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DOJ Adds Promptness And Remediation To Leniency Program

By **Bryan Koenig**

Law360 (April 4, 2022, 9:25 PM EDT) -- Companies disclosing anti-competitive conduct in the hopes of avoiding criminal charges and reducing fines must now report violations "promptly" and attempt to undo the harm they've caused, the U.S. Department of Justice announced Monday as part of crucial changes to its leniency program.

DOJ Antitrust Division chief Jonathan Kanter announced the changes as the leniency program, often described as the centerpiece of department efforts against price-fixing and other cartels, continues to evolve.

"Corporate boards and executives, and the counsel advising them, should understand that sitting on their hands after detecting an antitrust crime will have real ramifications — losing out on leniency means severe consequences," Assistant Attorney General Kanter said in a statement.

Kanter made the announcement during a competition enforcers summit with the Federal Trade Commission. In addition to the requirement to report violations "promptly," the changes to the Antitrust Division's leniency policy also include extensive additions to guidance provided in the form of frequently asked questions. He said nearly 50 questions and responses have been added. Also added is a new requirement to make efforts "to remediate the harm caused by the illegal activity, and to improve its compliance program to mitigate the risk of engaging in future illegal activity."

The changes also buff out what had been an obligation to make restitution to harmed parties "when possible." The obligation now calls for "best efforts to make restitution to injured parties."

"These are increased expectations on the leniency applicants," Lisa Phelan, a partner at Morrison & Foerster LLP and a former chief of the Antitrust Division's National Criminal Enforcement Section, told Law360 on Monday.

Phelan noted that the changes come as U.S. and international enforcers deal with a multi-year downward trend in companies coming forward to disclose price-fixing and other cartels. Raising the bar for leniency, she said, "seems kind of counterproductive" if the goal is to get more companies to come forward.

Phelan also asserted that the remediation requirement is redundant ("a solution in search of a problem") given that cartel enforcement is virtually guaranteed to incite follow-on litigation from private parties claiming they were injured by the alleged conduct.

In addition, Phelan raised concerns about the FAQs that leave the definition of prompt reporting up to the DOJ's discretion.

"The division makes this assessment based on the facts and circumstances of the illegal activity and the size and complexity of operations of the corporate applicant. It is the applicant's burden to prove that its self-reporting was prompt," the new FAQs state.

And the FAQs appear to broaden the types of people responsible for reporting violations, Phelan said, pointing to language adding any "authoritative representative of the applicant for legal matters" and not just board members and general counsel.

In addition to substantive changes, Kanter said during the summit — which was held remotely — that the leniency policy was centralized in the DOJ's Justice Manual, the reference used by U.S. attorneys in prosecuting violations of federal law. The leniency policy is part of the manual's chapter devoted to the DOJ's Antitrust Division and is "written in plain language" as part of what he said are broader efforts to make DOJ antitrust enforcement more accessible, understandable and transparent to the public.

"We are focused on making our policies intelligible to all," Kanter said. "There are no unwritten rules to enforcement at the antitrust division."

DOJ leadership has long referred to the leniency program as the linchpin of criminal antitrust enforcement, which is largely reliant on the willingness of firms to disclose price-fixing and other anti-competitive conspiracies.

To qualify for leniency, a company has to be the first to report the particular conduct — and then has to cooperate fully with the DOJ in its investigation. In exchange, companies and their executives can avoid criminal charges and reduce the penalties against them.

Kanter's changes represent a stark contrast to the violation reporting policy overhauls enacted by his Trump administration predecessor, Makan Delrahim, who took a carrot-over-stick approach in considering whether corporate compliance programs — employed by companies to monitor and avoid corporate antitrust malfeasance — are sufficient when deciding whether to file criminal charges against businesses. Delrahim said in July 2019 that the division would break from tradition and consider giving companies credit at the charging stage if they employ an antitrust compliance program.

Traditionally, the department has granted criminal leniency only to the first whistleblower to come clean completely under its leniency program, which affords far greater protections to participants than charging credit.

But attorneys told Law360 at the time of the Delrahim changes that the leniency program may not be enough to combat anti-competitive conduct.

Kanter and his FTC peer, Chair Lina Khan, continued Monday to send strong signals about the kind of aggressive antitrust enforcement agenda they were pursuing as the Biden administration pursues a whole-of-government approach to try and reverse what the president has described as a "failed" experiment of decades of underenforcement.

Criminal enforcement, especially against wage-fixing, agreements not to compete for workers and other

labor-side violations, make up an important part of that agenda at the division, which Kanter on Monday said ended the last fiscal year with more than 140 open grand jury investigations.

Kanter continued to signal Monday that the DOJ is eager to bring both criminal and civil cases that it may have shied away from in the past, including challenges to allegedly anti-competitive mergers. That means under Kanter and Khan, antirust enforcers will have a strong disinclination against most merger fixes, preferring instead to challenge potentially anti-competitive transactions outright.

"We must be prepared to try cases to a verdict," Kanter said.

Khan at Monday's summit similarly emphasized a strong skepticism against insufficient merger fixes that Biden's enforcers argue have in the past allowed rampant industry consolidation with few real benefits. Enforcers, the FTC chair said, need the confidence to say it's "not our jobs" to accept remedies that won't work from parties trying to get their mergers over the finish line.

Kanter also further teased the possibility of criminal charges not just in the traditional space of collusion between companies but also against individual firms and executives whose alleged monopolistic practices meet the criteria for criminal prosecution. If a case warrants monopolization charges, Kanter said, "the division will not hesitate."

--Editing by Michael Watanabe.

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