relieved of the conditional letter's obligations and will no longer receive the non-prosecution protection afforded by the letter.

69. Can the Division revoke a conditional leniency letter?

Yes. The grant of immunity is contingent on the applicant's satisfying the criteria for leniency. The Division does not take revocation lightly—the Division has revoked only one conditional leniency letter—but may revoke the letter if the applicant cannot or does not satisfy the conditions for leniency.

70. What would cause the Division to revoke a conditional leniency letter?

The Division may revoke a conditional leniency letter if:

- Contrary to the applicant's representations, the applicant is not eligible for leniency or
- The applicant has not provided the cooperation required by the conditional leniency letter or met its other obligations detailed in the letter.

In the history of the Leniency Policy, the Division has revoked only one conditional leniency letter. One example of a circumstance in which the Division may do so is:

Corporate Applicant XYZ seeks leniency and represents to the Division that it promptly reported its illegal conduct to the Division on discovering it. XYZ also represents to the Division that its participation in the conspiracy had lapsed years before this discovery, limiting the opportunities to assist with a covert investigation. After the Division gives XYZ a conditional leniency letter, the Division discovers credible evidence that these representations are false; XYZ initially discovered the illegal activity years before reporting it to the Division and responded by training employees on the dangers of ambiguous communications, which led employees to avoid referencing the conspiracy in writing without ceasing their illegal conduct. In fact, XYZ only truly terminated its participation in the conspiracy shortly before it executed the conditional leniency letter.

71. What process will an applicant receive before its conditional leniency letter is revoked?

Before the Division makes a final determination to revoke an applicant's conditional leniency, it will notify the applicant of the staff's recommendation to revoke leniency and provide the applicant with an opportunity to meet with staff, section or

office management, the Director of Criminal Enforcement, and the Deputy Assistant Attorney General for Criminal Enforcement regarding the revocation.³⁷

While a recommendation to revoke leniency is under consideration, the Division will suspend the applicant's obligation to cooperate so that the applicant is not put in the position of continuing to provide evidence that could be used against it should the conditional leniency letter be revoked.

72. *When can an applicant or its employees ask a court to overturn the Division's decision to revoke conditional leniency?*

The Leniency Policy is an exercise of prosecutorial discretion and is generally not subject to judicial review.

Under the conditional leniency letter, an applicant agrees not to seek judicial review of a revocation unless it is charged for the illegal activity. Similarly, applicants agree that judicial review of any Antitrust Division decision to revoke any conditional non-prosecution protection granted to an individual under a corporate conditional letter "is not available unless and until the individual has been charged by indictment or information for the illegal activity."³⁸

73. *If a corporate conditional leniency letter is revoked, what will happen to the protection provided in the letter for the applicant's personnel?*

If the Division revokes the applicant's conditional leniency letter, the conditional leniency agreement is void. Thus, the protection provided to individuals under the letter no longer exists.

As a matter of prosecutorial discretion, even if the Division revokes an organization's conditional leniency, the Division will elect not to prosecute individuals who had received protection under the letter so long as they had provided, and continue to provide, timely, truthful, continuing, and complete cooperation to the Division before the revocation and, in the Division's view, were not responsible for the revocation.

74. *Under what circumstances can the protection granted to an individual under a corporate conditional leniency letter be revoked?*

The Division does not take revocation lightly. It may revoke a director, officer, or employee's non-prosecution protections under a corporate conditional leniency letter under any of the following conditions:

³⁷ See MODEL CORP. CONDITIONAL LENIENCY LETTER, U.S. DEP'T OF JUSTICE ¶ 6; MODEL INDIVIDUAL CONDITIONAL LENIENCY LETTER, U.S. DEP'T OF JUSTICE ¶ 6.

³⁸ See MODEL CORP. CONDITIONAL LENIENCY LETTER, U.S. DEP'T OF JUSTICE ¶ 6.

- 1) The individual caused the corporate applicant to be ineligible for leniency under paragraph 1 of the corporate conditional leniency letter;
- 2) The individual continued to participate in the illegal activity after the corporate applicant reported the activity to the Division, and the individual was instructed to cease their participation in the activity;
- 3) The individual obstructed or attempted to obstruct an investigation of the illegal activity at any time, whether the obstruction occurred before or after the date of the corporate conditional leniency letter; or
- 4) The individual fails to provide timely, truthful, continuing, and complete cooperation.

75. *What notice or process will an individual receive if the Division is contemplating revoking their protections under a corporate conditional leniency letter?*

Absent exigent circumstances, such as risk of flight, the staff will notify the individual or their counsel, and counsel for the corporate applicant, of its recommendation to revoke the individual's protections under the conditional leniency letter. Counsel for the individual typically has the opportunity to meet with Division leadership before the Division makes a final determination to revoke an individual's protection provided under a corporate conditional leniency letter.

If the Division revokes conditional protection granted to a director, officer, or employee of a corporate applicant, the Division may use against such individual any evidence provided at any time under the corporate conditional leniency letter by the corporate applicant, the individual, or other directors, officers, or employees of the applicant.³⁹ While a recommendation to revoke the protections provided in the conditional leniency letter as they relate to this specific individual is under consideration, the Division will suspend the individual's obligation to cooperate so that the individual is not put in the position of continuing to provide evidence that could be used against them should their protections be revoked.

XI. CONFIDENTIALITY

76. *What confidentiality assurances are given to applicants?*

The Division treats an applicant's identity and information in strict confidence. Therefore, the Division does not publicly disclose an applicant's identity or information the applicant provides unless: (1) the applicant has publicly disclosed its application; (2)

³⁹ MODEL CORP. CONDITIONAL LENIENCY LETTER, U.S. DEP'T OF JUSTICE ¶ 6.

the applicant agrees to the disclosure; (3) a court orders the disclosure; or (4) disclosure is required in a criminal case.

77. *Will the Division disclose an applicant's identity or information to a foreign government?*

The Division will not disclose an applicant's identity or information to enforcers outside the United States without the applicant's consent. Typically, when an applicant has sought leniency in other jurisdictions, it will provide this consent in the form of a confidentiality waiver to facilitate efficient investigations. *See* FAQ 30.

The Leniency Policy does not insulate applicants from proceedings in other jurisdictions, nor do applications in other jurisdictions insulate applicants from prosecution by the Division.

XII. LENIENCY AND PENALTY PLUS

78. *What is leniency plus?*

Leniency plus enables an organization that is under investigation for one antitrust conspiracy (but cannot obtain leniency for that conspiracy) to receive additional credit for substantial assistance in its plea agreement for that conspiracy by reporting its involvement in a separate antitrust conspiracy for which it is eligible for leniency.

Many of the Division's investigations result from evidence developed during an investigation of a completely separate conspiracy. The Division takes a proactive approach to attracting leniency applications by encouraging subjects and targets of investigations to consider whether they may qualify for leniency in other markets. For example, consider the following hypothetical fact pattern:

As a result of a leniency application in the widgets market, a grand jury is investigating the other four producers in that market, including XYZ, for their participation in an international cartel. In its internal investigation, XYZ uncovers information that its executives also participated in a separate conspiracy in the sprockets market. The government has not yet detected the sprockets cartel because the applicant was not a competitor in that market and no other investigation has uncovered it. XYZ is interested in cooperating with the Division's widgets investigation under a plea agreement and seeking leniency for the sprockets conspiracy.

Assuming that XYZ qualifies for leniency in the sprockets conspiracy and provides timely, truthful, continuing, and complete cooperation with the Division's investigation into the widgets conspiracy, XYZ may also obtain "leniency plus." That means XYZ receives leniency for the sprockets conspiracy—*plus*, in the sentencing

hearing for the widgets cartel, the Division recommends that the court, in calculating XYZ's fine, make a substantial assistance departure that takes into consideration the applicant's cooperation in both investigations. The substantial assistance departure that the Division recommends would be greater than if XYZ had cooperated exclusively in the widgets investigation. XYZ receives credit for self-reporting and cooperating in the sprockets investigation by both obtaining leniency for sprockets *and* receiving a greater reduction in the recommended widgets fine.

79. *What kind of cooperation credit is given in leniency plus investigations?*

How much cooperation credit the Division recommends for reporting an additional conspiracy will depend on the defendant's cooperation and the facts and circumstances of the case. Factors the Division considers include:

- 1) the strength of the evidence the defendant provides in the leniency investigation;
- 2) the potential significance of the violation reported in the leniency application, measured in such terms as the volume of commerce involved, the geographic scope, and the number of corporate and individual co-conspirators; and
- 3) the likelihood that the Division would have uncovered the additional violation without the self-reporting, *e.g.*, if there were little or no overlap in the corporate participants or the culpable executives involved in the original cartel under investigation and the leniency plus matter, then the credit for the disclosure will be greater.

Of these three factors, the first two are given the most weight.

To receive any leniency plus credit at sentencing, the defendant must provide timely, truthful, continuing, and complete cooperation with the investigation that led to the guilty plea.

80. *What is penalty plus?*

"Penalty plus" refers to situations where an organization fails to uncover or disclose the full extent of its antitrust-related wrongdoing before being sentenced for one of its antitrust crimes. In those cases, it is the Division's practice to seek a more severe punishment at the time the applicant is sentenced for its second antitrust conviction.⁴⁰

⁴⁰ See, *e.g.*, Press Release, U.S. Dep't of Justice, Bridgestone Corp. Agrees to Plead Guilty to Price Fixing on Automobile Parts Installed in U.S. Cars (Feb. 13, 2014), <https://www.justice.gov/opa/pr/bridgestone-corp-agrees-plead-guilty-price-fixing-automobile-parts-installed-us-cars>.

Like leniency plus, described above, penalty plus creates substantial incentives for an organization to conduct a thorough internal investigation to detect and report any additional antitrust crimes it uncovers. If an organization pleads guilty to an antitrust offense but fails to report an additional antitrust crime it was also involved in, that applicant not only foregoes potential credit from leniency plus, but the Division will generally seek a more severe punishment under penalty plus for the additional crime.

The severity of the penalty plus enhancement the Division seeks depends on the reason the applicant failed to report the additional crime. For example, if an organization's internal investigation fails to discover the additional crime, and the organization agrees to plead guilty and cooperate after the Division detects the crime, the Division would recommend that any downward adjustment begin from a higher point in the U.S. Sentencing Guidelines range for the additional antitrust crime.

The sentencing consequences will be greater for an organization that made no meaningful effort to conduct an internal investigation or was aware of the additional antitrust crime but elected not to report it. In that case, the Division will seek a more severe penalty plus enhancement in the form of a higher fine and will likely recommend that the court impose probation under the U.S. Sentencing Guidelines.⁴¹

In the most egregious cases, the Division will recommend that the court consider the failure to report the additional crime as an aggravating sentencing factor warranting a fine at the top end of the Guidelines range or an upward departure. The Division may also recommend that the court appoint a monitor to ensure compliance.

XIII. WHEN LENIENCY IS NOT AVAILABLE

81. If an organization is too late to obtain leniency, what cooperation credit can it expect to receive for self-reporting its criminal conduct?

Even if an organization cannot qualify for leniency, it should self-report criminal conduct, accept responsibility, and cooperate with the Division's investigation. The Division evaluates the facts of each case under the Leniency Policy, the [Principles of Federal Prosecution](#),⁴² and the [Principles of Federal Prosecution of Business Organizations](#)⁴³ when considering the appropriate disposition for organizations involved in criminal conduct. Among the factors considered is whether the applicant made a timely and voluntary disclosure of its wrongdoing.

⁴¹ GUIDELINES MANUAL, UNITED STATES SENTENCING COMM'N §§8D1.1-8D1.4 (2016), <https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/GLMFull.pdf>.

⁴² U.S. Dep't of Justice, Just. Manual § 9-28.710.

⁴³ U.S. Dep't of Justice, Just. Manual § 9-28.300.

An organization that voluntarily self-reports its criminal conduct and pleads guilty may earn a reduced fine based on its substantial assistance to the Division's investigation. Organizations that self-report their wrongdoing and cooperate early usually have a greater chance to provide assistance that is recognized at sentencing. In addition, timely acceptance of responsibility will be reflected in a reduced sentence under the Guidelines.⁴⁴

In certain circumstances, a disposition short of a criminal conviction may be appropriate even if an organization does not qualify for leniency, especially when it has invested in an effective compliance program that allowed it to identify the misconduct and promptly self-report, despite that it was not the first to seek leniency.

82. *If an organization is too late to obtain leniency, how will its current personnel be treated if it self-reports its criminal conduct?*

To qualify for any cooperation credit, an organization must provide the Division with all relevant facts related to its wrongdoing, including identifying all individuals involved in or responsible for the misconduct. The Division retains discretion to prosecute those individuals and makes charging decisions based on the [Principles of Federal Prosecution](#).⁴⁵

Under Department policy, outside of corporate leniency, individual releases of liability are included in a corporate resolution only in extraordinary circumstances, but individual non-prosecution agreements may be available. The order in which an organization and its co-conspirators accept responsibility does not determine whether its personnel will be subject to prosecution. Nevertheless, it is in the applicant's and the individuals' interests to cooperate promptly. The earlier cooperation begins, the more likely it is to substantially assist the investigation. And an individual's willingness to cooperate—and the value of that cooperation—is among the most important factors the Division considers when making charging decisions or recommending reduced sentences.

⁴⁴GUIDELINES MANUAL, UNITED STATES SENTENCING COMM'N §3E1.1 (2016), <https://guidelines.uscourts.gov/guidelines/guidelines.html#3E1.1>

⁴⁵ U.S. Dep't of Justice, Just. Manual § 9-27.000.