DEPARTMENT OF JUSTICE

"FREQUENTLY ASKED QUESTIONS REGARDING THE ANTITRUST DIVISION'S LENIENCY PROGRAM AND MODEL LENIENCY LETTERS (November 19, 2008)"

By:

SCOTT D. HAMMOND
Deputy Assistant Attorney General
for Criminal Enforcement

BELINDA A. BARNETT
Senior Counsel
Antitrust Division
U.S. Department of Justice

FREQUENTLY ASKED QUESTIONS
REGARDING THE ANTITRUST DIVISION'S LENIENCY PROGRAM
AND MODEL LENIENCY LETTERS
(November 19, 2008)

The Antitrust Division first implemented a leniency program in 1978 and substantially revised the program with the issuance of a Corporate Leniency Policy in 1993 and a Leniency Policy for Individuals in 1994.[1] Through the Division's leniency program, a corporation can avoid criminal conviction and fines, and individuals can avoid criminal conviction, prison terms, and fines, by being the first to confess participation in a criminal antitrust violation, fully cooperating with the Division, and meeting other specified conditions.

The Division has issued several speeches providing guidance on how the leniency program is implemented. It has also adopted model conditional leniency letters for both corporate and individual applicants to memorialize the agreement made with a leniency applicant.[2] The vast majority of the information in this paper restates what is available in prior policy statements. Therefore, this paper is meant to be a comprehensive and updated resource, and to provide guidance, on recurring issues regarding the implementation of the Division's Corporate Leniency Policy and Individual Leniency Policy. This paper discusses: (1) leniency application procedures; (2) the criteria for obtaining leniency under the Corporate Leniency Policy; (3) the criteria for obtaining leniency under the Individual Leniency Policy; (4) the conditional leniency letter; (5) the final, unconditional leniency letter and potential revocation of conditional leniency; and (6) confidentiality regarding leniency applications.

The Division's implementation of its leniency program has been greatly influenced by the views and input of the private bar and business community. The Division will continue to solicit their suggestions on how to make the program fair, transparent, and predictable. Therefore, we expect that we will periodically update and reissue these Frequently Asked Questions. Updated versions will be identified by a new posting date in the title of the paper.

---

[1] The Division's Corporate Leniency Policy and Leniency Policy for Individuals are available at http://www.usdoj.gov/atr/public/criminal/leniency.htm.

[2] The model conditional leniency letters are available at http://www.usdoj.gov/atr/public/criminal/leniency.htm.

I. Leniency Application Procedures

Application Contact Information

1. ***Who does counsel for a potential applicant contact to apply for leniency?***

The Division's Deputy Assistant Attorney General for Criminal Enforcement ("Criminal DAAG") reviews all requests for leniency.[3] An applicant's counsel may contact the Criminal DAAG directly at 202-514-3543 to apply for leniency. However, counsel is not required to call the Criminal DAAG to initiate an application, but instead may contact any one of the seven Division field offices or the Division's National Criminal Enforcement Section in Washington, D.C.[4] For example, if there is an existing investigation involving the subject matter of the application, it likely will be more expeditious for counsel to contact the investigating staff. In such cases, Division staff will promptly alert the Criminal DAAG of the application.

Securing a Marker

The Division understands that when corporate counsel first obtains indications of a possible criminal antitrust violation, authoritative personnel for the company may not have sufficient information to know for certain whether the corporation has engaged in such a violation, an admission of which is required to obtain a conditional leniency letter.[5] Counsel should understand, however, that time is of the essence in making a leniency application. The Division grants only one corporate leniency per conspiracy, and in applying for leniency, the company is in a race with its co-conspirators and possibly its own employees who may also be preparing to apply for individual leniency. On a number of occasions, the second company to inquire about a leniency application has been beaten by a prior applicant by only a matter of hours. Thus, the Division has

---

[3] Note that the Corporate Leniency Policy, which was issued in 1993, states that the Director of Operations reviews corporate leniency applications, and the Leniency Policy for Individuals, which was issued in 1994, states that the Deputy Assistant Attorney General for Litigation reviews individual leniency applications. Both of the leniency policies were written before the Division created the Criminal DAAG position and gave that position oversight of the Division's criminal enforcement program, including the Division's leniency program.

[4] The phone numbers for making leniency applications to the field offices and Washington criminal section are: Atlanta Field Office 404-331-7120; Chicago Field Office 312-353-7523; Cleveland Field Office 216-687-8400; Dallas Field Office 214-661-8619 or 214-661-8610; National Criminal Enforcement Section 202-307-1166; New York Field Office 212-264-0390; Philadelphia Field Office 215-597-7405; and San Francisco Field Office 415-436-6677.

[5] See discussion at question 5 below.

established a marker system to hold an applicant's place in the line for leniency while the applicant gathers more information to support its leniency application.

2. *What is a marker, and how is it used in the leniency application process?*

The Division frequently gives a leniency applicant a "marker" for a finite period of time to hold its place at the front of the line for leniency while counsel gathers additional information through an internal investigation to perfect the client's leniency application. While the marker is in effect, no other company can "leapfrog" over the applicant that has the marker.

To obtain a marker, counsel must: (1) report that he or she has uncovered some information or evidence indicating that his or her client has engaged in a criminal antitrust violation; (2) disclose the general nature of the conduct discovered; (3) identify the industry, product, or service involved in terms that are specific enough to allow the Division to determine whether leniency is still available and to protect the marker for the applicant; and (4) identify the client.[6] As noted above, when corporate counsel first obtains indications of a possible criminal antitrust violation, authoritative personnel for the company may not have sufficient information to enable them to admit definitively to such a violation. While confirmation of a criminal antitrust violation is not required at the marker stage, in order to receive a marker counsel must report that he or she has uncovered information or evidence suggesting a possible criminal antitrust violation, e.g. price fixing, bid rigging, capacity restriction, or allocation of markets, customers, or sales or production volumes. With respect to the product or service involved in the violation, in some cases, an identification of the industry will be sufficient for the Division to determine whether leniency is available. For example, there may be no pending investigations of any products or services in that particular industry. In other cases, an identification of the specific product or service or other identifying information, such as the geographic location of affected customers or one or more of the subject companies, may be necessary in order for the Division to determine whether leniency is available.

Because companies are urged to seek leniency at the first indication of wrongdoing, the evidentiary standard for obtaining a marker is relatively low, particularly in situations where the Division is not already investigating the wrongdoing. For example, if an attorney gave a compliance presentation and after the presentation an employee reported to the attorney a conversation the employee had overheard about his employer's potential price-fixing activities, this information would be sufficient to obtain a marker. However, the burden is higher when the Division already is in possession of

---

[6] It is also possible in limited circumstances for counsel to secure a very short-term "anonymous" marker without identifying his or her client. An anonymous marker is given when counsel wants to secure the client's place first in line for leniency by disclosing the other information listed above, but needs more time to verify additional information before providing the client's name. For example, the Division might give counsel two or three days to gather additional information and to report the client's identity to the Division.

information about the illegal activity. For example, it is not enough for counsel to state merely that the client has received a grand jury subpoena or has been searched during a Division investigation and that counsel wants a marker to investigate whether the client has committed a criminal antitrust violation.

A marker is provided for a finite period. The length of time an applicant is given to perfect its leniency application is based on factors such as the location and number of company employees counsel needs to interview, the amount and location of documents counsel needs to review, and whether the Division already has an ongoing investigation at the time the marker is requested. A 30-day period for an initial marker is common, particularly in situations where the Division is not yet investigating the wrongdoing. If necessary, the marker may be extended at the Division's discretion for an additional finite period as long as the applicant demonstrates it is making a good-faith effort to complete its application in a timely manner.

II. Corporate Leniency Criteria

3. ***What are the criteria for obtaining corporate leniency, and is corporate leniency available both before and after an investigation has begun?***

Leniency is available for corporations either before or after a Division investigation has begun. The Corporate Leniency Policy includes two types of leniency, Type A Leniency and Type B Leniency. Type A Leniency is available only before the Division has received any information about the activity being reported from any source, while Type B is available even after the Division has received information about the activity. Detailed below are the criteria for each type of leniency.

Leniency Before an Investigation Has Begun ("Type A Leniency")

Leniency will be granted to a corporation reporting illegal antitrust activity before an investigation has begun if the following six conditions are met:

(1) At the time the corporation comes forward, the Division has not received information about the activity from any other source.

(2) Upon the corporation's discovery of the activity, the corporation took prompt and effective action to terminate its participation in the activity.

(3) The corporation reports the wrongdoing with candor and completeness and provides full, continuing, and complete cooperation to the Division throughout the investigation.

(4) The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials.

(5) Where possible, the corporation makes restitution to injured parties.

(6) The corporation did not coerce another party to participate in the activity and clearly was not the leader in, or the originator of, the activity.

If the corporation does not meet all six of the Type A Leniency conditions, it may still qualify for leniency if it meets the conditions of Type B Leniency.

Alternative Requirements for Leniency ("Type B Leniency")

A company will qualify for leniency even after the Division has received information about the illegal antitrust activity, whether this is before or after an investigation is formally opened, if the following conditions are met:

(1) The corporation is the first to come forward and qualify for leniency with respect to the activity.

(2) At the time the corporation comes in, the Division does not have evidence against the company that is likely to result in a sustainable conviction.

(3) Upon the corporation's discovery of the activity, the corporation took prompt and effective action to terminate its part in the activity.

(4) The corporation reports the wrongdoing with candor and completeness and provides full, continuing, and complete cooperation that advances the Division in its investigation.

(5) The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials.

(6) Where possible, the corporation makes restitution to injured parties.

(7) The Division determines that granting leniency would not be unfair to others, considering the nature of the activity, the confessing corporation's role in the activity, and when the corporation comes forward.

The "First-in-the-Door" Requirement

4. ***Can more than one company qualify for leniency?***

No. Under both Type A and Type B, only the first qualifying corporation may be granted leniency for a particular antitrust conspiracy. Condition 1 of Type A leniency requires that the Division has not yet received information about the illegal antitrust activity being reported from any other source, and Condition 1 of Type B leniency requires that the company is the first to come forward and qualify for leniency. Under

the policy that only the first qualifying corporation receives conditional leniency,[7] there have been dramatic differences in the disposition of the criminal liability of corporations whose respective leniency applications to the Division were very close in time. Thus, companies have a huge incentive to make a leniency application as quickly as possible.

Criminal Violation

5. ***Does a leniency applicant have to admit to a criminal violation of the antitrust laws before receiving a conditional leniency letter?***

Yes. The Division's leniency policies were established for corporations and individuals "reporting their illegal antitrust activity," and the policies protect leniency recipients from criminal conviction. Thus, the applicant must admit its participation in a criminal antitrust violation involving price fixing, bid rigging, capacity restriction, or allocation of markets, customers, or sales or production volumes before it will receive a conditional leniency letter. Applicants that have not engaged in criminal violations of the antitrust laws have no need to receive leniency protection from a criminal violation and will receive no benefit from the leniency program.

When the model corporate conditional leniency letter was first drafted, the Division did not employ a marker system. Thus, companies received conditional leniency letters far earlier in the process, often before the company had an opportunity to conduct an internal investigation. However, the Division's practice has changed over time. The Division now employs a marker system, and the Division provides the company with an opportunity to investigate thoroughly its own conduct. While the applicant may not be able to confirm that it committed a criminal antitrust violation when it seeks and receives a marker, by the end of the marker process, before it is provided with a conditional leniency letter, it should be in a position to admit to its participation in a criminal violation of the Sherman Act. The Division may also insist on interviews with key executives of the applicant who were involved in the violation before issuing the conditional leniency letter. A company that argues that an agreement to fix prices, rig bids, restrict capacity, or allocate markets might be inferred from its conduct but that cannot produce any employees who will admit that the company entered into such an agreement generally has not made a sufficient admission of criminal antitrust violation to be eligible for leniency. A company that, for whatever reason, is not able or willing to admit to its participation in a criminal antitrust conspiracy is not eligible for leniency. Previously the model conditional leniency letters referred to the conduct being reported as "*possible* [. . . price fixing, bid rigging, market allocation] or other conduct violative of Section 1 of the Sherman Act." (emphasis added). Because applicants must report a criminal violation of the antitrust laws before receiving a conditional leniency letter, the word "possible" has been deleted from the model letter, and a reference to "or other

[7] The conditional nature of the Division's leniency letters is discussed in Section IV below.

conduct constituting a criminal violation of Section 1 of the Sherman Act" has been added to the model letters.[8]

Non-Antitrust Crimes

6. ***Does the Division's leniency program apply to any non-antitrust crimes?***

As explained below, in some instances, the Division's leniency program provides some protection for non-antitrust violations, and in some instances, it does not. The model corporate conditional leniency letter provides leniency from the Antitrust Division "for any act or offense [the applicant] may have committed [time period covered] in connection with the anticompetitive activity being reported." Thus, this language provides leniency from the Antitrust Division not only for a criminal antitrust violation, but also for other offenses committed in connection with the antitrust violation. For example, conduct that is usually integral to the commission of a criminal antitrust violation, such as mailing, faxing, or emailing bids agreed upon with competitors, can constitute other offenses, such as mail or wire fraud violations or conspiracies to defraud. On occasion, other types of offenses may also occur in connection with a criminal antitrust violation. A cartelist may bribe a purchasing agent to steer contracts to the designated winning bidders in connection with a bid-rigging scheme, or payoffs received in connection with a bid-rigging scheme may not be reported as income to the Internal Revenue Service. As stated above, the protections of a conditional leniency letter apply to such additional offenses that are committed in connection with the antitrust violation.

The conditional leniency letter, however, only binds the Antitrust Division, and not other federal or state prosecuting agencies. For example, if a qualifying leniency applicant participated in a bid-rigging conspiracy and also bribed a foreign public official in return for steering contracts in violation of the Foreign Corrupt Practices Act ("FCPA"), the Antitrust Division would not prosecute the leniency applicant for either the bid-rigging conspiracy or the FCPA violation if the FCPA violation was committed in connection with the bid rigging. If the FCPA violation was not committed in connection with the bid rigging, the leniency letter would provide no protection from the Antitrust Division with respect to the FCPA violation. Moreover, the leniency letter would not prevent the Criminal Division of the U.S. Justice Department or any other prosecuting agency from prosecuting the applicant for a FCPA violation regardless of whether that violation was committed in connection with the antitrust offense. If the applicant has exposure for an antitrust and non-antitrust violation, the applicant may seek non-prosecution protection for the non-antitrust violation in a separate agreement in return for self-reporting that violation to the relevant prosecuting agency pursuant to the

[8] Model Corporate Conditional Leniency Letter, introductory paragraph and paragraph #1; *see also* Model Individual Conditional Leniency Letter, introductory paragraph and paragraph #1.

Department's Principles of Federal Prosecution of Business Organizations.[9] The factors that will be weighed in deciding whether to prosecute a company for non-antitrust conduct can be found at U.S.A.M. 9-28.300. To date, in situations where the additional offense has consisted of conduct that is usually integral to the commission of any criminal antitrust violation, such as mail or wire fraud or conspiracy to defraud resulting from the mailing or wire transmission of announcements of fixed prices, there have been no instances where a separate prosecuting agency has elected to prosecute such conduct by a leniency applicant.

Expanding Leniency Protection for Subsequently Discovered Conduct

7. ***If during the course of its internal investigation, an applicant discovers evidence that the anticompetitive activity was broader than originally reported, for example, in terms of its geographic scope or the products covered by the conspiracy, will the applicant's leniency protection be expanded to include the newly discovered conduct?***

Yes, under the conditions discussed below. Companies frequently apply for leniency before completing their own internal investigations in order to ensure their place at the front of the line. As a result, the Division may learn from one of the applicant's employees of anticompetitive activity that is more extensive than the conduct originally reported and thus that falls outside the scope of the conditional leniency letter. For example, an applicant's executives may report evidence showing that the anticompetitive activity was broader in terms of its geographic scope or the products covered by the conspiracy. In such cases, assuming that the applicant has not tried to conceal the conduct, that it is providing full, continuing, and complete cooperation, *and that the applicant can meet the criteria for leniency on the newly discovered conduct it reported,* the leniency coverage will be expanded to include such conduct. If the newly discovered conduct is part of the original conspiracy reported, the leniency protection for the expanded conduct typically will be accomplished by issuing an addendum to the original leniency letter. However, if the newly discovered conduct constitutes a separate conspiracy, the new leniency protection will be provided in a separate corporate conditional leniency letter.

"Amnesty Plus"

8. ***If a company is under investigation for one antitrust conspiracy but is too late to obtain leniency for that conspiracy, can it receive any benefits in its plea agreement for that conspiracy by reporting its involvement in a separate antitrust conspiracy?***

Yes. A large percentage of the Division's investigations have been initiated as a result of evidence developed during an investigation of a completely separate conspiracy. This pattern has led the Division to take a proactive approach to attracting leniency applications by encouraging subjects and targets of investigations to consider whether

[9] U.S. Attorney's Manual ("U.S.A.M.") 9-28.000, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm.

they may qualify for leniency in other markets where they compete. For example, consider the following hypothetical fact pattern.

> *As a result of cooperation received pursuant to a leniency application in the widgets market, a grand jury is investigating the other four producers in that market, including XYZ, Inc., for their participation in an international cartel. As part of its internal investigation, XYZ, Inc., uncovers information of its executives' participation not only in a widgets cartel but also in a separate conspiracy in the sprockets market. The government has not detected the sprockets cartel because the leniency applicant was not a competitor in that market and no other investigation has disclosed the cartel activity. XYZ, Inc. is interested in cooperating with the Division's widgets investigation and seeking leniency by reporting its participation in the sprockets conspiracy. Assuming XYZ, Inc. qualifies for leniency with respect to the sprockets conspiracy, what benefits can XYZ, Inc. receive by following this path?*

XYZ, Inc. can obtain what the Division refers to as "Amnesty Plus." In such a case, the Division would grant leniency to XYZ, Inc. in the sprockets investigation, meaning that XYZ, Inc. would pay zero dollars in fines for its role in the sprockets conspiracy and none of its officers, directors, and employees who admitted to the Antitrust Division their knowledge of, or participation in, the sprockets conspiracy and fully and truthfully cooperated with the Division would receive prison terms or fines in connection with the sprockets conspiracy. *Plus*, the Division would recommend to the sentencing court that XYZ, Inc. receive a substantial additional discount in its fine for its participation in the widgets cartel-- *i.e.*, a discount that takes into consideration the company's cooperation in both the widgets and sprockets investigations,[10] and would, therefore, be greater than the discount it would have received for cooperation in the widgets investigation alone. Consequently, XYZ, Inc. would receive dual credit for coming forward and cooperating in the sprockets investigation both in terms of obtaining leniency in that matter and in terms of receiving a greater reduction in the recommended widgets fine.

9. *How is the Amnesty Plus discount calculated?*

The size of the Amnesty Plus discount depends on a number of factors, including: (1) the strength of the evidence provided by the cooperating company in the leniency product; (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 co-conspirator companies and individuals; and (3) the likelihood the Division would have uncovered the additional violation absent the self-reporting, *i.e.*, if there were little or no overlap in the corporate participants and/or the

---

[10] *See* United States Sentencing Guidelines §8C4.1 (substantial assistance departure), *available at* http://www.ussc.gov/guidelin.htm.

culpable executives involved in the original cartel under investigation and the Amnesty Plus matter, then the credit for the disclosure would be greater. Of these three factors, the first two are given the most weight.[11]

10. ***If the leniency applicant is a subject or target of, or a defendant in, a separate investigation, will the applicant's conditional leniency letter contain any changes from the model corporate conditional leniency letter?***

Yes. An additional paragraph will be included when necessary in the model corporate conditional leniency letter to make clear that the protection afforded to the company and its executives pursuant to the letter, as well as their cooperation obligations, extend only to the activity reported pursuant to the leniency application and not to the separate investigation. In so doing, the letter will detail the company's acknowledgement of its status and that of its directors, officers, and employees as subjects, targets, or defendants in the separate investigation; the lack of effect of the conditional leniency letter on the ability of the United States to prosecute it and its directors, officers, and employees in that separate investigation; and the lack of effect of the separate investigation on the cooperation obligations of the company and its directors, officers, and employees under the conditional leniency letter. Specifically, the model paragraph for such a situation is as follows:

> 5. **Gadget Investigation**: Applicant acknowledges that it is a [subject/target of] [defendant in] a separate investigation into [price-fixing, bidding-rigging, and market-allocation] activity, or other conduct constituting a criminal violation of Section 1 of the Sherman Act, 15 U.S.C. § 1,[and related statutes,] in the gadget industry [insert geographic scope--e.g. in the United States and elsewhere] and that some of its current and former directors, officers, or employees are, or may become, subjects, targets, or defendants in that separate investigation. Nothing in this Agreement limits the United States from criminally prosecuting Applicant or any of its current or former directors, officers, or employees in connection with the gadget investigation. The status of Applicant or any of its current or former directors, officers, or employees as a subject, target, or defendant in the gadget investigation does not abrogate, limit, or otherwise affect Applicant's cooperation obligations under paragraph 2 above, including its obligation to use its best efforts to secure the ongoing, full, and truthful cooperation of covered employees, or the cooperation obligations of covered employees under paragraph 4 above. A failure of a covered employee to comply fully with his or her obligations described in paragraph 4 above includes, but is not limited to, regardless of any past or proposed cooperation, not making himself

[11] For a fuller discussion of the Division's Amnesty Plus program as well as the benefits generally of providing "second-in-the-door" cooperation, see Scott D. Hammond, Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations, Speech Before the ABA Antitrust Section 2006 Spring Meeting (March 29, 2006), *available at* http://www.usdoj.gov/atr/public/speeches/215514.htm.

> or herself available in the United States for interviews and testimony in trials, grand jury, or other proceedings upon the request of attorneys and agents of the United States in connection with the anticompetitive activity being reported because he or she has been, or anticipates being, charged, indicted, or arrested in the United States for violations of federal antitrust [and related statutes]involving the gadget industry. Such a failure also includes, but is not limited to, not responding fully and truthfully to all inquiries of the United States in connection with the anticompetitive activity being reported because his or her responses may also relate to, or tend to incriminate him or her in, the gadget investigation. Failure to comply fully with his or her cooperation obligations further includes, but is not limited to, not producing in the United States all documents, including personal documents and records, and other materials requested by attorneys and agents of the United States in connection with the anticompetitive activity being reported because those documents may also relate to, or tend to incriminate him or her in, the gadget investigation. The cooperation obligations of paragraph 4 above do not apply to requests by attorneys and agents of the United States directed at [price-fixing, bid-rigging, or market-allocation] activity in the gadget industry if such requests are not, in whole or in part, made in connection with the anticompetitive activity being reported. The Antitrust Division may use any documents, statements, or other information provided by Applicant or by any of its current or former directors, officers, or employees to the Division at any time pursuant to this Agreement against Applicant or any of its current or former directors, officers, or employees in any prosecution arising out of the gadget investigation, as well as in any other prosecution.[12]

In addition, directors, officers and employees of the applicant who are subjects, targets, or defendants in the separate investigation but who are interviewed by the Division in connection with his or her employer's leniency application will be given a separate letter in which the individual acknowledges his or her status in the separate investigation and acknowledges that the leniency letter governs the conditions of the individual's eligibility for leniency protection with respect to the anticompetitive activity being reported pursuant to the leniency letter. Specifically, the model letter for these acknowledgements states:

> Dear [Name]:
>
> On ____ __, 20XX the Antitrust Division of the United States Department of Justice and [Generic Company, Ltd. ("Applicant")] entered into an agreement granting Applicant conditional leniency for its participation in [price fixing, bid rigging, and market allocation] or other conduct constituting a criminal violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, in the widget industry [insert geographic scope: e.g., in the United States and elsewhere] ("Applicant

[12] Paragraph #5, Model Dual Investigations Leniency Letter, *available at* http://www.usdoj.gov/atr/public/criminal/leniency.htm.

Agreement"). A copy of the Applicant Agreement is attached. You are a "covered employee" as defined in paragraph 2(c) of the Applicant Agreement. You are also a [subject/target of] [defendant in] the Antitrust Division's gadget investigation as referenced in paragraph 5 of the Applicant Agreement.

The Applicant Agreement governs the terms and conditions of your eligibility for leniency protection in the widget investigation. Your signature below signifies that you have read, understood, and will comply with the terms and conditions of the Applicant Agreement. Please sign, and have your attorney sign, below in acknowledgment.[13]

Meaning of "Discovery of the Illegal Activity"

11. ***Both Type A and Type B leniency require that "[t]he corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity." How does the Division interpret "discovery of the illegal activity being reported," especially when high-level officials of the company participated in the cartel?***

Questions have arisen about what it means for the corporation to "discover" the illegal activity being reported. More specifically, in cases (usually involving small, closely held corporations) where the top executives, board members, or owners participated in the conspiracy, it has been suggested that the corporation may not be eligible for leniency because the corporation's "discovery" of the activity arguably occurred when those participants joined the conspiracy.

The Division, however, generally considers the corporation to have discovered the illegal activity at the earliest date on which either the board of directors or counsel for the corporation (either inside or outside) was first informed of the conduct at issue. Thus, the fact that top executives, individual board members, or owners participated in the conspiracy does not necessarily bar the corporation from eligibility for leniency. The purpose of this interpretation is to ensure that as soon as the authoritative representatives of the company for legal matters -- the board or counsel representing the corporation -- are advised of the illegal activity, they take action to cease that activity. In the case of a small closely held corporation in which the board of directors is never formally advised of the activity, because all members of the board are conspirators, the corporation still may qualify under this provision if the activity is terminated promptly after legal counsel is first informed of the activity.

[13] Model Dual Investigations Acknowledgement Letter for Employees, *available at* http://www.usdoj.gov/atr/public/criminal/leniency.htm.

12. ***Does the grant of conditional leniency always cover activity up until the date of the conditional leniency letter?***

The grant of conditional leniency usually protects the applicant for any activity committed in connection with a criminal antitrust violation prior to the date of the conditional leniency letter. This is because, in the vast majority of cases, leniency applicants approach the Division promptly after discovery of the anticompetitive activity in order to enhance the likelihood that they are the first applicant and that a co-conspirator or an employee does not beat them in the race to obtain leniency. In such cases, paragraph #3 of the Division's model corporate conditional leniency letter provides that "[T]he Antitrust Division agrees not to bring any criminal prosecution against Applicant for any act or offense it may have committed prior to the date of this letter in connection with the anticompetitive activity being reported." In rare cases in which there is a significant lapse in time between the date the applicant discovered the anticompetitive activity being reported and the date the leniency application was made, and hence there is a significant lapse in time between the date the applicant was required to take prompt and effective action to terminate its participation in the conspiracy and the date the applicant reported the activity to the Division, the Division reserves the right to grant conditional leniency only up to the date the applicant represents it terminated its participation in the activity. Thus, in such cases, the Division also likely will insist on insertion of a discovery date and a termination date in paragraph #1 of the corporate conditional leniency letter. The discovery date and termination date representations would be that the applicant "discovered the anticompetitive activity being reported in or about [month/year] and terminated its participation in the activity in or about [month/year]."[14] The applicant bears the burden of proving the accuracy of this representation.[15]

Termination of Participation in Anticompetitive Activity

13. ***What constitutes "prompt and effective action to terminate [the applicant's] participation in the anticompetitive activity being reported upon discovery of the activity?"***

The model corporate conditional leniency letter requires a leniency applicant to promptly terminate its participation in the anticompetitive activity being reported upon

[14] *See* n.2, Model Corporate Conditional Leniency Letter.

[15] Model Corporate Conditional Leniency Letter, paragraph #1. ("Applicant agrees that it bears the burden of proving its eligibility to receive leniency, including the accuracy of the representations made in this paragraph and that it fully understands the consequences that might result from a revocation of leniency as explained in paragraph 3 of this Agreement.") Logically, the applicant, as the party seeking leniency and representing that it is eligible, has the burden of establishing its eligibility for leniency.

discovering the illegal conduct.[16] This prerequisite to obtaining leniency exists because, as a matter of good public policy, the Division does not believe that it would be appropriate to provide leniency to a company that discovers illegal conduct but then elects to continue engaging in that conduct. What constitutes prompt and effective action will, of course, depend on the particular circumstances in each leniency matter. A primary consideration is what steps are taken by management in response to the discovery of the anticompetitive activity being reported. For example, a company must not use managers or executives who were involved in the anticompetitive activity to investigate the activity, to formulate the company's response to the discovery of such activity, or to determine the appropriate disciplinary action against employees who participated in the activity. Other considerations are the size of the applicant corporation, its corporate structure, the complexity of its operations involved in the reported activity (including its geographic scope), and the nature of the reported activity.

A company terminates its part in anticompetitive activity by stopping any further participation in that activity, unless continued participation is with Division approval in order to assist the Division in its investigation. The Division will not disqualify a leniency applicant whose illegal conduct ended promptly after it was discovered merely because the applicant did not take some particular action. Moreover, as an exercise of prosecutorial discretion, if the Division was persuaded that the company and its high-level management had done everything that could reasonably be expected of them to terminate the company's involvement in the anticompetitive activity being reported, the Division would not revoke a company's conditional acceptance into the leniency program because a lower-level employee in one of the company's remote offices continued for some short period of time to have conspiratorial contacts with his or her counterpart. On the other hand, if any of the applicant's executives or high-level managers who were members of the conspiracy prior to discovery, continue to act in furtherance of the conspiracy despite that company's remedial actions, then the company should recognize that the Division may decide that the applicant did not promptly and effectively end its participation in the conspiracy.

A company that seeks a marker from the Division immediately after discovering anticompetitive conduct, and that effectively terminates its involvement in that activity at about the same time, will be viewed by the Division as having taken prompt and effective action. To date, almost every company that has sought leniency from the Division has done so shortly after discovering the anticompetitive activity being reported. On the other hand, an applicant that discovers anticompetitive activity but, instead of reporting the activity to the Division, keeps the culpable employees in the same positions with no repercussions or inadequate supervision and fails to prevent those employees from continuing to engage in the anticompetitive activity, can expect the Division to decline to grant it conditional leniency. As with the discovery representation, the applicant has the

[16] *Id.* ("Applicant represents . . . that . . . it . . . took prompt and effective action to terminate its participation in the anticompetitive activity being reported upon discovery of the activity.")

burden of proving that it took prompt and effective action, and will not receive final leniency unless it satisfies its burden of proof.[17]

Leniency applicants most commonly effectuate termination by reporting the anticompetitive activity to the Division and refraining from further participation - unless continued participation is with Division approval. Applicants may be asked to assist the Division in the conduct of a covert investigation, by, for example, participating in consensually monitored discussions with other members of the conspiracy.[18] Whether the Division's investigation is overt or covert, however, there is a risk of obstruction resulting from unauthorized disclosures about the application or the investigation. Therefore, at the outset of the leniency application, the applicant should discuss with the Division staff who within the company can be told about the leniency application as well as when and how they should be informed.

Not the Leader or Originator of the Activity

Part A of the Corporate Leniency Policy, section A6, requires that "[t]he corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity." Similarly, Part B of the Corporate Leniency Policy, section B7, requires that:

> The Division determine[] that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward.

The model corporate conditional leniency letter incorporates this requirement in paragraph #1, which requires the applicant to represent that it "did not coerce any other party to participate in the anticompetitive activity being reported and was not the leader in, or the originator of, the activity." As with the discovery and termination representations, the applicant bears the burden of proving the accuracy of this representation.[19]

14. *How does the Division define what it means to be "the leader in, or originator of, the activity"?*

The leniency policy refers to "*the* leader" and "*the* originator of the activity," rather than "*a"* leader or "*an*" originator. Applicants are disqualified from obtaining

---

[17] *Id.*, *supra* note 15.

[18] When an applicant's employees are participating in cartel meetings and communications at the direction of the Antitrust Division to assist with a covert investigation, the employees are deemed to be agents of the Antitrust Division under U.S. law and are no longer deemed co-conspirators.

[19] Model Corporate Conditional Leniency Letter, paragraph #1, *supra* note 15.

leniency only if they were clearly the single organizer or single ringleader of a conspiracy. If, for example, there are two ringleaders in a five-firm conspiracy, then all of the firms, including the two leaders, are potentially eligible for leniency. Or, if in a two-firm conspiracy, each firm played a decisive role in the operation of the cartel, both firms may qualify for leniency. In addition, an applicant will not be disqualified under this condition just because it is the largest company in the industry or has the greatest market share if it was not clearly the single organizer or single ringleader of the conspiracy. Wherever possible, the Division has construed or interpreted its program in favor of accepting an applicant into the leniency program in order to provide the maximum amount of incentives and opportunities for companies to come forward and report their illegal activity.

Cooperation Obligations

15. ***What are the corporate applicant's cooperation obligations?***

Type A leniency requires that "[t]he corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation." Type B leniency requires that "[t]he corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation that advances the Division in its investigation." Both Type A and Type B leniency require that "[t]he confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials." Paragraph #2 of the model corporate conditional leniency letter describes specific cooperation obligations of the applicant, such as provision of documents, information, and materials wherever located; using its best efforts to secure the cooperation of its current directors, officers, and employees;[20] and paying restitution to victims.

Production of Attorney-Client or Work-Product Privileged Communications or Documents

16. ***As part of the applicant's cooperation obligations, will the applicant be required to provide communications or documents protected by the attorney-client privilege or work-product doctrine?***

Paragraphs #2 and #4 of the model corporate conditional leniency letter state that the applicant and its directors, officers, and employees are not required to produce communications or documents protected by the attorney-client privilege or work-product doctrine as part of their cooperation. Moreover, as stated in the introductory paragraph of the model leniency letter, the Division does not consider disclosures made by counsel in furtherance of the leniency application to constitute a waiver of the attorney-client privilege or the work-product privilege. While the Division does not require or request

[20] In specific cases, the Division, in its discretion, may also agree to cover former employees. See discussion at question 19 below.

the production of privileged communications or documents and does not refuse to grant leniency because a corporation has not produced such privileged information, some corporations, after consulting its counsel, have concluded that a voluntary disclosure of privileged communications and/or documents was in the best interest of the corporation.

Effect of Refusal of Individual Executives to Cooperate

17. ***If one or more individual corporate executives refuse to cooperate, will the corporate applicant be barred from leniency on the basis that the confession is no longer a "corporate act" or that the corporation is not providing "full, continuing, and complete" cooperation?***

In order for the confession of wrongdoing to be a "corporate act" and in order for the cooperation to be considered "full, continuing, and complete," the corporation must, in the Division's judgment, be taking all legal, reasonable steps to cooperate with the Division's investigation. The model corporate conditional leniency letter requires the company to use "its best efforts to secure the ongoing, full, and truthful cooperation of [its] directors, officers and employees."[21] If the corporation is unable to secure the full and truthful cooperation of one or more individuals, that would not necessarily prevent the Division from granting the leniency application. However, the number and significance of the individuals who fail to cooperate, and the steps taken by the company to secure their cooperation, would be relevant to the Division's determinations of whether there is a corporate confession, whether the corporation's cooperation is truly "full, continuing, and complete," and whether the Division is receiving the benefit of the bargain if certain key executives are not cooperating. Of course, in such situations, the non-cooperating individuals would lose the protection given to cooperating employees under the corporate conditional leniency letter, and the Division would be free to prosecute such individuals for the antitrust crime and any related offenses.

Definition of Current Employees

18. ***How is "current director, officer, or employee" defined for purposes of the cooperation obligations and leniency 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. Thus, leniency coverage for individuals who are directors, officers and employees of the applicant at the time the letter is signed will continue even if they leave their employment as long as they satisfy the obligations of the corporate conditional leniency letter.

[21] Model Corporate Conditional Leniency Letter, paragraph #2(c).

Coverage of Former Employees

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

The Corporate Leniency Policy does not refer to former directors, officers or employees, so the Division is under no obligation to grant leniency to those former representatives. However, the Division has the authority to agree not to prosecute former directors, officers and employees who come forward to cooperate and often reaches such agreements. It is therefore possible, and in many cases advisable, for the applicant to seek to include in the corporate conditional leniency letter protection for former directors, officers or employees or certain named former directors, officers, or employees on the same basis as current ones. The model letter provides optional language for the inclusion of former directors, officers or employees in paragraphs #2(c)-(f), #3, and #4. As noted in footnote 3 of the model corporate conditional leniency letter, whether the Division includes former directors, officers, or employees in the agreement depends on a number of factors, such as whether the applicant is interested in protecting these persons and, most importantly, whether it has the ability to secure the cooperation of key former directors, officers, and employees.

Restitution

20. ***What is the meaning of the qualifier in the Corporate Leniency Policy that "[w]here possible, the corporation makes restitution to injured parties"?***

There is a strong presumption in favor of requiring restitution in leniency situations. Restitution is excused only where, as a practical matter, it is not possible. Examples of situations in which an applicant might be excused from making restitution include situations where the applicant is in bankruptcy and is prohibited by court order from undertaking additional obligations, or where there was only one victim of the conspiracy and it is now defunct. Another example of a situation where the Division will not require the applicant to pay full restitution is if doing so will substantially jeopardize the organization's continued viability. Paragraph #2(g) of the model letter requires that the applicant make "all reasonable efforts, to the satisfaction of the Antitrust Division, to pay restitution." Thus, the applicant must demonstrate to the Division that it has satisfied its obligation to pay restitution before it will be granted final leniency. Restitution is normally resolved through civil actions with private plaintiffs. Under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, Title 2, §§ 211-214, 118 Stat. 661, 666-668, a leniency applicant may qualify for detrebling of damages if the applicant cooperates with plaintiffs in their civil actions while the applicant's former co-conspirators will remain liable for treble damages on a joint and several basis.

No Criminal Case

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

In certain cases where a corporation has otherwise met the requirements for leniency and has agreed to pay restitution, the Division may ultimately determine that either (1) the leniency applicant has not engaged in any criminal antitrust conduct or (2) even though the leniency applicant has engaged in criminal antitrust conduct, prosecution of the other conspiracy participants is not justified under the Principles of Federal Prosecution given the weakness of the evidence or other problems with the case. The issue has arisen as to whether, in such cases, the leniency applicant still has to pay restitution as agreed in the corporate conditional leniency letter.

If the Division's investigation ultimately reveals that the leniency applicant has not engaged in any criminal antitrust conduct, the Division will not grant leniency because it is unnecessary. Obligations placed on the applicant by the Leniency Policy or the applicant's conditional leniency letter with the Division no longer apply once the Division determines there is no underlying criminal antitrust conduct. In such cases, the Division will so advise the applicant in writing and the applicant will have no duty to pay restitution. If the leniency applicant has already paid restitution or is in the process of doing so, the applicant must resolve the matter with the recipient. Once the Division decides not to grant leniency, the applicant has no duty toward the Division, nor does the Division have any duty to help "reverse" any steps taken by the applicant to make restitution. Due to the Division's use of a marker system, however, this situation is much less likely to occur today. Through the marker system, the applicant has the opportunity to conduct a thorough internal investigation and the Division has the opportunity to interview key corporate executives before a conditional leniency letter is issued. Thus, any issues regarding whether a criminal antitrust violation occurred should be resolved during the marker stage.

If, on the other hand, the Division concludes that the leniency applicant has engaged in criminal antitrust activity and conditionally grants the leniency application, but later closes the investigation without charging any other entity in the conspiracy, the obligation to pay restitution will remain in effect. In such a case, the Division will notify the leniency applicant and the subjects of the investigation in writing that the investigation has been closed. In such cases, the leniency applicant may withdraw its application if it so chooses, and, if it does, the obligations undertaken by the applicant pursuant to the conditional leniency letter - including the payment of restitution - will no longer be in effect. If the applicant withdraws its application, the Division, for its part, will technically no longer be prohibited from prosecuting the applicant and will not provide any additional assurances of non-prosecution. Again, the Division will not assist in restoring any restitution already paid if the leniency application is withdrawn. Moreover, if the applicant chooses to withdraw its leniency application, it will not qualify for detrebling of civil damages under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004. Also, once an applicant has fulfilled all of the conditions for

leniency and the Division has issued a final leniency letter, the Division does not permit the leniency recipient to withdraw its leniency application.

Foreign Parties

22. *What are the applicant's restitution obligations to foreign parties in international conspiracies?*

The 2008 revisions to the model corporate conditional leniency letter explicitly recognize the holdings of F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) and Empagran S.A. v. F. Hoffmann-La Roche Ltd., 417 F.3d 1267 (D.C. Cir. 2005), that damages for violations of the Sherman Antitrust Act do not include foreign effects independent of and not proximately caused by any adverse domestic effect. Paragraph #2(g) of the model letter now states: "However, Applicant is not required to pay restitution to victims whose antitrust injuries are independent of any effects on United States domestic commerce proximately caused by the anticompetitive activity being reported."

Leniency for Corporate Directors, Officers, and Employees

23. *What are the conditions for leniency protection for the applicant's directors, officers, and employees?*

If a corporation qualifies for Type A leniency, all directors, officers, and employees of the corporation who admit their involvement in the criminal antitrust violation as part of the corporate confession will also receive leniency if they admit their wrongdoing with candor and completeness and continue to assist the Division throughout the investigation. In addition, the applicant's directors, officers, and employees who did not participate in the conspiracy but who had knowledge of the conspiracy and cooperate with the Division are also covered by the conditional leniency letter, as detailed below. If their corporation qualifies for Type B leniency, the Corporate Leniency Policy states that individuals who come forward with the corporation will still be considered for immunity from criminal prosecution on the same basis as if they had approached the Division individually. In practice, however, the Division ordinarily provides leniency to all qualifying current employees of Type B applicants in the same manner that it does for Type A applicants.

Paragraph #4 of the corporate conditional leniency letter details the specific conditions for leniency protection for the applicant's directors, officers, and employees who had knowledge of, or participated in, the anticompetitive activity being reported by the applicant. The conditions are: (1) verification of the applicant's representations in paragraph #1 of the corporate conditional leniency letter; (2) the applicant's full, continuing, and complete cooperation as defined in paragraph #2 of the letter; (3) admission by the pertinent director, officer, or employee of his or her knowledge of, or participation in, the anticompetitive activity being reported; and (4) the individual's full and truthful cooperation with the Division in its investigation of the activity. The specific

cooperation obligations of the individuals are also defined in paragraph #4 of the corporate conditional leniency letter, such as the provision of documents, records and other materials and information; participation in interviews; and the provision of testimony. As noted below, the Division reserves the right to revoke the conditional protections of the corporate conditional leniency letter with respect to any director, officer, or employee who the Division determines caused the corporate applicant to be ineligible for leniency, who continued to participate in the anticompetitive activity being reported after the corporation took action to terminate its participation in the activity and notified the individual to cease his or her participation in the activity, or who obstructed or attempted to obstruct an investigation of the anticompetitive activity at any time, whether the obstruction occurred before or after the date of the corporate conditional leniency letter.[22]

III. Criteria under the Leniency Policy for Individuals

24. ***What are the criteria for leniency under the Leniency Policy for Individuals?***

An individual who approaches the Division on his or her own behalf to report illegal antitrust activity may qualify for leniency under the Leniency Policy for Individuals. As with a corporate applicant, an individual leniency applicant is required to admit to his or her participation in a criminal antitrust violation.[23] The individual must not have approached the Division previously as part of a corporate approach seeking leniency for the same conduct. Once a corporation attempts to qualify for leniency under the Corporate Leniency Policy, individuals who come forward and admit their involvement in the criminal antitrust violation as part of the corporate confession will be considered for leniency solely under the provisions of the Corporate Leniency Policy. They may not be considered for leniency under the Leniency Policy for Individuals.

Leniency will be granted to an individual reporting illegal antitrust activity before an investigation has begun if the following three conditions are met.[24]

---

[22] See Section V below and Model Corporate Conditional Leniency Letter, paragraph #4.

[23] See also discussion at question 6 above regarding the Division's policy regarding coverage of non-antitrust crimes, which applies to individual leniency applicants as well as to corporate applicants.

[24] As with the model corporate conditional leniency letter, the model individual conditional leniency letter provides that the leniency protection applies to "any act or offense [the applicant] may have committed prior to the date of this letter in connection with the anticompetitive activity being reported." Model Individual Conditional Leniency Letter, paragraph #3. With respect to an individual leniency applicant, if a significant lapse in time occurs between the applicant's termination of his or her participation in the anticompetitive activity being reported and the date the applicant reported the activity to the Division, the Division reserves the right to grant conditional

(1) At the time the individual comes forward to report the activity, the Division has not received information about the activity being reported from any other source.

(2) The individual reports the wrongdoing with candor and completeness and provides full, continuing, and complete cooperation to the Division throughout the investigation.

(3) The individual did not coerce another party to participate in the activity and clearly was not the leader in, or the originator of, the activity.

Any individual who does not qualify for leniency under the individual or corporate leniency policies may still be considered for statutory or informal immunity.

Paragraph #2 of the model individual conditional leniency letter describes specific cooperation obligations of the individual applicant, such as the production of documents, records and other materials and information; participation in interviews; and provision of testimony. As is the case with a corporate applicant, an individual applicant is not required, and will not be asked, to produce communications or documents privileged under the attorney-client privilege or work-product doctrine.[25]

Regarding the leadership condition, an individual leniency applicant is required to represent in his or her leniency letter that, "in connection with the anticompetitive activity being reported, [he/she] did not coerce any other party to participate in the activity and was not the leader in, or the originator of, the activity" in order to establish his or her eligibility for leniency. The applicant bears the burden of proving the accuracy of this representation.[26] As with a corporate applicant, an individual applicant would only be disqualified from obtaining leniency based on leadership role if he or she is clearly the single organizer or single ringleader of a conspiracy. Accordingly, in situations where the conspirators are viewed as co-equals or where there are two or more conspirators that

---

leniency only up to the date applicant terminated his or her participation in the activity. Model Individual Conditional Leniency Letter, n.2.

[25] Model Individual Conditional Leniency Letter, paragraph #2(a), (d). Of course, as with a corporate applicant, an individual, after consulting with counsel, may conclude that a voluntary disclosure of privileged communications or documents is in his or her best interest.

[26] Model Individual Conditional Leniency Letter, paragraph #1 ("Applicant agrees that [he/she] bears the burden of proving [his/her] eligibility to receive leniency, including the accuracy of the representations made in this paragraph and that [he/she] fully understands the consequences that might result from a revocation of leniency as explained in paragraph 3 of this Agreement.").

are viewed as leaders or originators, any of the participants may qualify under the Individual Leniency Policy.

IV. The Conditional Leniency Letter

25. ***What is the conditional leniency letter, and why is it conditional?***

The conditional leniency letter is the initial leniency letter given to a leniency applicant. The Division has a model corporate conditional leniency letter and a model individual conditional leniency letter.[27] The initial grant of leniency pursuant to the letters is conditional because a final grant of leniency depends upon the applicant performing certain obligations over the course of the criminal investigation and any resulting prosecution of co-conspirators, such as establishment of its eligibility; its full, truthful and continuing cooperation; and its payment of restitution to victims, as set forth in the letter, and the final grant also depends on the Division verifying the applicant's representations regarding its eligibility. Only those who qualify for leniency should receive its rewards. After all of the applicant's obligations have been satisfied (usually after the investigation and prosecution of co-conspirators have been concluded) and the Division has verified the applicant's representations regarding eligibility, the Division will issue the applicant a final leniency letter confirming that the conditions of the conditional leniency letter have been satisfied and that the leniency application has been granted.

The conditional nature of the leniency initially granted is reflected in the model leniency letters. The introductory paragraph of the model corporate and individual conditional leniency letters states that the agreement "is conditional." Further, the letters state in paragraph #3 that, "[s]ubject to verification of Applicant's representations in paragraph 1 above, and subject to [Applicant's/its] full, continuing, and complete cooperation, as described in paragraph 2 above, the Antitrust Division agrees conditionally to accept Applicant into [Part A/Part B of the Corporate Leniency Program/the Individual Leniency Program]." The letters also state in the introductory paragraph that the agreement "depends upon Applicant (1) establishing that [it/he or she] is eligible for leniency as [it/he or she] represents in paragraph 1 of [the] Agreement, and (2) cooperating in the Antitrust Division's investigation as required by paragraph 2 of [the] Agreement." As noted above, the applicant, as the party seeking leniency, has the burden of establishing its eligibility for leniency.[28] The introductory paragraph further notes that, "[a]fter Applicant establishes that [it/he or she] is eligible to receive leniency and provides the required cooperation, the Antitrust Division will notify Applicant in writing that [it/he or she] has been granted unconditional leniency."

---

[27] Both model conditional letters are available at http://www.usdoj.gov/atr/public/criminal/leniency.htm.

[28] *See supra* n.15.

Although many of the leniency requirements are fulfilled during the criminal investigation, 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 program. The Division's conditional leniency letters address that need. In contrast, many voluntary disclosure programs of other prosecuting agencies do not provide any upfront assurances regarding non-prosecution. Thus, the alternative to the conditional letter would be for the Division to give no assurances until the conclusion of the investigation and prosecution of co-conspirators. The conditional leniency letters, however, provide companies and their executives with a transparent and predictable disclosure program, and have been very effective both for the Division in setting forth the requirements of leniency and for applicants in meeting those requirements.

V. The Final Leniency Letter

26. ***How and when does an applicant receive a final, unconditional leniency letter?***

As noted above and in the model corporate and individual conditional leniency letters, after the applicant "establishes that [it/he/she] is eligible to receive leniency," as represented in paragraph #1 of the conditional leniency letter, "and provides the required cooperation," as set forth in paragraph #2 of the conditional leniency letter, "the Antitrust Division will notify Applicant in writing that [it/he/she] has been granted unconditional leniency."[29] Normally this would occur after the investigation and any resulting prosecutions of the applicant's co-conspirators are completed.

27. ***Before an applicant is granted final, unconditional leniency, under what circumstances can the Division revoke an applicant's conditional leniency, and will the Division provide the applicant with any advance notice of a staff recommendation to revoke conditional leniency?***

If the Division determines, before it grants an applicant a final, unconditional leniency letter, that the applicant "(1) contrary to [its/his/her] representations in paragraph 1 of [the conditional leniency letter], is not eligible for leniency or (2) has not provided the cooperation required by paragraph 2 of [the conditional leniency letter]," the Division may revoke the applicant's conditional acceptance into the leniency program.[30] Before the Division makes a final determination to revoke a corporate applicant's conditional leniency, it will notify applicant's counsel in writing of staff's recommendation to revoke the leniency and provide counsel with an opportunity to meet with the staff and Office of

[29] Model Corporate Conditional Leniency Letter, introductory paragraph; Model Individual Conditional Leniency Letter, introductory paragraph.

[30] Model Corporate Conditional Leniency Letter, paragraph #3; Model Individual Conditional Leniency Letter, paragraph #3.

Criminal Enforcement regarding the revocation.[31] During the time that a recommendation to revoke an applicant's 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 be revoked. In the history of the Division's leniency program, the Division has revoked only one conditional leniency letter out of the more than 100 conditional leniency letters entered.

28. ***When can an applicant or its employees judicially challenge a Division decision to revoke conditional leniency?***

Paragraph #3 of the model corporate and individual conditional leniency letters states that the applicant "understands that the Antitrust Division's Leniency Program is an exercise of the Division's prosecutorial discretion, and [it/he/she] agrees that [it/he/she] may not, and will not, seek judicial review of any Division decision to revoke [its/his/her] conditional leniency unless and until [it/he/she] has been charged by indictment or information for engaging in the anticompetitive activity being reported." Paragraph #4 of the model corporate conditional leniency letter also notes that "[j]udicial review of any Antitrust Division decision to revoke [an individual's] conditional non-prosecution protection granted [under the corporate conditional leniency letter] is not available unless and until the individual has been charged by indictment or information." The Division's leniency program is an exercise of prosecutorial discretion generally not subject to judicial review. Accordingly, the proper avenue to challenge a revocation of a leniency letter is to raise the letter as a defense post-indictment. Stolt-Nielsen, S.A. v. United States, 442 F.3d 177, 183-187 (3d Cir. 2006).

29. ***If a corporate conditional leniency letter is revoked, what will happen to the protection provided in the letter for the corporation's directors, officers, and employees?***

If the Division revokes a corporation's conditional acceptance into the leniency program, the conditional leniency letter it received "shall be void."[32] Thus, the protection provided to employees pursuant to the letter no longer exists. However, as a matter of prosecutorial discretion, even if the Division revokes a company's conditional leniency letter, the Division will elect not to prosecute individual employees, so long as they had fully cooperated with the Division prior to the revocation and, in the Division's view, were not responsible for the revocation.

---

[31] Model Corporate Conditional Leniency Letter, paragraph #3. The individual conditional corporate leniency letter provides this notice will be given absent exigent circumstances, such as risk of flight. Model Individual Conditional Leniency Letter, paragraph #3.

[32] Model Corporate Conditional Leniency Letter, paragraph #3.

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

As noted in the model corporate conditional leniency letter, if an director, officer, or employee covered by the leniency letter fails to comply with his or her obligations under the letter, the Division may revoke any conditional leniency, immunity, or non-prosecution granted to the individual under the letter.[33] Also, the Division reserves the right to revoke the conditional non-prosecution protections of the corporate conditional leniency letter with respect to any director, officer, or employee who the Division determines caused the corporate applicant to be ineligible for leniency under paragraph #1 of the corporate conditional leniency letter, who continued to participate in the anticompetitive activity being reported after the corporation took action to terminate its participation in the activity and notified the individual to cease his or her participation in the activity,[34] or who obstructed or attempted to obstruct an investigation of the anticompetitive activity at any time, whether the obstruction occurred before or after the date of the corporate conditional leniency letter.[35]

31. ***What notice or process will be given to an individual if the Division is contemplating revoking his or her conditional protections provided in a corporate conditional leniency letter?***

Absent exigent circumstances, such as risk of flight, before the Division makes a final determination to revoke an individual's conditional leniency, immunity, or non-prosecution provided under a corporate conditional leniency letter, it will notify in writing the individual's counsel and the corporate applicant's counsel of staff's recommendation to revoke the protections provided in the letter and provide counsel with an opportunity to meet with the staff and Office of Criminal Enforcement regarding the revocation.[36] During the time that a revocation recommendation 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 him or her should his or her conditional protections be revoked. If the Division revokes

---

[33] Model Corporate Conditional Leniency Letter, paragraph #4.

[34] Such notice ordinarily is part of the corporation's prompt and effective action to terminate its participation in the anticompetitive activity being reported. It need not be specific to the individual or the individual's particular conduct so long as it reasonably notifies the director, officer, or employee that he or she should not participate in the illegal activity. General instructions or guidance by the corporation not to engage in cartel or illegal conduct generally, made prior to the corporation's discovery of the anticompetitive activity being reported, do not constitute such notice for purposes of this provision.

[35] Model Corporate Conditional Leniency Letter, paragraph #4.

[36] *Id.*

conditional leniency, immunity, or non-prosecution granted to a director, officer, or employee of a corporate applicant, the Division may use against such individual any evidence provided at any time by the corporate applicant, the individual, or other directors, officers, or employees of the applicant.[37]

VI. Confidentiality

32. *What confidentiality assurances are given to leniency applicants?*

The Division holds the identity of leniency applicants and the information they provide in strict confidence, much like the treatment afforded to confidential informants. Therefore, the Division does not publicly disclose the identity of a leniency applicant or information provided by the applicant, absent prior disclosure by, or agreement with, the applicant, unless required to do so by court order in connection with litigation.

33. *Will the Division disclose information from a leniency applicant to a foreign government?*

The leniency program has been the Division's most effective generator of international cartel prosecutions. Invariably, however, when a company is considering whether to report its involvement in international cartel activity, a concern is raised as to whether the Division will be free to disclose the information to any foreign governments in accordance with its obligations under bilateral antitrust cooperation agreements. As noted above, the Division's policy is to treat the identity of, and information provided by, leniency applicants as a confidential matter, much like the treatment afforded to confidential informants. Moreover, the Division has an interest in maximizing the incentives for companies to come forward and self-report antitrust offenses. In that vein, it would create a strong disincentive to self-report and cooperate if a company believed that its self-reporting would result in investigations in other countries and that its cooperation - in the form of admissions, documents, employee statements, and witness identities - would be provided to foreign authorities pursuant to antitrust cooperation agreements, and then possibly used against the company.

While the Division has been at the forefront in advocacy and actions to enhance international cartel enforcement, and the Division has received substantial assistance from foreign governments in obtaining foreign-located evidence in a number of cases, in the final analysis, the Division's overriding interest in protecting the viability of the leniency program has resulted in a policy of not disclosing to foreign antitrust agencies information obtained from a leniency applicant unless the leniency applicant agrees first to the disclosure. This aspect of the Division's leniency nondisclosure policy will not insulate the leniency applicant from proceedings in other countries. But it will ensure that cooperation provided by a leniency applicant will not be disclosed by the Division to its foreign counterparts pursuant to antitrust cooperation agreements without the prior

[37] *Id.*

consent of the leniency applicant. The Division first announced this policy in 1999, and it is the Division's understanding that virtually every other jurisdiction that has considered the issue has adopted a similar policy.