

The Antitrust Division's Corporate Leniency Program

Learn from the Past or Be Condemned to Repeat It

by ROBERT B. BELL AND KRISTIN MILLAY



Criminal antitrust violations differ from most corporate criminal violations in that they require agreements among multiple parties. In a criminal antitrust violation, several competitors collude to fix prices, rig bids, or otherwise limit free and fair competition in the marketplace.

Criminal antitrust activity is inherently difficult to detect and to prosecute without the cooperation of at least one participant in the cartel. The involvement of multiple parties in the criminal activity creates a unique opportunity that the Antitrust Division of the Department of Justice has long seized upon: the ability to create an incentive structure that encourages self-reporting.

The Division has capitalized on the unique nature of criminal antitrust violations by developing a Leniency Program that provides amnesty from criminal antitrust

prosecution for the first company that discloses an antitrust violation and cooperates with DOJ. Essentially, the Leniency Program pits co-conspirators against one another by creating a race to be the first company to report their misconduct. In exchange for the leniency that it grants to the first self-reporting company, the Division reaps a substantial reward in the form of cooperation that enables DOJ to get pleas from or convictions of the remaining members of the conspiracy.

In 1993, the Division put in place a Leniency Program that was massively and consistently successful, incentivizing cartel participants to self-report and to cooperate in helping DOJ build its case against their co-conspirators. The violations reported by leniency applicants triggered a series of major cartel investigations and helped the Division obtain hundreds of

millions of dollars in antitrust fines each year. In 2016, however, criminal antitrust fines abruptly plummeted to a level lower than the Division had seen in over a decade. Fines remained at low levels in 2017 and 2018, leading many to wonder why the consistent successes of the Leniency Program had suddenly stalled. This article explores some possible explanations for this surprising decrease in criminal antitrust enforcement activity and focuses in particular on a series of recent changes to the Leniency Program that have altered the balance of incentives facing potential leniency applicants.

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1993: Creating the Right Incentives

The current iteration of the Leniency Program dates back to 1993, but the Division first implemented a corporate Leniency Program in 1978. The original version of the program was little known and rarely utilized, resulting in an average of only one leniency application each year for the 15 years that it existed. (Scott D. Hammond, Antitrust Div. Deputy Assistant Attorney Gen., *Address at the 24th Annual National Institute on White Collar Crime: The Evolution of Criminal Antitrust Enforcement over the Last Two Decades* (Feb. 25, 2010), available at <https://www.justice.gov/atr/file/518241/download>.) The number of companies that received amnesty under the old program was exceedingly small, with only four companies qualifying during the first 10 years of the program's operation. (See Robert E. Bloch, *Past Practice and Future Promise: The Antitrust Division's Corporate Amnesty Program*, 8 ANTITRUST 28, 29 (1993).)

There were several reasons for the original program's lack of success, but primary among them was the lack of sufficient incentives for companies to come forward. Under the old program, amnesty decisions were highly discretionary, and the exact criteria for obtaining amnesty were unclear. Moreover, companies did not know whether they could qualify for leniency or whether they were disqualified because the Division had already opened an investigation into their industry. Companies who were considering a leniency application had to weigh the significant and certain danger of reporting their criminal activity to the government against the unclear and uncertain benefits of potentially receiving amnesty, and it is not surprising that they frequently decided that applying for leniency was not worthwhile.

Things changed in 1993, when the Division found the key to transforming the Leniency Program: increasing the incentives for companies to apply for leniency by restricting the Division's prosecutorial discretion. (See Scott D. Hammond, *Cornerstones of an Effective Leniency Programme*, 4 COMPETITION L. INT'L 4, 9 (2008) [hereinafter Hammond, *Cornerstones*].) The critical changes implemented in 1993 were to (1) make amnesty automatic rather than discretionary if there was no preexisting investigation when the leniency applicant self-reported; (2) create "Type B" leniency, where some level of leniency was available even if a company's cooperation began after an investigation was already underway; and (3) extend automatic

amnesty not only to the company itself, but also to all of the company's directors, officers, and employees who agreed to cooperate with DOJ. (*Id.* at 10 n.1.)

The result of these changes was a simplified leniency program with a clear structure. The first company to report a cartel would be immune from prosecution, along with all of its cooperating officers, directors, or employees. Companies that failed to report before the Division opened an investigation nevertheless had significant incentive to cooperate because the creation of Type B leniency meant that many of the benefits of leniency were still available to companies that assisted the Division's investigation. Overall, the changes rebalanced the incentives by placing substantial new benefits on the scale.

The Division took a risk when it overhauled the Leniency Program in 1993, sacrificing a significant amount of discretion in an effort to provide clarity and predictability to potential leniency applicants. But Division officials believed that by adopting a straightforward set of criteria that clearly laid out the substantial rewards for a successful leniency applicant, they could encourage self-reporting and cooperation. To put it mildly, the risk paid off.

1993-2015: Reaping the Rewards of a Successful Leniency Program

The 1993 version of the Leniency Program has been wildly successful, to the point where leniency applications have become the initial source for approximately two-thirds of DOJ's criminal antitrust investigations. (Bill J. Baer, Antitrust Div. Assistant Att'y Gen., Remarks at the Georgetown University Law Center Global Antitrust Enforcement Symposium: Prosecuting Antitrust Crime (Sept. 10, 2014), available at <https://www.justice.gov/atr/file/517741/download> [hereinafter Baer, *Prosecuting Antitrust Crime*].) The cases that come to the Division through the Leniency Program also tend to yield some of the largest criminal fines, with 90% of criminal antitrust fines stemming from cases that were started or aided by a leniency application. (Scott D. Hammond, Antitrust Div. Deputy Assistant Att'y Gen., Address at the 26th Annual National Institute on White Collar Crime: Deterrence and Detection of Cartels: Using All the Tools and Sanctions (Mar. 1, 2012), available at <https://www.justice.gov/atr/file/518936/download>.) The Leniency Program is now widely considered the Division's most important tool for uncovering, investigating, and prosecuting cartels.

The benefits of the 1993 Leniency Program began to accrue a few years after the new version was implemented, as newly motivated leniency applicants began coming forward to alert the Division to a series of major cartels. Whereas the Division had received only an average of one leniency application per year under the old program, in the years following 1993 it began to receive one application per month. (Scott D. Hammond, Antitrust Div. Dir. of Criminal Enforcement, A Summary Overview of the Antitrust Division's Criminal Enforcement Program (Jan. 23, 2003), available at <https://www.justice.gov/atr/speech/summary-overview-antitrust-divisions-criminal-enforcement-program>.) By the beginning of FY 2003, the rate had increased to more than four leniency applications per month. (*Id.*)

The investigations triggered by these leniency applicants exposed major international cartels and yielded an unprecedented volume of criminal antitrust fines. The 1978 version of the Leniency Program had failed to detect even one international or major domestic cartel. Under the new policy, the Division finally had the tools it needed to detect and prosecute the most egregious violations of the antitrust laws. Because of the Leniency Program, the Division successfully prosecuted major cartels that spanned an array of industries, including vitamins, textiles, construction, food, and chemicals. Division officials estimated that between 1997 and 2003, the Division prosecuted international cartels affecting over \$10 billion in US commerce. (James M. Griffin, Antitrust Div. Deputy Assistant Att'y Gen., The Modern Leniency Program After Ten Years (Aug. 12, 2003), available at <https://www.justice.gov/atr/speech/modern-leniency-program-after-ten-years-summary-overview-antitrust-divisions-criminal>.)

The types of cartels that the Division has been able to prosecute with the assistance of leniency applicants are particularly rewarding targets, not only because each cartel is quite large in and of itself, but also because investigations into large international cartels tend to generate a family of related "spin-off" investigations. For example, the Division's investigation into automotive parts manufacturers, which eventually became the single largest criminal antitrust investigation in US history, began in 2010 with a single leniency application. In order to provide valuable cooperation that would secure them more lenient treatment, companies that got caught up in the investigation began to report their participation in other price-fixing conspiracies on an array of additional auto parts, includ-

ing seatbelts, airbags, steering wheels, windshield wipers, and power window motors. Because of the domino effect created by this wave of self-reporting and cooperation, the auto parts investigation ultimately uncovered antitrust violations involving almost 60 different auto parts and resulted in charges against 48 corporations and 65 individuals.

The Division's annual fine totals surged as a result of the rise in leniency applicants and the Division's resulting ability to detect and prosecute larger cartels. In FY 1997, for example, the Division collected \$205 million in criminal fines, an amount that was 500 percent higher than in any previous year in the Division's history. (Scott D. Hammond, Antitrust Div. Dir. of Criminal Enf't, A Summary Overview of the Antitrust Division's Criminal Enforcement Program (Jan. 23, 2003), available at <https://www.justice.gov/atr/speech/summary-overview-antitrust-divisions-criminal-enforcement-program>.) Two years later, in FY 1999, the Division collected fines in excess of \$1.1 billion. The surge in fines proved to be a long-term trend rather than a temporary blip, and over the years the Division continued to build on the successes of the Leniency Program. During the 10-year period from 2005 to 2015, annual criminal antitrust fines averaged \$956 million and always exceeded \$300 million. Five times during that period, the fine total for the year was \$1 billion or more. (*Criminal Enforcement Trends Charts Through Fiscal Year 2017*, US Dep't of Justice, Antitrust Div. (Mar. 12, 2018), <https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts>.)

While the fine totals are impressive in and of themselves, it is worth noting that the benefits of the Leniency Program extend above and beyond the amount of fines collected. In addition to incentivizing leniency applicants to self-report in the first instance, the program continues to ease the Division's path long after the first company has come forward. When the other participants in the cartel learn that the Division has the cooperation of a leniency applicant, they face a strong incentive to negotiate a guilty plea rather than go to trial. The remaining cartel participants know full well that the leniency applicant has incriminating evidence against them, and that the applicant is freely handing that information over to the government to secure amnesty. The initial cooperation thus has a snowball effect, incentivizing the leniency applicant's co-conspirators to offer their own cooperation and to avoid trial. It is impossible to quantify the full

scope of time, effort, and resources this system has saved the Division over the years.

In short, the story of the current Leniency Program from its creation in 1993 through 2015 was one of unmitigated success, to a degree that likely could not have been foreseen when the Division implemented the program.

2018 until later this year. However, publicly available reports on new fines imposed in 2018 indicate that for the third straight year, antitrust fines have remained at a surprisingly low level. In FY 2018, the Division imposed new fines of only \$192.9 million. (Leah Nylen, *US Corporate Cartel Charges Dip for Third Straight Year*, MLEX MKT. INSIGHT (Oct. 1, 2018).)

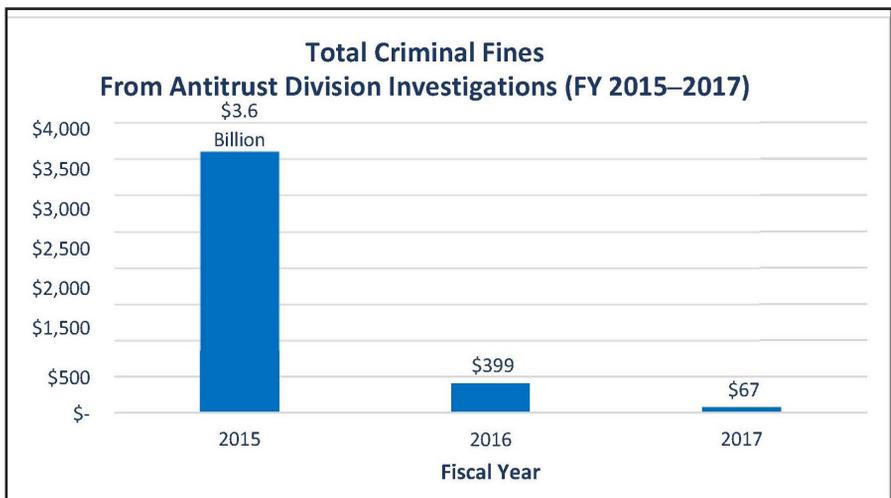
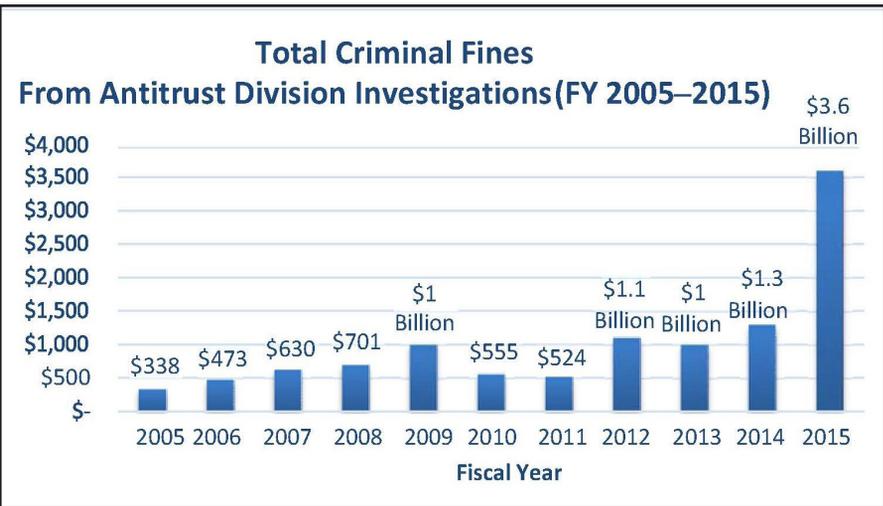
The secrecy surrounding DOJ's ongoing investigations makes it difficult to predict what is likely to happen going forward, as only the Division knows whether it currently has any promising leads for uncovering major cartel activity. However, there are a few indications that things are unlikely to improve dramatically in the near future. First, the number of companies charged with price-fixing fell to three in FY 2018, down from eight companies in FY 2017 and 16 companies in FY 2016. (Id.) This downward trend

2016-2018: A Mysterious Drop in Antitrust Fines

After years of consistently high antitrust fines, things took an unexpected turn in FY 2016, when fines dropped sharply, only to fall even lower the following year. The Division collected a record high of \$3.6 billion in fines in FY 2015, but then saw fines plummet to \$399 million in FY 2016 and \$67 million in FY 2017. While the minimal fines collected in 2017 were particularly surprising, even the fine total for 2016 was the lowest amount the Division had collected in over 10 years. (Id.)

The low fine totals in 2016 and 2017 were striking enough to prompt some antitrust practitioners to wonder whether they were a sign that something was awry in criminal antitrust enforcement, but others dismissed the low numbers as part of the natural ebb and flow that one would expect as the Division cycles through different phases of its major investigations. It is now becoming clear that the low fines in 2016 and 2017 are solidifying into a trend. The Division bases its statistics on the fines it actually collects in any given year, and it will not release its number for FY

decreases the likelihood that the Division is on the verge of the snowball effect that tends to fuel larger cartel investigations because there are fewer existing cases to trigger self-reporting of related misconduct by investigation targets seeking a more lenient plea deal. Second, one former Division official publicly acknowledged that the Division recently has seen a decline in Type A leniency applications. (Charles McConnell, *Type A Leniency Applications Down, US DOJ Official Says*, GLOBAL COMPETITION REV. (June 15, 2018), <https://globalcompetitionreview.com/article/1170614/type-a-leniency-applications-down-us-doj-official-says>.)



Type A leniency applications alert the Division to cartel behavior that it was not already investigating, so a decline in that type of leniency application leaves the Division with fewer leads that might jump-start a major cartel investigation.

The precipitous drop in antitrust fines, especially when coupled with the decline in criminal cases filed and the downturn in Type A leniency applications, is an abrupt departure from the robust cartel enforcement program that the Division has overseen for the past several decades. After the events of the past three years, it seems worthwhile carefully to consider what might be causing this decline, and whether the Division can do anything to reverse it.

Possible Explanations for the Decline in Antitrust Enforcement

There are several possible explanations for the downturn in criminal antitrust fines, and in a field as complex as international cartel enforcement, there are almost certainly several intertwined causes contributing to the decline. However, some explanations seem more compelling than others. We will provide a brief overview of several of these theories before turning to the one that we believe is the best fit with the facts.

One set of possible explanations focuses on changes in the level or type of cartel activity. The first possibility is that the Leniency Program has been so successful that it has served as an effective deterrent to criminal antitrust activities. Under this theory, the Division is charging fewer cartels because there are fewer cartels to detect in the first place. It is certainly possible that cartel enforcement and a resulting increase in antitrust compliance efforts have had a deterrent effect to some extent, but it seems unlikely to fully account for the drop in criminal fines in light of the abruptness of the drop in fines. If companies were successfully fostering a new culture of antitrust compliance, one would expect a more gradual waning of criminal cases, rather than a simultaneous abandonment of major cartel activity across a varied range of companies and industries. Moreover, the government implements deterrence mechanisms to discourage all kinds of different crimes, and even successful deterrence efforts hardly bring all crime to a screeching halt. As Division officials have acknowledged, even when their enforcement efforts are successful, “there remains a powerful temptation to cheat the system and profit from collusion.” (Baer, Prosecuting Antitrust Crime, *supra*.)

A related possible explanation is that participants in price-fixing cartels have become more wary of getting caught, and therefore have learned to be more careful to avoid detection. This theory posits that cartels have become more sophisticated and difficult for DOJ to uncover, leading to a decrease in fines. Again, this may be a partial explanation, but it fails to fully explain why the decline in 2016 was so large and so sudden. If the decline were primarily driven by an increase in the difficulty of detecting cartels, one would expect criminal fines to taper off more gradually as cartelists learned new methods for successfully concealing their misconduct. Moreover, if the Leniency Program were still functioning as it has in the past, companies would have sufficient incentives to self-report, and it would not matter that DOJ was unable to detect the criminal activity on its own.

Other theories focus on recent increases in the various burdens facing successful leniency applicants, in the form of both civil litigation and foreign leniency programs. These explanations suggest that companies that might otherwise apply for leniency are being deterred because even if they successfully obtain the benefits of leniency, those benefits are outweighed by costly litigation and cooperation obligations. Under this set of theories, potential leniency applicants might decide that it is better to take their chances and hope their misconduct will remain undetected, believing that this uncertainty is preferable to the burdens they will certainly face if they self-report.

The first theory in this category relates to the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA). Passed in 2004, ACPERA further incentivized companies to apply for leniency by capping damages for successful leniency applicants who face follow-on private civil antitrust litigation. Under this statute, leniency recipients facing follow-on civil suits are liable for single damages instead of treble damages and do not face exposure to joint and several liability, so long as they substantially cooperate with the plaintiffs. ACPERA proved to be a successful tool for incentivizing leniency applicants, as the DOJ received nearly double the number of Type A leniency applications in the six years following ACPERA's enactment than it had in the six years prior. (Niall Lynch & Kathleen Fox, How ACPERA Has Affected Criminal Cartel Enforcement, LAW360 (Aug. 11, 2011), <https://m.lw.com/thoughtLeadership/how-acpera-affects-criminal-cartel-enforcement>.) Now, however, some believe that leniency applicants are being

deterred by the burdens of private civil litigation and the significant uncertainty surrounding what a company has to do to satisfy ACPERA's "substantial cooperation" requirement. It is certainly true that potential leniency applicants would appreciate greater clarity on what ACPERA requires, but it does not seem likely that a statute that initially led to a surge in leniency applications suddenly began deterring them in 2016.

The next possible explanation is that potential leniency applicants are being deterred by the burden and complexity of being a leniency applicant in multiple jurisdictions. Following the success of the Division's Leniency Program, similar programs proliferated around the world and have now been implemented in some form in more than 60 countries. (Mark Leddy & Elaine Ewing, *Cartel Leniency Programs: Caveats and Costs*, 1 CLPD 29 (2015).) Coordinating leniency applications across jurisdictions is no easy task, but the worldwide rise in leniency programs is unlikely to be a major factor in deterring leniency applicants because the incentives remain relatively balanced. A potential leniency applicant must consider the burden of seeking leniency in multiple jurisdictions, but it also must weigh that burden against the offsetting risk that if one of a company's co-conspirators reports the cartel first, the company will face criminal exposure in a daunting number of countries.

Another theory posits that an increase in civil class action litigation in Europe has deterred leniency applicants in the US because it adds to the burdens that applicants face if they self-report. Civil antitrust litigation has been on the rise in Europe over the past several years, particularly in the United Kingdom, Germany, and The Netherlands. (Mark Sansom, Anna Morfey & Patrick Teague, *Recent Developments in Private Antitrust Damages Litigation in Europe*, 29 ANTITRUST 33 (2015).) This does seem to be a more significant factor than any of the other potential explanations discussed thus far. The rise of class action antitrust litigation in Europe represents a significant new burden that leniency applicants have to bear, and it does not come with any counterbalancing benefit that weighs in favor of seeking leniency. This increased burden could well be playing a role in deterring some leniency applicants and thus may be a contributing factor to the decline in antitrust fines. However, there is one final theory that seems to provide the best and most direct explanation for the sudden downturn in the US.

Changes to the Leniency Program

The theory that we will focus on for the remainder of this article relates to a series of changes to the Leniency Program itself, announced in several speeches and policy statements between 2014 and 2017. Not only do these changes coincide with the timing of the drop-off in fines, but they also strike to the core of what has made the Leniency Program so successful for so long: the balance of incentives that potential leniency applicants weigh when deciding to come forward. Taken together, the changes that the Division has made since 2014 have fundamentally altered the nature of the advice that an antitrust lawyer must give to a corporate client considering a leniency application.

Prior to 2014, the Leniency Program had not changed in any material way in years. The program was administered in a way that reflected the trade-off the Division had so accurately identified in 1993: that the Division had to surrender a great deal of discretion in order to provide the predictability, certainty, and transparency necessary to attract leniency applicants. Each of the policy shifts that the Division has announced since 2014 represents an expansion of DOJ's prosecutorial discretion, at the expense of the predictability that leniency applicants need.

Threat of Prosecution for Related Offenses

The first of these shifts was a decision by Division officials to repeatedly emphasize DOJ's ability to prosecute leniency recipients for non-antitrust crimes. In a September 2014 speech, then-Assistant Attorney General Bill Baer emphasized that the terms of the Leniency Program govern only the Antitrust Division and do nothing to prevent other components of DOJ from prosecuting a successful leniency applicant for crimes other than the antitrust violation that was the basis for the amnesty application. (Baer, *Prosecuting Antitrust Crime*, *supra*.) Baer's speech named several broad categories of offenses that leniency applicants might be prosecuted for, including "fraud, tax evasion, or corruption." (*Id.*) Prior to Baer's speech, the Division's stated policy was not to prosecute leniency applicants for non-antitrust crimes committed "in connection with" the antitrust violation. (*Id.*)

Baer did try to provide some reassurance that "the department never has and never would use other criminal statutes to do an end-run around antitrust leniency," but without further clarity, it is

difficult for potential leniency applicants to know what prosecutors would consider an “end-run” and what they would consider a legitimate use of prosecutorial discretion. (*Id.*)

Baer’s statement is particularly worrisome because of the overlap between antitrust crimes and other criminal offenses, such as fraud. For example, the Division has previously characterized bid rigging as simply “fraud which involves bidding.” (ANTITRUST DIV., US DEP’T OF JUSTICE, PREVENTING AND DETECTING BID RIGGING, PRICE FIXING, AND MARKET ALLOCATION IN POST-DISASTER REBUILDING PROJECTS: AN ANTITRUST PRIMER FOR AGENTS AND PROCUREMENT OFFICIALS (Jan. 31, 2013, updated June 25, 2015), available at <https://www.justice.gov/atr/preventing-and-detecting-bid-rigging-price-fixing-and-market-allocation-post-disaster-rebuilding>.)

The Division has since formalized Baer’s statements by including similar warnings in a revised version of its “Frequently Asked Questions About the Antitrust Division’s Leniency Program.” The FAQs are a comprehensive guide to the Leniency Program and are one of the best resources for potential applicants who are looking to understand how the Division applies its leniency policy. Issued in January 2017, the revised FAQs include some significant departures from the original version, which was published in 2008. Among the changes is a warning that leniency applicants “should not expect to use the Leniency Program to avoid accountability for non-antitrust crimes.” (ANTITRUST DIV., US DEP’T OF JUSTICE, FREQUENTLY ASKED QUESTIONS ABOUT THE ANTITRUST DIVISION’S LENIENCY PROGRAM AND MODEL LENIENCY LETTERS (Nov. 19, 2008, updated Jan. 26, 2017), available at <https://www.justice.gov/atr/page/file/926521/download> [hereinafter Revised FAQs].)

Notably absent from the revised FAQs is language from the previous version that had assured potential applicants that there had never been an instance where another component of DOJ had prosecuted a leniency applicant for offenses that typically occur during the commission of an antitrust offense, such as mail or wire fraud. In place of this reassuring language is the far less comforting warnings that “[n]ot every conspiracy among competitors amounts to an antitrust crime” and that “[l]eniency applicants with exposure for both antitrust and non-antitrust crimes should report all crimes to the relevant prosecuting agencies.” (Revised FAQs, *supra.*)

Antitrust lawyers have struggled to know

exactly what to make of Baer’s statement and the subsequent revisions to the FAQs. On the one hand, it technically has always been the case that the protections of the Leniency Program apply only to antitrust crimes and bind only the Antitrust Division. On the other hand, these statements mark a distinct change in tone and emphasis, one that replaces previous reassurances to leniency applicants with threats about their risk of criminal exposure and an emphasis on DOJ’s discretion. In light of this shift, potential applicants understandably may be reluctant to take a chance on whether the Division’s change in tone and emphasis is a harbinger of how leniency recipients will now be treated in practice.

Indeed, there have already been indications that successful leniency applicants now bear a heightened risk of criminal exposure. Most notably, DOJ’s treatment of UBS in 2015 has shown how leniency recipients may face significant criminal liability based on information they reveal to the Division while seeking amnesty. UBS had provided the government with valuable cooperation and secured leniency for its role in a conspiracy to manipulate currency exchange rates. DOJ benefitted enormously from UBS’s cooperation, securing a total of \$2.5 billion in fines from four of the world’s largest banks. In spite of UBS’s valuable cooperation, DOJ then used the misconduct that UBS had disclosed in its leniency application to argue that UBS was in violation of an earlier nonprosecution agreement that UBS had reached with the government in 2012. On this basis, DOJ rescinded the 2012 NPA, essentially forcing UBS to plead guilty and pay a criminal fine of \$203 million. For many antitrust lawyers, DOJ’s treatment of UBS demonstrated that companies can no longer feel confident that a successful leniency application will protect them from criminal liability.

Emphasis on the Burdens of Cooperation

The second thing the Division has done in recent years is to make several statements suggesting that leniency applicants will need to work harder if they want to preserve their chance of receiving amnesty. These statements have emphasized both the extensive efforts that leniency applicants must make to satisfy their cooperation obligations, as well as the need to meet the Division’s preferred timetable in order to qualify for leniency. In a September 2014 speech, Bill Baer emphasized that leniency applicants must make “a thorough and prompt investment of time and resources,” including by “con-

ducting a thorough internal investigation, providing detailed proffers of the reported conduct, producing foreign-located documents, preparing translations, and making witnesses available for interviews.” (Baer, Prosecuting Antitrust Crime, *supra*.) A February 2016 speech by then-Deputy Assistant Attorney General Brent Snyder similarly emphasized that it is within the Division’s discretion to deny leniency or to provide diminished leniency if the Division believes that the applicant’s cooperation has been insufficiently prompt. (Brent C. Snyder, Antitrust Div. Deputy Assistant Att’y Gen., Remarks at the Yale Global Antitrust Enforcement Conference: Individual Accountability for Antitrust Crimes (Feb. 19, 2016), available at <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-yale-global-antitrust>.)

It is perfectly reasonable for the Division to expect applicants to provide meaningful cooperation, but these statements risk conveying an adversarial posture towards leniency applicants that could deter companies that are in a position to help uncover significant cartel activity. Potential applicants might hesitate to come forward if they are concerned that they

cannot bear the significant costs of cooperation or believe that they may need more time than the Division is willing to give them to cooperate fully. Moreover, corporate leniency applicants now have all the more reason to be worried about their ability to meet their cooperation obligations because the set of policy shifts that we will discuss next are likely to make it more difficult for companies to secure the cooperation of their employees.

Narrowed Protections for Individual Employees

Since 2014, the Division has taken three new positions with respect to how employees of leniency recipients will be treated going forward. Overall, these new positions have created additional uncertainty for leniency applicants about the criminal exposure faced by their employees. In our experience, the principal reason companies decide to apply for leniency is to protect their employees from criminal prosecution and jail sentences. Uncertainty over whether a leniency application will accomplish that is not only a disincentive for companies considering whether to apply for leniency, but also has the additional drawback of making it more difficult to convince culpable employees to cooperate with DOJ. Because extending amnesty to a leniency recipient’s employees was one of the three changes

that made the 1993 version of the Leniency Program so effective, it is quite troubling that some of those protections are now being scaled back.

First, and most importantly, in 2017 the Division indicated in its Revised FAQs that it is within DOJ’s discretion to exclude “highly culpable” current employees from leniency where the company is a Type B leniency applicant (i.e., an applicant who does not come forward until after the Division has opened an investigation). (Revised FAQs, *supra*.) The new FAQs also omit language from the original version, which had reassured leniency applicants that “[i]n practice . . . the Division ordinarily provides leniency to all qualifying current employees of Type B applicants in the same manner that it does for Type A applicants.” (ANTITRUST DIV., US DEP’T OF JUSTICE, FREQUENTLY ASKED QUESTIONS ABOUT THE ANTITRUST DIVISION’S LENIENCY PROGRAM AND MODEL LENIENCY LETTERS (Nov. 19, 2008) [hereinafter Original FAQs].)

While it has long been the case that leniency for employees of Type B applicants is discretionary rather than automatic, in practice the Division has always granted immunity to employees in such cases unless the employee refused to cooperate with the investigation. Potential leniency applicants will rightfully be concerned that the Division has chosen to emphasize its ability to prosecute culpable employees of Type B leniency recipients, while at the same time removing language about the lenient treatment such employees received in the past. This concern is exacerbated by the fact that there is no way for a company to know in advance of applying for leniency whether Type A leniency is still available. The uncertainty is likely to have a chilling effect, especially in cases where the culpable employees are high-level executives who are participating in the decision whether or not to apply for leniency, and whose decision will almost certainly be affected by their own risk of criminal exposure.

The second change in the treatment of the employees of leniency applicants concerns protections offered to former employees. The original FAQs had warned that leniency for former employees was not automatic but had advised companies to seek discretionary leniency for their former employees and to encourage former employees to cooperate. In contrast, the revised FAQs suggest that from now on, leniency for former employees will be the exception rather than the rule. The revised guidance provides that former

employees “are presumptively excluded from any grant of corporate leniency” and that protections will only be extended to former employees “on an individualized, case-by-case basis” at the discretion of the Division. (Revised FAQs, *supra*.) This revision created two significant problems. First, it may deter former employees from cooperating with an internal investigation, which could prevent the company from uncovering evidence that would motivate it to pursue leniency. Second, the change may deter potential leniency applicants who are reluctant to expose their former employees to a risk of criminal liability.

The final thing the Division has done on this front is to create some disconcerting ambiguity around whether companies must terminate or demote employees who were culpable in an antitrust violation. In a 2014 speech, Brent Snyder cautioned that if a company retains “culpable employees in positions where they can repeat their conduct,” that would “raise[] serious questions and concerns about the company’s commitment to effective antitrust compliance.” (Brent C. Snyder, Antitrust Div. Deputy Assistant Att’y Gen., Remarks at International Chamber of Commerce/United States Council of International Business Joint Antitrust Compliance Workshop: Compliance Is a Culture, Not Just a Policy (Sept. 9, 2014), *available at* <https://www.justice.gov/atr/file/517796/download>.) It is not yet clear how the Division plans to apply this statement in practice, but the substance of the statement could lead potential leniency applicants to worry that the Division will pressure them to fire or demote certain employees.

Cumulative Effect of Policy Shifts in the Leniency Program

In summary, since 2014 the Division has issued a series of statements that have done the following: (1) repeatedly warned leniency applicants that they face a risk of criminal exposure even if they receive amnesty; (2) emphasized the Division’s high expectations for cooperation and warned that the opportunity for leniency could be rescinded if an applicant fails to meet those expectations; (3) indicated that current employees of Type B leniency applicants might be prosecuted; (4) established that former employees are now presumptively excluded from grants of corporate leniency; and (5) suggested that a company seeking leniency may need to fire or demote certain employees in order to prove to the Division that the company is committed to antitrust

compliance. All of these changes were made during the Obama administration, but the Trump Justice Department has neither clarified nor reversed any of them.

The common thread through all of these changes is that they expand the discretion that the Division intends to exercise in its treatment of companies and individuals who utilize the Leniency Program. Instead of providing bright-line rules for how it intends to treat leniency applicants, the Division appears to be steadily carving out more room for itself to extract penalties from certain companies and their employees. The expanded discretion inherent in these policy shifts is significant in light of the Division’s own past experience. Over time, the Division has learned that “[p]rospective amnesty applicants come forward in direct proportion to the predictability and certainty of acceptance into the programme.” (Hammond, *Cornerstones, supra*.) To put it more bluntly, “[u]ncertainty in the qualification process will kill an amnesty programme.” (*Id.*)

As criminal antitrust fines continue to stagnate in the wake of the Division’s recent policy shifts, it is becoming increasingly clear that expanded discretion comes with a high cost, in the form of increased uncertainty and opacity to potential leniency applicants. Potential applicants who may once have seen amnesty as a sufficient incentive could now be deterred by the risk that DOJ will decide to prosecute them for non-antitrust offenses, by the possibility that they will not be able to satisfy the Division’s high standards for cooperation, or by the increased criminal exposure that their employees may face during the process. By making the benefits of leniency both less substantial and less certain, the recent changes pose a significant threat to the future success of the Leniency Program.

Getting the Leniency Program Back on Track

As we have acknowledged, it is difficult to be entirely certain about what is causing the decline in criminal antitrust enforcement, and there are likely several interrelated causes. Regardless, it would be to the benefit of the Leniency Program for the Division to correct or clarify some of the policy shifts announced over the past few years. To the extent that leniency applicants are being deterred by other causes—whether by the ambiguity under ACPERA, the burdens imposed by leniency applications in multiple jurisdictions, and/or an increase in class

action litigation in Europe—it only becomes more critical that the Division make leniency as attractive an option as possible in the US. As the burdens associated with leniency increase, the benefits should be made more certain and well defined, not less. Instead, the changes in recent years have compounded the problem. To that end, we have several suggestions for how the Division might get the Leniency Program back on track.

First, the Division should announce a policy that the requirements of the Leniency Program are effectively “locked in” as soon as an applicant comes forward. It is understandable that the Division will want to make periodic adjustments to its policies, but leniency applicants will be much more likely to come forward if they have assurances that those policies will not be changed to their detriment midstream.

Second, the Division should enhance protections for current and former employees of leniency applicants by not only restoring but improving upon the pre-2014 policies. The Division should consider guaranteeing immunity for all cooperating employees of Type B leniency applicants. While no such employee has ever been prosecuted, the Division’s position that it has the discretion to do so is likely deterring potential applicants who want to protect their employees. Additionally, the Division could improve the appeal of the Leniency Program by rolling back the presumptive exclusion of former employees from grants of leniency. Instead, the Division should express a willingness to work with leniency recipients to protect any former employees who cooperate. The final change the Division should consider with respect to employees is to reassure leniency applicants that they will not be pressured or required to fire culpable employees in order to be deemed cooperative. Instead, the Division could take the position that it will work with leniency applicants to strike an appropriate balance between the company’s desire to protect its employees and the government’s desire to deter future antitrust violations.

Third, potential leniency applicants are unlikely to come forward unless they receive some reassurance they are not putting themselves at significant risk of additional criminal exposure by applying for leniency. The Division could provide greater clarity and specificity about what DOJ is likely to consider an illegitimate “end-run” around antitrust leniency and what conduct it will consider prosecuting under

other statutes. Leniency applicants facing criminal liability for conduct they voluntarily report to the Division have been, and should continue to be, the exception rather than the rule. A speech or policy statement providing clarity and reassurance on this issue could go a long way toward re-incentivizing leniency applicants to come forward.

Finally, the Division could encourage leniency applications by matching these substantive changes with a change in tone and posture toward potential applicants. Companies weighing whether to seek leniency are making a difficult, multifaceted risk assessment and are on the lookout for any information that can help them predict how they will be treated as leniency applicants. Companies will be far less comfortable seeking leniency if they look to publicly available statements from Division officials and find that those statements express skepticism of leniency applicants, admonish them for not cooperating aggressively enough, and warn them of the dangers of additional criminal exposure. Instead, the Division could encourage leniency applications by demonstrating through its tone that its approach to working with applicants is more collaborative than it is adversarial.

Back in 1993, the Antitrust Division identified and corrected an imbalance in the incentives facing potential leniency applicants, with hugely successful results. Now, in the midst of a continued trend of low criminal antitrust enforcement, it appears that recent events have misaligned the incentives once again. Fortunately, the Division has the opportunity to correct this situation and revitalize the Leniency Program. By taking the steps outlined above, the Division can restore clarity and predictability to the Leniency Program and can help to convince leniency applicants that the benefits of the program outweigh the risks and burdens it entails.