

7-3.300 - Antitrust Division Leniency Policy and Procedures

<u>7-3.310</u>	Type A Corporate Leniency
<u>7-3.320</u>	Type B Corporate Leniency
<u>7-3.330</u>	Individual Leniency
<u>7-3.340</u>	Application Process

The Antitrust Division has a policy of according leniency to organizations or individuals that self-report their 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 certain conditions. As used in this policy, an organization or individual that meets the criteria for leniency will not be charged criminally for the illegal activity.

The corporate leniency policy, 7-3.310-20, is the Antitrust Division's voluntary self-disclosure policy. It incentivizes timely corporate self-reporting that facilitates prosecution of individuals responsible for the misconduct. An organization that seeks to self-report illegal activity to the Antitrust Division, but does not meet the conditions of the corporate leniency policy, will not be eligible for a declination.

Pursuant to JM § 9-28.900(A)(3)(c), when an acquiror discloses illegal activity by the acquired entity, the prosecution team should apply a presumption of declination to the acquiror only if the parties (i) satisfy all relevant requirements of the Antitrust Division's leniency policy; (ii) voluntarily disclose the misconduct to the Antitrust Division (and the Federal Trade Commission, if the Commission is reviewing the transaction) before the merger or acquisition closes; and (iii) enter into an agreement, to the satisfaction of the Antitrust Division (and, when relevant, Federal Trade Commission), that (a) suspends any review period until a conditional leniency letter is issued or the marker lapses, and/or (b) otherwise commits to not close the merger or acquisition for a specified period of time, in the discretion of the Antitrust Division (and, when relevant Federal Trade Commission), after a conditional leniency letter is issued or the leniency marker expires. For the purposes of JM § 9-28.900(A)(3)(c), in situations where the Antitrust Division concludes that the parties have satisfied the requirements of Sections 9-28.900(A)(3)(c)(i) – (iii), the prosecution team may effectuate this "presumption of declination" by issuing a conditional leniency letter or its functional equivalent. See JM § 7-3.340(B)-(C).

Additional information and current contact information to make an application can be found in the Antitrust Division's Leniency Program FAQs, available at: <https://www.justice.gov/atr/leniency-program>

Whenever used in this policy, "current directors, officers, and employees" and "timely, truthful, continuing, and complete cooperation" are defined in the model conditional leniency letters available at: <https://www.justice.gov/atr/leniency-program>

[updated March 2024]

7-3.310 - Type A Corporate Leniency

Leniency will be granted to an organization that reports its participation in illegal activity before the Antitrust Division has begun an investigation if:

1. At the time the applicant reports the illegal activity, the Antitrust Division has not received information about the illegal activity from any other source;
2. The applicant, upon its discovery of the illegal activity, promptly reports it to the Antitrust Division;
3. The applicant reports its participation in the illegal activity with candor and completeness and makes a confession of wrongdoing that is truly a corporate act, as opposed to isolated confessions of directors, officers, and employees;
4. The applicant provides timely, truthful, continuing, and complete cooperation to the Antitrust Division throughout its investigation;
5. The applicant uses best efforts to make restitution to injured parties, to remediate the harm caused by the illegal activity, and to improve its compliance program to mitigate the risk of engaging in future illegal activity; and
6. The applicant did not coerce another party to participate in the illegal activity and clearly was not the leader or originator of that activity.

If Type A leniency is granted, the applicant's current directors, officers, and employees will not be charged criminally for the illegal activity if they provide timely, truthful, continuing, and complete cooperation to the Division throughout its investigation of the illegal activity.

[updated June 2022]

7-3.320 - Type B Corporate Leniency

Leniency will be granted to an organization that reports its participation in illegal activity but does not meet the criteria for Type A Corporate Leniency if:

1. At the time the applicant reports the illegal activity, the Antitrust Division does not yet have evidence against the applicant that, in the Antitrust Division's sole discretion, is likely to result in a sustainable conviction against the applicant;
2. The applicant, upon its discovery of the illegal activity, promptly reports it to the Antitrust Division;
3. The applicant reports its participation in the illegal activity with candor and completeness and makes a confession of wrongdoing that is truly a corporate act, as opposed to isolated confessions of directors, officers, and employees;
4. The applicant provides timely, truthful, continuing, and complete cooperation that advances the Antitrust Division's investigation;
5. The applicant uses best efforts to make restitution to injured parties, to remediate the harm caused by the illegal activity, and to improve its compliance program to mitigate the risk of engaging in future illegal activity;
6. The applicant did not coerce another party to participate in the illegal activity and clearly was not the leader or originator of that activity; and
7. The applicant is the first to qualify for leniency for the illegal activity reported and the Antitrust Division determines that granting leniency to the applicant would not be unfair to others.

In evaluating whether granting leniency to the applicant would be unfair to others, the Antitrust Division will consider the nature of the illegal activity, the applicant's role in it, the applicant's criminal history, and the timing of the leniency application.

The Antitrust Division will consider including non-prosecution protection for current directors, officers, and employees of a Type B corporate leniency applicant, for the illegal activity. Such protection is not guaranteed and is at the Antitrust Division's sole discretion. Individuals seeking non-prosecution protection as part of a Type B application must admit their wrongdoing with candor and completeness and provide timely, truthful, continuing, and complete cooperation that advances the Antitrust Division's investigation.

[updated June 2022]

7-3.330 - Individual Leniency

Leniency will be granted to an individual reporting their participation in illegal activity before the Antitrust Division has begun an investigation if:

1. At the time the individual reports the illegal activity, the Antitrust Division has not received information about the illegal activity from any other source;
2. The individual reports the wrongdoing with candor and completeness and provides timely, truthful, continuing, and complete cooperation to the Antitrust Division throughout its investigation; and
3. The individual did not coerce another party to participate in the illegal activity and clearly was not the leader or originator of that activity.

Any individual who does not qualify for leniency under the Individual Leniency Policy will be considered for statutory or informal immunity or a non-prosecution agreement. The Antitrust Division will make such decisions on a case-by-case basis consistent with the Principles of Federal Prosecution.

[updated June 2022]

7-3.340 - Application Process

A. Step One: Leniency Marker

A "marker" is the confirmation the Division gives a leniency applicant to hold its place in line. While one applicant has a marker, no other applicant can obtain a marker for the same conspiracy.

Markers **must** be requested using the contact information available at: <https://www.justice.gov/atr/leniency-program>

To obtain a marker, an applicant must: (1) report that they have uncovered some information or evidence indicating that the applicant has engaged in a criminal antitrust violation and disclose the general nature of the conduct discovered; (2) identify the industry, product, or service involved in terms that are specific enough to allow the

Antitrust Division to determine whether leniency is still available and to protect the marker for the applicant; and (3) identify the client.

If the Antitrust Division determines a marker is available and the applicant qualifies for one, it will inform the applicant. While the applicant holds the marker, the Antitrust Division and the applicant will take steps to confirm that the applicant meets the Leniency Policy's requirements.

A marker is deemed "perfected" when the leniency applicant has provided sufficient information to move from the marker stage to the conditional leniency letter stage.

B. Step Two: Conditional Leniency Letter

The second stage is the conditional leniency letter. This is the initial, conditional grant of leniency to the applicant. An applicant will remain in this stage until it has demonstrated that it can meet the criteria to qualify for leniency, including through providing evidence of the self-disclosed violation.

The Antitrust Division's model corporate and individual conditional leniency letters are available at: <https://www.justice.gov/atr/leniency-program>

C. Step Three: Final Leniency Letter

The third stage is the final leniency letter. An applicant will receive a final leniency letter after it satisfies its obligations under the conditional leniency letter and the Division verifies the applicant's representations regarding eligibility. Normally, the Division issues the final leniency letter after the completion of the investigation and any resulting prosecutions.

[updated June 2022]