OECD Working Party No. 3: Leniency Roundtable

Remarks of Acting Deputy Assistant Attorney General Richard A. Powers

June 5, 2018

It is an honor to be here representing the United States as the newly appointed Acting Deputy Assistant Attorney General for Criminal Enforcement at the Antitrust Division. Since the OECD adopted its Hard Core Cartel Recommendation 20 years ago, this organization has played a critical role in making cartel enforcement a priority around the world. Events like today's roundtable show that the OECD remains as focused as ever on cartel enforcement. I particularly admire and appreciate the OECD's commitment to the important work of re-assessing cartel enforcement and leniency programs in light of modern developments.

I am re-joining the U.S. Antitrust Division at a significant time. We will soon celebrate the 25th Anniversary of the modern version of the U.S. Department of Justice's Corporate Leniency Policy.[1] This fall, we are planning to have a celebration of that landmark at the Department of Justice, and we hope to see many of you there.

As the Criminal Deputy in the Antitrust Division, I take seriously my job as the steward of the Division's Leniency Program and will continue its administration in a transparent and predictable way.

My prior work as a prosecutor in other parts of the Department of Justice will certainly inform my approach.

The Antitrust Division has its own important policies, procedures, and institutional practices—but it is not an isolated agency acting alone. It operates within the larger institution of the U.S. Department of Justice, and is guided by the Department-wide policies laid out in the U.S. Attorneys' Manual. I will return to that observation again in my remarks today.

Since its revision 25 years ago, the Antitrust Division's Corporate Leniency Policy has been the Division's most effective investigative tool in the fight against cartels. The program has led to the detection of some of the world's largest international cartels and the prosecution of the companies and executives that participated in them. As leniency programs have spread around

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[1] U.S. Dep't of Justice, Antitrust Division, Corporate Leniency Policy, available at https://www.justice.gov/atr/file/810281/download.

the world, though, some have started to wonder whether leniency has begun to suffer from its own success.

Specifically, defense counsel have asked whether the costs of seeking leniency in scores of jurisdictions, and the increasing exposure from private damages actions in multiple jurisdictions, have made the cost of seeking leniency too high. Unsurprisingly, we at the Department of Justice think the opposite is true. As worldwide exposure increases, so do the potential benefits of leniency. The benefits of seeking leniency therefore still outweigh the increasing costs.

That said, as enforcers we must take seriously the concerns raised to ensure our leniency programs thrive. Cartels that go unreported might never be detected, instead continuing to cause harm to consumers. Promoting self-reporting is therefore a critical part of protecting consumers.

Although not a word of our Corporate Leniency Policy has changed since 1993, much has changed in the world during those 25 years. So it is incumbent upon us to assess, and where needed, to adapt to the changing and sometimes challenging landscape we face in the implementation of our leniency programs. I will briefly address two of those challenges which serve as potential deterrents to self-reporting: 1) the increased costs of reporting; and 2) the increased exposure to private damages actions.

The decision of whether and where to seek leniency is increasing in complexity as the number of jurisdictions where one can and should consider self-reporting grows. Once a company decides to seek leniency, the costs of doing so in multiple jurisdictions obviously increases. As enforcers, we understand that as the leniency queue grows, so do the demands placed on leniency applicants.

There are steps, however, that enforcers can take to try to address these issues. From the outset, we can increase our cooperation and our shared commitment to coordinating, where and to the extent possible, to decrease burdens on applicants. My predecessors—including Brent Snyder, who is speaking here today—have had some great ideas on practical ways to accomplish these goals.[2]

For example, when leniency applicants raise these issues with us, we can: 1) try to coordinate timelines and deadlines to allow the applicant to meet them in multiple jurisdictions;

[2] Brent Snyder, *Challenges and Co-ordination of Leniency Programmes* (May 22, 2018), available at https://one.oecd.org/document/DAF/COMP/WP3/WD(2018)16/en/pdf.

2) tailor our document demands to get the necessary evidence from the leniency applicant without unnecessary burden; and 3) where possible, coordinate the timing and locations of interviews to alleviate burdens on applicants and employees.

We look forward to furthering this mission by first engaging with foreign enforcers, and also the defense bar, to examine possible ways to reduce unnecessary burdens on leniency applicants. I welcome your thoughts and ideas, and look forward to an open, productive dialogue on these issues.

This focus is in keeping with the Justice Department's broader policies. Just a few weeks ago, the Department added a new provision to the U.S. Attorneys' Manual, encouraging prosecutors to coordinate, when possible, with other agencies that are seeking to impose penalties for the same misconduct.[3] This policy is not legally enforceable in court, but it provides important guidance to all attorneys in the Justice Department, including Antitrust Division prosecutors.

The policy is designed to prevent inconsistent, incompatible, or truly duplicative enforcement efforts. For the Antitrust Division, this is nothing new. We will continue to coordinate as appropriate with foreign enforcers and focus our own investigative requests on material that is sufficiently tied to the United States.

This policy serves a second, equally critical purpose: it encourages us to build and to enhance relationships with our law enforcement partners, both within the U.S. and abroad. In my experience working at other parts of the Department of Justice and with non-competition authorities, these relationships are critical to our enforcement efforts. Working with other enforcers also provides an objective view of our process that can lead to improvements to our programs—a necessary prerequisite for at least another successful 25 years.

Another issue that is frequently raised is that the increasing global exposure from private damages suits acts as a deterrent to seeking leniency. The United States has the longest tradition of private damages actions, and therefore a lot of experience with the interplay between private damages actions and leniency. Competition law in the United States authorizes the award of

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[3] U.S. Dep't of Justice, United States Attorneys' Manual 1-12.100 (May 2018); *see* Deputy Attorney General Rod Rosenstein Delivers Remarks to the New York City Bar White Collar Crime Institute (May 9, 2018), available at https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar.

treble damages to private litigants. Our Corporate Leniency Policy does not shield applicants from those suits—and in fact, it requires the applicant to pay restitution to injured parties.

In the United States, the Antitrust Criminal Penalty Enhancement and Reform Act of 2004,[4] also referred to as ACPERA, limits a qualifying leniency applicant's liability for civil damages claims in private state or federal antitrust actions. Under ACPERA, if a corporation enters into a leniency agreement with the Antitrust Division and provides satisfactory cooperation to the claimant, private damages are limited to single, rather than treble, damages and are not joint and several with co-conspirators. Thus, by satisfying the cooperation requirements of ACPERA, a leniency applicant can greatly limit its liability in private damages suits.

ACPERA was intended to reduce the disincentive to seeking leniency associated with treble private damages. We have recently heard increasing concerns from counsel representing leniency applicants that the benefits of ACPERA are not as significant as they once hoped. For instance, we have heard that if co-conspirators are able to reach single-damage settlements with private plaintiffs, then ACPERA does not make the leniency applicant better off than those co-conspirator companies that did not receive leniency.

We are acutely aware of these concerns and frequently engage with counsel for our leniency applicants as they navigate these private suits. At the same time, we must always respect the rights of victims. ACPERA is a positive step in the direction of reducing a leniency disincentive, and an example worth discussing in this forum, particularly for jurisdictions encountering the rise of private damages actions.

While we are mindful of the concerns we have heard, we do not agree with the notion that the benefits of leniency are not sufficient to induce self-reporting. Where some may argue that the carrot is not as effective because of some of the issues raised here today, the stick has not changed.

Indeed, when a company is considering whether to seek leniency, that decision is not a purely financial one; individual liberty interests also may be at stake. In a jurisdiction such as ours, the threat of years spent in a federal prison has only increased.

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[4] Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA), Pub. L. No. 108-237, §213, 118 Stat. 666, 667 (2004).

Moreover, while we agree that it is critical to our incentive system for companies and individuals to be no worse off for having sought leniency, we also believe that we—the Department of Justice—should not be worse off for having given leniency to a particular entity.

That is why our Corporate Leniency Policy has a certain set of requirements that a company must meet in order to qualify. They are very clearly laid out in the policy, so that there is no question what a company must be prepared to do. One of these requirements is that corporate applicants must admit to criminal antitrust activity with candor and completeness. Companies must also provide full, continuing, and complete cooperation throughout the investigation.

These are critical components of the Leniency Policy. The requirements exist because, if a company provides minimal, incomplete, or inexplicably slow cooperation, or does not give us sufficient evidence of an agreement, then we have wasted valuable taxpayer dollars interacting with that applicant. Those scarce resources otherwise could have gone to our independent investigative efforts.

In closing, I commend the OECD and Working Party No. 3 for today's discussion. It is an important and timely one, especially for us, as we approach the 25th anniversary of the U.S. Corporate Leniency Program. We are taking this opportunity not only to reflect on past achievements, but also to assess what else we can do to ensure sustainable success for at least another 25 years. I am honored to be here among my esteemed colleagues to discuss these important issues.

Thank you.