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PERSPECTIVE

US DOJ gives important new guidance for antitrust leniency

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I What is ACPERA?

In 2004, Congress enacted the Antitrust Criminal Penalty Enhancement and Reform Act (“ACPERA”). ACPERA provides the basis for the Department of Justice Antitrust Division’s (“Antitrust Division”) Corporate Leniency Policy (“Leniency Program”). Its enactment resulted in over nine billion in criminal fines and penalties, in addition to jail terms for more than 250 individuals – according to Justice News (June 26, 2020).

ACPERA offers companies that have engaged in anticompetitive conduct an opportunity to secure amnesty through the Leniency Program. It does so by eliminating treble damages and limiting damages to only those that are solely attributable to the commerce done by the applicant. (Pub. L. 108-237, § 213(a), 118 Stat. 666). For this reason, the Antitrust Division sees ACPERA as a compelling incentive to self-report antitrust violations by offending companies.

II. Recent Changes to Leniency Program FAQs

On April 4, the Antitrust Division revised its Leniency Program’s Frequently Asked Questions (“FAQs”), which were originally published in 2008 and most recently updated in 2017. The guidance was accompanied by revised model leniency letters and the consolidation of the Leniency Program in the Antitrust Division’s Chapter of the Justice Manual, 7-3.000 – Criminal Enforcement.



The Department of Justice building in Washington on Nov. 13, 2021. | The New York Times News Service

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One significant change brought by the updated FAQs is enhanced guidance on restitution, that is, what leniency applicants must do to satisfy the requirement in ACPERA to retribute victims.

1. Best efforts to pay restitution

The updated FAQs requires a company which seeks leniency to make “best efforts” to pay res-

titution to its victims. The FAQs suggest that exceptions may be made to this requirement when providing full restitution is impossible in the specific circumstances of the applicant or the victim. *See* FAQ No. 34. For instance, full restitution may be impossible when the applicant is in bankruptcy and prohibited by court order from making payments. *Id.* In addition to using “best efforts” to make

restitution to victims, a leniency applicant must now also use “best efforts” to “remediate the harm caused by the illegal activity.” *See* FAQ No. 48.

The updated FAQs 34 and 48 together offer more clarity to show that the actual payment of restitution is excused in very narrow circumstances. Further, the remediation requirement also covers any non-monetary harms that may

not be covered by the restitution requirement—most importantly, the possibility of future harms.

2. Timing of 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. See FAQ No. 35.

A welcome change to the unclear “making efforts to pay restitution,” the concept of paying full restitution before receiving a final leniency letter bolsters transparency of the process. In return, it only seeks the offending company’s good faith, timely, and truthful cooperation in investigations and prosecution. It establishes the key dynamic of resolution and negotiation by including the claimants or victims early in the process. A full payment of restitution in return for a final leniency letter brings balance to the previous regime where victims must rely on civil litigation for remedies. Complex antitrust litigation tends to be long and protracted, delaying justice for those harmed by illegal price-fixing conspiracies and other anti-competitive conduct.

3. Satisfactory cooperation

Under the updated FAQs, “satisfactory cooperation” by a leniency applicant requires the applicant to provide the civil plaintiff with “a full account” of all potentially relevant facts known to it and all potentially relevant documents. See FAQ No. 40; 15 U.S.C. §§7a-1(b) (1)-(3). Further, this cooperation must be timely and early. On the other hand, this updated FAQ also states that an applicant should not be disqualified from ACPERA benefits for failing to respond to unreasonable requests by civil plaintiffs.

While the updated FAQs aim to promote self-reporting, yet again, they offer much needed clarity to a term that is yet to be interpreted widely. To date, only one court has entered an order finding satisfactory cooperation and a limitation of damages pursuant to ACPERA. However, it did so without an explanation. *In re Sulfuric Acid Antitrust Litig.*, No. 03 C 4576 (N.D. Ill. July 7, 2005); see ABA section of Antitrust Law, Antitrust Law Developments 758 (6th ed. 2007). Other judicial guidance has been sparse, covering situations where a defendant egregiously violated discovery obligations, *In re After-*

market Auto. Lighting Prod. Antitrust Litig., 276 F.R.D. 364 (C.D. Cal. 2011), and where plaintiffs unsuccessfully sought to force an applicant to disclose its identity. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 599 F. Supp. 2d 1179 (N.D. Cal. 2009). Although the final determination concerning ACPERA is made by the court at the conclusion of civil litigation, the updated FAQs unequivocally provide potential leniency applicants with more clarity about what they must do in the early stages. This will promote transparent dealings and strengthen civil enforcement.

III. Impact and moving forward

There is no doubt that the Antitrust Division’s latest changes to the FAQs enhance transparency in the Antitrust Division’s leniency regime. It should also make the Leniency Program more attractive to companies while ensuring civil plaintiffs get a “full account” of the facts. See FAQ No. 40. After all, the central purpose of ACPERA is to bolster the leniency program already used by the Antitrust Division so that antitrust prosecutors can more effectively go after antitrust violators, while

ensuring that victims of the crime are not forgotten. See Cong. Rec. at H3660 (June 2, 2004). Overall, the updated FAQs shows us that the Antitrust Division is willing to make its Leniency Program more attractive to potential applicants, while also ensuring that it has ample resources to litigate any such contentious matters when necessary, according to Justice News (April 4, 2022).

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