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Clarity, Confusion Collide In Antitrust Leniency Overhaul

By **Bryan Koenig**

Law360 (April 25, 2022, 5:02 PM EDT) -- The U.S. Department of Justice Antitrust Division tried earlier this month to clarify and reinvigorate the leniency program undergirding its criminal enforcement in an attempt to spur companies to self-report price-fixing cartels, but attorneys say the DOJ may inadvertently have made participation less enticing.

The changes announced April 4 by antitrust chief Jonathan Kanter include new requirements for "prompt" reporting of violations, remediation of harm caused by antitrust violations and improvements to compliance programs aimed at preventing anti-competitive conduct. But even as the division tried to add clarity to its leniency program, which offers an escape hatch from criminal charges and a reduction of penalties for the first company to report and fully cooperate with prosecutors, attorneys say the agency left plenty of ambiguity about what it takes to qualify for lenient treatment.

Waymaker LLP partner Melissa Meister, a former assistant U.S. attorney and trial attorney with the DOJ's civil frauds section, said the division is still employing the same amount of "squish language," giving prosecutors discretion over whether a company has promptly reported conduct and cooperated fully.

"It still provides lawyers with a lot of opportunities to make arguments" against granting leniency, Meister said.

But a senior Antitrust Division official argued in an interview with Law360 that the changes provide valuable predictability and transparency that the bar will come to appreciate.

"There's no uncertainty here," the official said. "It's spelled out clearly."

Meister is not alone among attorneys who say explanations of the promptness criteria, including in an overhaul of the Antitrust Division's frequently asked questions, are ambiguous.

"There is some discretion here with the Antitrust Division on how they will be using it," said Mark Krotoski, a partner with Morgan Lewis & Bockius LLP and former assistant chief in the division's National Criminal Enforcement Section.

But the division official countered that there is nothing vague about the use of the word "prompt." Previous leniency guidance, the official noted, had already required "prompt" cessation of anti-competitive conduct upon discovery. "We don't look at the word 'prompt' differently in this context,"

the official said.

In remarks earlier this month at the American Bar Association's annual spring antitrust meeting, Richard A. Powers, deputy assistant attorney general for criminal enforcement, said the division's guidance offers a "straightforward, commonsense" meaning behind pushing swift reporting.

Marvin Price, the division's director of criminal enforcement, also said at the spring meeting that swift reporting could give the enforcer a chance to employ "more aggressive techniques" such as wiretaps consented to by the leniency applicant.

The DOJ's defense notwithstanding, Lisa Phelan, a partner at Morrison & Foerster LLP and a former chief of the National Criminal Enforcement Section, noted in an email that the prompt-reporting requirement also expands the number of corporate officers responsible for those disclosures; the FAQs now include any "authoritative representative of the applicant for legal matters" and not just board members and general counsel.

That expansion, Phelan said, "makes it more difficult for a potential corporate applicant to assess promptly whether there could be any email, text or other document, buried deep in the millions of potentially relevant documents, that could render the company ineligible."

Previously, according to Phelan, internal investigations needed only ensure that board members and the general counsel didn't know about the violations.

"Now, with an undefined broader group of executives potentially able to disqualify the company, more risk exists that a company will enter the program, and six or nine months later an email from five years earlier turns up, suggesting prior knowledge of some executive, thereby disqualifying the company after it has extensively incriminated itself with DOJ," she said.

The DOJ itself has long described leniency as the linchpin of its criminal enforcement efforts against price-fixing, bid-rigging and other "cartel" behavior.

"The updates to the leniency policy are important improvements to the program that are consistent with the core of the written policy going back thirty years," a division spokesperson said in a statement. "As the Antitrust Division continues to pursue an aggressive enforcement agenda on behalf of the American people, the updated leniency policy will play an important role in detecting and disrupting criminal antitrust conspiracies and supporting future litigation against those who lose the race to self-report."

Cartel enforcement, in cases that often trace to a leniency application, has brought in billions of dollars in fines over the years. It has also inspired follow-on private litigation by an aggressive plaintiff's bar.

But fines have been on a general trend of decline in recent years and international enforcers, including at the European Commission, have acknowledged a similar reduction in companies coming forward to disclose anti-competitive conduct. The DOJ, for its part, has long refused to disclose the precise number of leniency applications it receives, arguing that even the aggregated data would hamper its enforcement efforts, while asserting that it has seen no decline in applications.

"The numbers are holding steady," the division official said.

Kanter, the assistant attorney general for antitrust, defended the program, and the division's changes, in remarks at the ABA conference.

"We're starting from the premise that somebody has come in and committed a crime, and then we're saying OK, well, you can avoid going to prison or being a convicted felon if you cooperate, and if you satisfy very high standards," Kanter said. "Those standards have existed for a very long time, and now we're being very open about those standards. But the fact of the matter remains that the leniency program is alive and well."

Powers argued at the ABA conference that the new changes could help boost the leniency program, including by accelerating the prisoner's dilemma that drives companies to get in the door as soon as they can. Their goal: to beat out other potential informants who would otherwise get dibs on the protection from criminal prosecution and fines.

Meister said the changes could help encourage reporting by individuals and smaller companies. "But for large companies they're going to have to look at their analysis," Meister said.

According to Meister, large, publicly traded companies have long tried to thread the needle of enforcement by cutting deals while avoiding admissions of liability. "These FAQs make that impossible," Meister said. She pointed to newly-added language prohibiting applicants from "taking positions in the civil litigation that contravene the corporate confession of wrongdoing."

Under the updated FAQs, any company that denies culpability in civil follow-on litigation "has either made a false statement in that litigation or failed to meet the leniency policy's requirements for a corporate confession of wrongdoing."

Such changes, Meister said, could end up discouraging larger firms from coming forward as they weigh the potential for prosecution against the stock price implications of a public mea culpa. Conversely, Meister said that the DOJ policies are a "boon" to plaintiffs' attorneys.

"Anytime you can get DOJ to potentially tie its enforcement objectives to the plaintiffs," she said, "it motivates plaintiff attorneys."

With follow-on private litigation virtually inevitable, Phelan said that the new requirement for remediation plans by leniency applicants "seems unnecessary."

"The division has long taken the view that expending its limited resources on involvement in complex civil damage assessments, risked draining valuable assets better spent on finding the next cartel. It is not clear why it sees the need to reverse that approach," Phelan said.

Heather S. Nyong'o, a Cleary Gottlieb Steen & Hamilton LLP partner and former Antitrust Division trial attorney, also said at the ABA conference that the changes, and the greater burden on achieving leniency, have disrupted what she's always been able to tell clients considering a leniency application: that if they come forward they'll fare better than everyone who reports after them.

"That is no longer true," Nyong'o said.

The division official argued, however, that the new requirements for remediation and compliance programs will ensure "that victims are made whole and that applicants are not in the position to commit

the same crimes again."

In his own remarks, Kanter rebutted criticism that the DOJ was making the carrot side of the carrot-and-stick approach to leniency a little less sweet for companies.

"It's extremely sweet if you come bring us a leniency application in a matter where we're not currently aware of criminal behavior," Kanter said. "The incentive is even greater now to make sure you're going ahead and detecting conduct in your company and bring it to us early on."

Kanter also reiterated that leniency applies only where a crime has been committed.

"And so, the carrot, the carrot is not going to prison," he said. "That carrot's quite significant."

The program changes, Kanter argued further, are meant to make the rules of leniency clear, including when it comes to the choice that lawbreakers face.

"If you don't want to come in for leniency, you don't have to, but you should be very well aware that the consequences of not coming in and seeking leniency, might mean prison time. It might mean massive fines and follow-on liability," he said.

Kanter also touched on one particularly consequential piece of the program changes, made to clarify the distinction between the two types of leniency: Type A, which applies to companies that disclose conduct the DOJ had not previously known about and are thus eligible for fuller safeguards, and Type B, under which informants receive fewer protections because a department investigation is already underway.

"We've clarified what's necessary for Type B leniency ... And what we're saying is, well, we're going to need to make sure that you're owning up to your end of the bargain," Kanter said. "We need to make sure that you're not just giving back the money that you took through illegal behavior, criminal behavior but that you are remediating, that you're ensuring this doesn't happen again, that you are … cooperating fully to make sure that others are brought to justice."

Price also argued that defense attorneys may have developed a false perception over time that the DOJ treats Type A and Type B applicants the same.

Attorneys say, however, that the changes are more than just clarifications.

Krotoski pointed to a new FAQ that limits the scope of Type B coverage for corporate officers who under a Type A application would be protected from prosecution. Where officers had previously "often" been granted protection, the new FAQ emphasizes the "broad discretion" on whether to prosecute officers under a Type B application, assessed case by case based on requirements that now include an admission of individual wrongdoing.

The inability to give assurances about avoiding prosecution is "going to kneecap us when we're trying to do those investigations," Davis Polk & Wardwell LLP partner D. Jarrett Arp said at the ABA conference.

On the same panel with Arp, Price argued the DOJ has always made individual assessments of culpability under Type B

"This is not a situation where we made up the procedure that we're following," said Price, who argued

the DOJ will continue to cover individuals under its non-prosecution deals.

"But we're going to be doing it in an appropriate way," Price said. "I think that is transparent and that is predictable"

In an interview, Krotoski noted assertions from division officials that the new Type B guidance is consistent with broader department-wide policies. "However, it is a change from the prior guidance," Krotoski said, one that companies will have to factor into their calculations when mulling whether to seek leniency, which Krotoski said remains the best option.

When firms are mulling a leniency application, which starts with a "marker" that becomes full leniency only upon full cooperation, Krotoski said, they don't know whether they will be Type A Type B applicants because DOJ investigations or even their very existence are kept closely guarded. The risk of exposing corporate officers to criminal prosecution, he said, could weigh against coming forward.

"When you consider the costs and burdens of leniency," Krotoski said, "this raises more questions about how the standards are going to be applied and the predictable nature of it."

The DOJ official disagreed, arguing that there has "always, always been a difference" between Type A and Type B leniency. While past leadership may have blurred the lines in speeches and other remarks, the official said the written policy has always drawn a distinction.

"Written documents control," the official said. "That's how we should operate."

--Additional reporting by Matthew Perlman. Editing by Peter Rozovsky.
