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What You Need to Know About Corporate Leniency

Litigation and Dispute Resolution

Cheat Sheet

- **Corporate leniency.** If your company is at risk of criminal antitrust liability, you can seek corporate leniency from the US Department of Justice, Antitrust Division (DOJ). But hurry, it is only available to the first applicant.
- **Considerations.** Which jurisdictions might your company (and its executives) have exposure? What are the costs and disruptions caused by cooperation? What is the resulting exposure to private damages actions?
- **Obligations.** The US DOJ will require full cooperation by your company, including participation in affirmative investigative techniques, and restitution to the victims of the antitrust actions.
- **Benefits.** Your company and its executives will be immune from criminal prosecution, and the company will reduce its civil liability from treble damages to single damages and eliminate joint and several liability.

You are an in-house counsel who has just learned your company's executives have been meeting with their competitors and sharing confidential information. Potential criminal antitrust liability springs to mind, and you know the stakes – criminal fines, jail terms for the executives, and treble damage civil suits – are high.

One of the immediate decisions you must make is whether the company will seek corporate leniency from the US Department of Justice, Antitrust Division (DOJ).

Leniency is available only to the first applicant in the United States, so time is of the essence to avoid losing leniency to another company. If the conduct had effects in other jurisdictions, it may be necessary to consider seeking leniency in those jurisdictions as well.

The benefits of corporate leniency in the United States are very attractive. The company and its executives will be immune from criminal prosecution, and the company will reduce its civil liability from treble damages to single damages and eliminate joint and several liability.

Despite the substantial benefits, corporate leniency is not consequence-free. The DOJ will require fulsome cooperation by the company and its executives, which is likely to be costly and disruptive. The DOJ also requires leniency applicants to pay restitution to their victims, which usually is satisfied by settling class actions that often are triggered by a government investigation.

Therefore, you must consider a variety of factors in deciding whether to request leniency. They include the number of different jurisdictions in which your company (and its executives) may have exposure, the cost and disruption caused by cooperation in each jurisdiction, and the resulting exposure to private damages actions in those jurisdictions.

Despite the substantial benefits, corporate leniency is not consequence-free.

These considerations are complex and can be difficult to accurately assess under the “race for leniency” pressure that “first-in only” leniency creates.

A perhaps less obvious and relatively new consideration is the requirement that the leniency applicant help facilitate “affirmative investigative techniques” if requested by the DOJ. Although this obligation is not specified in the DOJ Corporate Leniency Policy, it was added to the cooperation obligations of its Model Corporate Leniency Letter in 2018.

“Affirmative investigative techniques” is a clinical description for the types of covert activities one might expect in organized crime stings. It is a catchall for a variety of covert law enforcement techniques: secret recordings, hidden cameras, undercover deception, etc. Make no mistake however — those techniques are not just for gangsters. They also are a staple of criminal antitrust investigations.

The strength of the evidence that may result from such activities makes them highly appealing to federal antitrust prosecutors. Covert recordings made in investigations of the lysine, marine hose, and other industries have been key to obtaining convictions.

For that reason, you should assume the DOJ will look for opportunities to obtain similar evidence against a leniency applicant’s unsuspecting co-conspirators if the conduct under investigation is ongoing.

Covert activities obviously raise concerns and potential risks that are quite different from other types of cooperation required of a leniency applicant. In deciding how much weight to give the “affirmative investigative techniques” obligation in your calculus of whether to seek leniency, you will need to consider in advance what the obligation entails, what “affirmative investigative techniques” could include, the likelihood that any resulting evidence will be disclosed, the potential risks from such

cooperation, and whether participating in such covert activities is avoidable.

As will be discussed, the obligation, while not to be taken lightly, is not one that by itself should deter a company from seeking leniency. The benefits of leniency are simply too great, especially for culpable executives and employees facing possible criminal prosecution. Meanwhile, the burdens of such cooperation are not likely to be significant as the risks can be managed, and disclosure of the cooperation is not inevitable.

The “best efforts” obligation: Secure cooperation from employees

The DOJ’s Model Corporate Leniency Letter does not directly require a corporate leniency applicant to engage in affirmative investigative techniques. It instead requires the corporate applicant to use “its best efforts to secure the truthful, full, continuing, and complete cooperation of” its current officers, directors, and employees.

To receive their own leniency coverage, those individuals are obligated to engage “in affirmative investigative techniques, including but not limited to making telephone calls, recording conversations, and introducing law enforcement officials to other individuals” if directed by the DOJ.

What constitutes “best efforts” to secure employee cooperation in covert operations is not defined in the DOJ’s Model Corporate Leniency Letter, but it certainly would require more than a mere request by the corporate leniency applicant. A refusal by one or some employees to participate in the requested covert techniques is unlikely to be treated as a breach of the corporate leniency applicant’s obligations. It is likely to be treated as a breach of the refusing employees’ leniency obligations, however, and could result in their being excluded from the applicant’s leniency agreement and subject to prosecution.

A refusal by all employees requested to participate in covert investigative activities may raise questions about whether the corporate leniency applicant has fulfilled its obligation to fully cooperate.

> “It is likely to be treated as a breach of the refusing employees’ leniency obligations, however, and could result in their being excluded from the applicant’s leniency agreement and subject to prosecution.”
>
> -US Dept. of Justice, Antitrust Division Frequently Asked Questions About The Antitrust Division’s Leniency Program and Model Leniency Letters

The DOJ likely would take into account whether the corporate leniency applicant disciplined or terminated non-cooperating employees in assessing whether the applicant had used “best efforts” to secure their cooperation.

Although the DOJ would be reticent to disqualify a corporate leniency applicant altogether, it would be more likely to do so if all employees refused to participate in affirmative investigative techniques and the corporate leniency applicant had done nothing to mandate participation or discipline non-participation.

Affirmative investigative techniques

“Wearing a wire” comes to mind when thinking about covert tactics, and, indeed, that is one type of

affirmative investigative technique in which a corporate leniency applicant's employees could be employed. There are others.

Perhaps the mildest affirmative investigative technique is when federal agents instruct or take over the corporate leniency applicant's email, text, or app-based communications with its co-conspirators. This technique allows agents to build a clear record of incriminating written evidence for use in obtaining search warrants and at trial or, potentially, to arrange meetings or oral communications that can be exploited with other covert techniques.

Consensual monitoring (recording) of telephone calls between the corporate leniency applicant's employees and their co-conspirators is a staple technique of covert operations in criminal antitrust investigations. Consensual monitoring requires a more involved role by the corporate leniency applicant's employees, who will be coached to elicit incriminating statements during the monitored calls. A federal agent often, but not always, will be sitting with the employee while the call is recorded.

If in-person meetings are ongoing or can be arranged in the United States, an employee may be asked to wear a device to record a face-to-face meeting with co-conspirators. This technique represents a significant escalation in the role of, risk to, and pressure on a corporate leniency applicant's employee.

The obligation to wear a recording device may be a one-time event in connection with a single meeting, or it could extend for a series of meetings. While federal agents may be physically located close to the meeting being recorded, that may not always be the case and understandably raises safety considerations.

The DOJ lysine investigation recordings featured meetings at hotels in which some of the hotel "staff" were undercover federal agents. Some of the "lysine tapes" can be viewed online.

A related affirmative investigative technique would be to introduce a federal undercover agent into the conduct, possibly posing as an employee of the corporate leniency applicant. While likely to be less common than other affirmative investigative techniques, it would indicate the possibility of a lengthier operation entailing greater covert assistance by the company and its employees.

On the whole, however, participation in affirmative investigative activities is not likely to add meaningfully to the financial cost or operational disruption of seeking leniency and cooperating in the government's investigation.

Such activities are normally of relatively limited duration and may not require significant amounts of employee time (although undoubtedly are stress-inducing). Moreover, successful affirmative investigative activities, which produce highly incriminating evidence, may reap longer term benefits for the corporate leniency applicant and its employees by helping the prosecutors to obtain pre-indictment plea resolutions, reducing the need for other types of disruptive and time-intensive cooperation, such as trial preparation and testimony.

Disclosure risks

If the DOJ indicts a case in which the leniency applicant participated in affirmative investigative techniques, it will be required to produce any covert evidence obtained, such as consensual recordings, at some point in the litigation process. The materials are likely to be subject to a pretrial protective order that would limit disclosure to outside parties, but, in the event of a trial, the materials are likely to be offered into evidence and displayed in open court.

On occasion, plaintiffs in related civil antitrust litigation have sought production from the DOJ of covert consensual recordings. The DOJ will oppose efforts by civil plaintiffs to obtain production of such materials on the basis of the law enforcement investigatory privilege and has usually been successful in defeating such attempts.

See, e.g., In re Polypropylene Carpet Antitrust Litig., 181 F.R.D. 680, 686-87 (N.D. Ga. 1988) (finding that the DOJ's documents are protected under the law enforcement investigatory privilege when at least one of the civil defendants is a potential defendant in an ongoing criminal investigation). But see, In re Packaged Ice Antitrust Litig., 2011 U.S. Dist. LEXIS 51116 (E.D. Mich. May 10, 2011) (ordering the DOJ to produce investigatory files in camera because the DOJ's criminal investigation has already concluded, the cooperating witnesses were publicly known and did not object to disclosure, and the records sought were tape recordings and verbatim transcripts, which are factual in nature).

Nevertheless, disclosure is not inevitable and not likely in some investigations. Most criminal antitrust investigations resolve without litigation, either through pre-indictment plea agreements or closure, and without any discovery obligation regarding evidence obtained covertly.

In particular, during a criminal grand jury investigation, before any indictments have been returned, prosecutors have no obligation to disclose their evidence to the companies and individuals under investigation. Prosecutors certainly will choose to strategically disclose their covert evidence to those under investigation in some instances in hopes of securing a pre-indictment guilty plea.

In other investigations, however, prosecutors may conclude that the likelihood of obtaining pre-indictment guilty pleas is enhanced by *not confirming* the fact of, or disclosing the substance of, evidence gathered covertly with the assistance of the corporate leniency applicant. Sometimes, for instance, a prosecutor may choose to confirm the existence of a covert recording but not play it for the individual who was recorded because he or she may imagine that the evidence is more incriminating than it actually is.

Many a prosecutor has begun to listen to a covert recording with breathless anticipation only to find that it was not particularly clear or inculpatory. At other times, prosecutors may want all targets of the investigation to assume that they have been recorded when, in fact, only some were.

In such cases, prosecutors may decide to do no more than confirm (or not deny) that covert evidence exists without displaying it to the subjects of the investigation and thereby divulging the role of the corporate leniency applicant and its employees in procuring it.

Other potential risks

A key consideration in assessing whether to take on the leniency obligation to engage in affirmative

investigative techniques will be the potential risks of that conduct.

The weightiest concern is the risk of exposing employees to physical harm or to criminal charges in other jurisdictions, but companies and executives will also be concerned with reputational harm, the risk of retaliation in their industry (especially where joint ventures or supply relationships exist with some of those competitors) and enhanced civil exposure that may result from disclosure of the covert evidence. However, as discussed below, the likelihood of these risks coming to fruition in a criminal antitrust case is relatively low.

First, it may be helpful to explain that there are no known instances where covert cooperation by the employees of a corporate leniency applicant has led to physical harm or retaliation.

The most common covert techniques — covert written communications and consensual monitoring — do not bring the employee into direct contact with the subjects of those operations and thus limit the exposure to physical harm. Although wearing a recording device to an in-person meeting carries more potential risk, advances in technology have made recording devices more difficult to detect and, as noted, federal agents often will be posted nearby.

Similarly, while care must be taken to ensure that recorded communications with a person located in another jurisdiction do not run afoul of the laws of that jurisdiction, the DOJ is knowledgeable and adept at orchestrating covert approaches that comply with the laws not only of the United States but the foreign jurisdiction as well. Note, it is not a violation of US law for an employee to engage in consensual monitoring at the direction of federal agents. (18 U.S.C. § 2511(2)(c).)

Foreign legal liability for consensual recordings may be avoided by, for instance, recording only calls initiated by the other party and received in the United States. Although the issue should not be taken lightly, a carefully considered approach is likely to eliminate the risk of violating foreign law.

> Note, it is not a violation of US law for an employee to engage in consensual monitoring at the direction of federal agents.

Finally, seeking leniency and thereafter equipping the DOJ with documents and witnesses for the prosecution of co-conspirators, by itself, raises the prospect of reputational harm and retaliatory consequences within the industry. Engaging in covert evidence gathering may not add much to those consequences for a company although as a practical matter may make the individuals unemployable in the industry in the future. This consequence to the individuals must be weighed against the countervailing risks and consequences of incarceration for the individual if leniency is not obtained, however.

Likewise, even without participating in affirmative investigative techniques, a corporate leniency applicant is required to provide cooperation to civil plaintiffs, thereby solidifying its US civil exposure, in order to obtain a reduction in civil damages exposure under the Antitrust Criminal Penalties Enhancement & Reform Act (ACPERA).

In any event, as noted above, absent litigation of an indicted case it may be that neither the fact of leniency nor resulting covert cooperation will be disclosed by the DOJ to the other subjects of the investigation or in related civil litigation.

Avoidability

Although participation in affirmative investigative techniques may not be required in many, or even most, investigations, there can be no certainty at the time a decision is made to request corporate leniency that DOJ will not require them. Nevertheless, there is a greater likelihood that the DOJ will decide to use affirmative investigative techniques when a cartel is ongoing and a lesser likelihood it will pursue them if a cartel has ended or the leniency applicant is no longer participating in the cartel.

While consideration could be given to making a "noisy" exit from the cartel prior to seeking leniency to minimize the feasibility of affirmative investigative techniques, this could expose the leniency applicant to at least two forms of peril. First, the withdrawal could trigger a race for leniency among co-conspirators that the company may not win. Second, if the DOJ viewed the withdrawal as an effort by the leniency applicant to undermine or eliminate its ability to fully cooperate, it could take the position that the corporate leniency applicant has breached its obligations and is not entitled to leniency.

It is worth noting, however, that such an argument by the Antitrust Division would arguably be in conflict with the requirement of the Corporate Leniency Policy that an applicant "upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity."

For those reasons, careful thought should be given to how best to manage exiting the cartel to avoid a leniency race and to whether other justifications exist for the withdrawal, such as the need to comply with the leniency requirements of another jurisdiction.

It may also be possible to persuade the Antitrust Division not to undertake affirmative investigative techniques due to safety and liability concerns. Although risks to employee's personal safety may not be significant, it will always be a legitimate concern to raise with the division and federal agents for at least some types of covert activities. Likewise, concerns can be raised about the risk of extra-territorial liability for employees in appropriate cases. The Antitrust Division expressly invites an applicant to raise such concerns.

> "Counsel for the Applicant should discuss with the Division any concerns, such as safety concerns, regarding engaging in affirmative investigative techniques. The Division will take those concerns into consideration in assessing the Applicant's good faith and complete cooperation."
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> - Model Letter at 7 n. 12

Finally, a corporate leniency applicant and employees who engage in covert investigative techniques will normally have an opportunity to offer input on the feasibility of the proposed approach. In doing so, they may be able to influence the type of technique used to minimize any safety or liability concerns and to provide greater comfort or security for the participating employees.

However, the final decision on what approach to take in any case will be made by the DOJ and the investigating agents, and a refusal by the corporate leniency applicant and its employees to participate could jeopardize their eligibility for leniency.

Bottom line: Not to be taken lightly, but warranted by the benefits.

The decision to seek leniency should carefully take into consideration the potential of being required to secure employee involvement in affirmative investigative techniques. This obligation poses risks and understandable concerns, but, in the final analysis, it probably should not by itself deter a

company from seeking leniency, given the substantial benefits to the company and its employees.

Most affirmative investigative techniques will be of limited duration and may require limited employee time, such as recording a single telephone call, but they may result in high-value evidence that would reduce the need for the company and its employees to provide other types of costly and time-intensive long-term cooperation, such as trial testimony, and reduce the likelihood and/or extent of disclosure of the evidence.

The DOJ will likely be open to discussions about potential safety and legal risks resulting from the conduct, which, in any event, can be managed and minimized if the decision is made to engage in affirmative investigative techniques. By contrast, a decision not to seek leniency exposes the company to the risk of criminal fines and unmitigated civil exposure and its employees to the risk of potentially lengthy incarceration.

The views expressed in this article are Micah Rubbo's own and do not represent the views of Twitter, Inc.

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