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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

When You Lose The Race To Corporate Leniency

Kellie Lerner

Elizabeth Friedman

Law360, New York (March 15, 2013, 12:51 PM ET) -- In recent years, the Antitrust Division of the U.S. Department of Justice has successfully incentivized cartelists to come forward and provide cooperation in criminal antitrust investigations through its Corporate Leniency Program. To be eligible for leniency under the program, a corporation must be the first entity to provide the DOJ with valuable information regarding an alleged antitrust conspiracy. However, in the wake of recent criminal investigations in the financial services industry, alternative arrangements have emerged for dilatory cartelists who wish to cooperate with the DOJ but have missed the opportunity for corporate leniency.

For example, in its investigation into anti-competitive activity in the municipal bond investments market, the DOJ has used nonprosecution agreements with increasing frequency. And on Feb. 6, 2013, the DOJ announced its first-ever deferred prosecution agreement with RBS, in which it required the bank to admit and accept responsibility for its role in manipulating Yen Libor and Swiss Franc Libor, pay a $150 million fine and cooperate in the DOJ's ongoing investigation. While it remains to be seen whether the use of NPAs and DPAs is a growing trend or a unique arrangement for targets of antitrust investigations in the financial services industry, this article examines the background and historical use of these agreements and their re-emergence in recent antitrust investigations.

Corporate Leniency, NPAs and DPAs

The Antitrust Division first implemented a leniency program in 1978, and revised it in 1993 with the issuance of a Corporate Leniency Policy to further entice corporations to come forward with antitrust violations. The 1993 revisions provided that: (1) amnesty is automatic if there is no pre-existing investigation; (2) amnesty may still be available even if cooperation begins after the investigation is underway; and (3) all officers, directors, and employees who offer cooperation are protected from criminal prosecution. In 2004, the DOJ further revised the program to provide for de-trebling of antitrust damages for successful leniency applicants who cooperate with civil plaintiffs.

The power to enter into NPAs and DPAs is found in the Speedy Trial Act of 1974, 18 U.S.C. § 3161(h)(2), which provides that time limits under the act are tolled during "[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct." Under an NPA or DPA, the DOJ agrees not to prosecute if the offender agrees to cease its unlawful conduct and undertake cooperation and compliance obligations. The DOJ may also levy fines through such agreements.

NPAs and DPAs have disparate levels of formality. The DOJ is not required to file a criminal charge to enter into an NPA, and thus, a guilty plea or conviction is not required. NPAs typically involve a letter from the government signed by both parties. Meanwhile, to execute a DPA, the government actually files criminal charges but then defers prosecuting the action so long as the offender fulfills its cooperation and compliance obligations detailed in the DPA. These obligations are generally more comprehensive and onerous than those found in NPAs.

Under either mechanism, the government often requires the offending corporation to retain independent monitors to oversee compliance with the agreements, although recently, the DOJ has permitted the use of self-monitoring arrangements. Finally, the government reserves the right to void either an NPA or DPA if the offender commits a similar violation or fails to fully cooperate within a specified probation period of one or more years.

The Division's Previous Use of NPAs and DPAs

Historically, the vast majority of DPAs and NPAs have come out of the DOJ's Criminal Division for violations of the Foreign Corrupt Practices Act. A December 2009 U.S. Government Accountability Office study reported that the Antitrust Division entered into just three NPAs between 1993 and September 2009, while the Criminal Division entered into a total of 49 DPAs and NPAs during the same time period. Ostensibly, the Antitrust Division used DPAs and NPAs sparingly out of concern that they could undermine the power of the Corporate Leniency Policy. To be sure, DPAs and NPAs allow some form of leniency for the second, third or even fourth offender to come forward and cooperate. Thus, providing any form of leniency to late-to-the-table offenders could slow or even thwart the primary purpose of the Corporate Leniency Policy, that is, to incentivize corporations to be the first to come forward with information about antitrust violations.

The Division's Recent Use of NPAs and DPAs: A Sea Change or Special Circumstance?

In 2011, Antitrust Division departed from tradition and entered into four NPAs, a number that exceeded the total number of NPAs entered into by the division in the entire preceding decade. The first of these NPAs was reached with UBS in May 2011, wherein UBS admitted wrongdoing in connection with the division's investigation into antitrust violations in the market for municipal bond investments. The bank also agreed to cooperate with the division's ongoing investigation and to pay restitution, penalties and disgorgement totaling $160 million. Over the following months, the division entered into NPAs with three additional banks in connection with the same investigation. All four NPAs followed the division's December 2010 settlement with Bank of America under the Corporate Leniency Policy, wherein the bank agreed to pay $137.3 million in restitution for its role in the alleged conspiracy.

And most recently, on Feb. 6, 2013, RBS entered into the first-ever DPA with the Antitrust Division (joined by the Criminal Division) in connection with its role in manipulating certain benchmark interest rates. The criminal information filed in connection with the DPA charges RBS not only with wire fraud, but also price fixing in violation of Section 1 of the Sherman Act. Moreover, the "Relevant Considerations" section of the DPA specifically acknowledges "that although RBS was not the first bank to provide the Department with helpful information and did not obtain leniency pursuant to the Antitrust Division's Leniency Policy, RBS provided highly valuable information that expanded and advanced the criminal investigation."

Some question whether the recent use of NPAs and DPAs marks a new trend in the Antitrust Division's enforcement policy, while others view their recent use as a peculiarity of antitrust investigations in the financial services industry. Indeed, a felony charge for a financial institution could lead to government disbarment or the loss of an operating license. These "collateral consequences" have been expressly recognized by the division itself. When speaking about the division's munibonds investigation at a 2012 conference, Deputy Assistant Attorney General Scott Hammond reiterated that charging a regulated financial institution with a felony could have resulted in serious collateral consequences.

This point was further underscored by Attorney General Eric Holder at a recent Senate Judiciary Committee Hearing. When addressing the challenges in prosecuting large financial institutions, Holder explained, "I am concerned that the size of some of these institutions becomes so large that it does become difficult for us to prosecute them when we are hit with indications that if you do prosecute, if you do bring a criminal charge, it will have a negative impact on the national economy, perhaps even the world economy."

Conclusion

The recent use of NPAs and DPAs may indicate some corporate entities are "too big to fail" the Antitrust Division's long-standing Corporate Leniency Policy. While one can surely predict the increased use of these agreements in the division's ongoing investigations in the financial services industry, it remains to be seen whether these lesser forms of leniency will be available to corporations in other industries who lose the race into the division's program.

--By Kellie Lerner and Elizabeth Friedman, Robins Kaplan Miller & Ciresi LLP

Kellie Lerner is a partner and Elizabeth Friedman is an associate in Robins Kaplan's New York office.