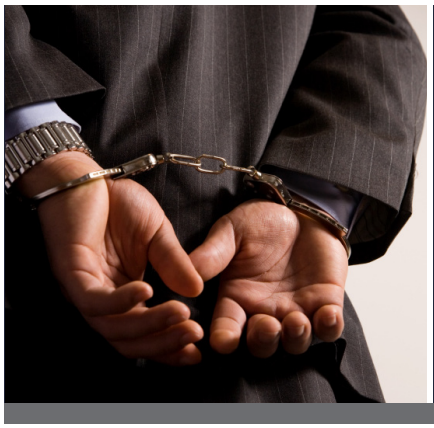

The Antitrust Division's Amnesty Program: An Update

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The Department of Justice's Antitrust Division Criminal Enforcement Section had another banner year in 2010. The Section collected hundreds of millions of dollars in fines through criminal price-fixing investigations involving the TFT-LCD (Flat-Panel) industry, international-airline transportation, environmental services, and municipal bonds, among others. The Section also issued dozens of indictments and secured several dozen corporate and individual pleas, while continuing to press for jail time for non-cooperative, culpable officers and employees.

The Division directly attributes the Section's successful cartel enforcement to its Amnesty Program (or Corporate Leniency Policy as it is formally known).[1] Companies operating in industries tinged by anticompetitive behavior should therefore reacquaint themselves with the Amnesty Program and its synergies with criminal and civil-enforcement activities—particularly because 2010 also brought Congress' reauthorization of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA"), which contains further, civil-suit incentives for companies to "rat out" cartel activity.

The Antitrust Division's Corporate Leniency Policy

In August 1993, the Antitrust Division created its revised Amnesty Program, radically changing the rules of the game for cartel enforcement. Although the DOJ had maintained a corporate-amnesty policy for years, the revised program diverged in at least two critical respects.

First, it expanded the circumstances under which a leniency applicant could receive amnesty. Amnesty became automatic for companies that reported illegal activity before an investigation formally commenced when:

(1) The Division had not already received information about the illegal activity from another source;

(2) The company promptly and effectively terminates its participation;

(3) The company reports the wrongdoing and cooperates in the investigation;

(4) The confession is a corporate act, as opposed to that of individual executives or officials;

(5) The corporation makes appropriate restitution; and

(6) The company did not originate or lead the activity, nor coerce others to participate.

Under the program's "Alternative Requirements for Leniency," even after an investigation had begun, a corporation could receive leniency by being the "first in," if the Division did "not yet have evidence against the company that is likely to result in a sustainable conviction," and if granting leniency would not be unfair to other participants.

Second—and of paramount importance to those making the decision to come forward—senior management could avoid indictment if a corporation qualified for leniency based on a report before an investigation began.

By the numbers: A statistical explosion in cartel enforcement

Enforcement figures from the last two decades reveal the Amnesty Program's jarring impact. Criminal fines have increased significantly since the Program's adoption. Although the Division imposed $1.6 billion in criminal fines in the 1990s, 87% of this amount was collected after 1996. That year, the new Amnesty Program netted a $105 million fine against ADM. That record fine was surpassed in 1999, by a $500 million fine against F. Hoffman La Roche in the Vitamins case. Over the last decade, however,

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the Division has imposed $4.2 billion in fines – more than two-and-a-half times the amount of fines imposed on corporations in the prior decade.

The number and percent of corporate employees imprisoned for antitrust violations, and the length of their sentences, have also increased sharply since the Program's adoption. Unlike the prior decade, in every year since 2002 at least half of the corporate employees sentenced for antitrust crimes received prison time. Nearly two thirds of them received prison time for the period from 2002 through 2009. And remarkably, corporate employees sentenced over the last decade received on average nearly two-and-a-half times the prison time received in the prior decade; with the longest average sentences meted out over the last several years.

Balancing the harms: To report, or not to report?

Over the last decade, however, the Division has imposed $4.2 billion in fines – more than two-and-a-half times the amount of fines imposed on corporations in the prior decade.

Despite the explosion in fines and individual sentences, some strong disincentives to cooperation remain for many companies. For example, given the secrecy of grand-jury proceedings, discerning the availability of "automatic" amnesty under the traditional amnesty tract may require determining whether or not an investigation has actually begun.

And even if a company has confidence that an investigation has not yet begun or, under the alternative requirements for leniency—that there is not yet "evidence against the company that is likely to result in a sustainable conviction"—the company must nevertheless evaluate the likelihood that it can satisfy the other mandatory criteria for leniency. Then, it must balance the perceived benefits of self-reporting against the risks of nondisclosure, including the real impact of a possible indictment of the company – e.g., the ability to continue in business, reputational harm, effects on stock price, fines, and the costs associated with investigation, litigation, and possible conviction. In addition, a company considering participation in the Amnesty Program must also assess other, important issues that self-reporting implicates, including:

- The relationship between the company and the Division;
- The potential waiver of the attorney-client privilege and the impact on privileges arising from work-product doctrine;
- Ongoing criminal exposure for employees who may sue the company for civil damages; and
- Exposure from employees who choose to cooperate with the Division on their own.

Limiting civil liability: The 2010 Reenactment of The Antitrust Criminal Penalty Enhancement and Reform Act of 2004

In 2004, Congress sought to clarify existing civil incentives and encourage self-reporting by passing the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA"). Section 213 of ACPERA limits damages in civil actions brought under Sections 1 or 3 of the Sherman Act (or any similar state law) if the conduct that serves as the basis of the antitrust claims is covered by a leniency agreement. In those cases the plaintiff may recover only actual damages against a leniency applicant and cooperating individuals, but cannot recover treble damages.[2] Cooperation under ACPERA also lets the leniency applicant avoid joint-and-several liability. Shortly before it was set to sunset this past June, President Obama signed legislation extending ACPERA's key amnesty provisions to 2020.[3]

Section 213(b) requires that an antitrust leniency applicant provide "satisfactory cooperation" to civil claimants in order to receive ACPERA's protections. Satisfactory cooperation includes:

- Providing a full account of all potentially relevant facts;
- Furnishing all potentially relevant writings; and
- Being available for, and completely and truthfully responding in, interviews, depositions, and testimony, and using best efforts to secure individuals for interviews, depositions, and testimony.[4]

The Court presiding over the civil action determines whether the leniency applicant or cooperating individual has cooperated sufficiently to avail itself of the limitations on damages. The 2010 reenactment added the requirement to cooperate with civil claimants "without unreasonable delay" following the expiration of any civil stay obtained by the Division.[5]

Despite ACPERA's clarification of incentives, much remains in

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dispute about what constitutes "satisfactory cooperation,"—including at what stage of civil proceedings a leniency applicant or cooperating individual should be required or compelled by the court to assist civil plaintiffs. Unfortunately, there is a paucity of authority on these questions so far, though the following decisions provide some insight on managing the timing of a satisfactory cooperation.

In the pending case *In re TFT-LCD (Flat Panel) Antitrust Litigation,* a class of direct-purchaser plaintiffs moved to compel an unidentified leniency applicant to identify itself in accordance with ACPERA or else forfeit any right to claim reduced civil liability.[6] The prosecutors in the parallel criminal case had confirmed that the DOJ entered into a conditional leniency agreement with a company that manufactured and sold TFT-LCD panels. The plaintiffs sought an order requiring the applicant to immediately disclose its identity and "provide the cooperation it owes Plaintiffs as required by [ACPERA]," or affirmatively state that it would not seek reduced civil liability. The direct purchaser plaintiffs argued that under Section 213, cooperation is "satisfactory" only if provided early in civil litigation. The court denied the motion for the inability to identify a provision in ACPERA cases interpreting the law authorizing the court to compel the amnesty applicant to identify itself and cooperate with plaintiffs.[7] To the contrary, the court concluded that the language of the statute "suggests that the court's assessment of an applicant's cooperation occurs at the time of imposing judgment or otherwise determining liability and damages."[8] At the same time, the court warned that the plaintiffs' argument that the value of cooperation diminishes with time was persuasive, and that plaintiffs were poised to embark upon costly discovery that could be obviated if the unknown leniency applicant agreed to cooperate.

Despite ACPERA's clarification of incentives, much remains in dispute about what constitutes "satisfactory cooperation,"—including at what stage of civil proceedings a leniency applicant or cooperating individual should be required or compelled by the court to assist civil plaintiffs.

In another pending antitrust class action, *In re Municipal Derivatives Litigation,* the antitrust leniency applicant, Bank of America ("BofA"), entered into a formal, written agreement with class counsel rather than relying upon the district court to assess the quality of cooperation *post hoc*. Under the agreement, class counsel agreed not to seek treble damages against BofA in exchange for BofA providing information and evidence pertaining to the alleged conspiracy to rig bids in the municipal-derivatives market.[9] This agreement gave BofA the certainty that it would not face treble damages while giving the class access to information that it might need to survive a *Twombly* motion.

Practical realities: Increased convictions and longer prison sentences

As the number of convictions for cartel activity continues to rise and prison sentences get longer, the practical realities of the Amnesty Program will continue to unfold. So too will the bounds of what cooperation is required to cut off the right to enhanced damages. Savvy corporate counsel interested in mitigating antitrust exposure may be well advised to seek the kind of agreement used in the *Municipal Derivatives Litigation* in order to mitigate civil as well as criminal exposure. Plaintiffs, likewise, should understand the incentives facing amnesty applicants so that, in exchange for helping to clarify the applicant's rights, they may receive something of value in their own antitrust proceedings.

1 *See, e.g.,* Scott Hammond, Deputy Ass't Attorney General, Antitrust Division, U.S. Dep't of Justice, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, Remarks before the Twenty-Fourth Annual National Institute on White Collar Crime (Feb. 25, 2010), http://www.justice.gov/atr/public/speeches/255515.htm.

2 Clayton Act Section 4, 15 U.S.C. § 15 (2006).

3 Pub. L. No. 111-190, 124 Stat. 1275 (2010).

4 Pub. L. No. 108-237, Tit. II, § 213(b).

5 Pub. L. No. 111-190, § 3.

6 618 F.Supp.2d 1194 (N.D. Cal. 2009).

7 *Id.* at 1195-96.

8 *Id.* at 1196.

9 No. 08-cv-2516, 252 F.R.D. 184, ___ , 2008 U.S. Dist. LEXIS 61005, at *8 (S.D.N.Y. Aug. 1, 2008).

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