"Major DOJ Antitrust Policy Shift On Immunity For Employees"

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Law360, New York (January 27, 2017, 12:55 PM EST) -- In the last week of the Obama administration, without any fanfare, the U.S. Department of Justice's Antitrust Division included a significant policy shift in an updated version of its "Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters."[1] When read in conjunction with the Yates memorandum's enhanced focus on prosecuting culpable individuals,[2] this policy change has a number of real-world implications that could affect the calculus of any corporation applying for leniency under the Antitrust Division's corporate leniency policy.[3]

Updated FAQs Eliminate Guaranteed Immunity for Cooperating Employees of Type B Leniency Applicants

The Antitrust Division first publicized its "Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters" on Nov. 19, 2008.[4] This document provided the most detailed published guidance regarding the division's leniency program in the form of 33 frequently asked questions and answers.

Under the leniency program, corporations could qualify for two types of leniency — known as Type A or Type B leniency — if they satisfied specific criteria. Type A leniency is available only if, "[a]t the time the corporation comes forward, the Division has not received information about the activity from any other source." Type B leniency is available only if "[t]he corporation is the first to come forward and qualify for leniency with respect to the activity."[5] The main distinction between the two is whether the division had previously received information about the wrongful conduct from another source. Nonetheless, only a corporation which is "first-in" can qualify for leniency, regardless of type.[6]

While a corporation that ultimately satisfied all of the requirements for Type A or Type B leniency received numerous benefits for itself, including immunity from prosecution as a corporate entity, it also received protection from prosecution for directors, officers and employees (collectively referred to herein as "employees") that admitted knowledge of or participation in wrongdoing and fully cooperated with the division's investigation. Cooperating employees of companies that qualified for Type A leniency were automatically eligible for protection. While employees of corporations that qualified for Type B leniency were technically to be considered for immunity as if they had approached the division individually, the 2008 version of the FAQs made it clear that "[i]n practice, however, 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."[7] Thus, all cooperating employees of any first-in leniency applicant were immune from individual criminal prosecution by the division, regardless of type.

The updated version of the FAQs, initially issued on Jan. 17, 2017,[8] continues to provide for immunity for all cooperating employees of corporations with Type A leniency. However, the 2017 FAQs appear to contain a significant shift in the provision of immunity for cooperating employees of Type B applicants. Specifically, the 2017 FAQs removed the statement "[i]n practice, however, 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." In its place, the 2017 FAQs now provide that "[t]he Division often chooses to include protection for current directors, officers, and employees of Type B Leniency applicants. However, the Division may exercise its discretion to exclude from the protections that the conditional leniency letter offers those current directors, officers, and employees who are determined to be highly culpable."[9]

The impetus for this change is not yet clear, but it comes after the memorandum then Deputy Attorney General Sally Q. Yates (the current acting attorney general) issued in September 2015 clarifying the DOJ's policies and procedures with respect to holding individuals responsible for corporate wrongdoing accountable. Although the Yates memorandum

provided for an increase in the department's focus on prosecuting culpable individuals generally, immunity for cooperating employees of first-in corporations under the Antitrust Division's leniency program was practically ensured. The policy outlined in the Yates memorandum included a general mandate that "Department lawyers should not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers or employees," but it also made clear that this mandate did not apply where it conflicted with "approved departmental policy such as the Antitrust Division's Corporate Leniency Policy."[10] The immunity granted to employees under the policies set forth in the Antitrust Division's 2008 FAQs was thus clearly still permissible under the Yates memorandum. Perhaps the change in the 2017 FAQs — removing practically guaranteed immunity for highly culpable employees of Type B leniency applicants — reflects the department's broader policy efforts to hold more individuals accountable for corporate wrongdoing.

It remains to be seen whether, in practice, this change in language is merely a removal of the practical assurances of immunity or if, coupled with the Yates memorandum, it establishes a presumption against immunity for highly culpable employees of corporations receiving Type B leniency. Regardless, this subtle change, buried in the 2017 FAQs, represents a significant policy shift that may have an impact on the effectiveness of internal investigations and what companies decide to do based on what they learn.

Individual Employees May Be Less Likely To Cooperate in Corporate Investigation

Corporations may find it more difficult to get employees to cooperate with internal investigations into wrongdoing as a result of this new policy, which could make it even more difficult for companies to perfect markers and decrease the overall value of the cooperation companies can provide to the Antitrust Division. In particular, an employee may be less likely to cooperate because whether the employee has immunity now hinges on: (1) whether the corporation qualifies for Type A or Type B leniency; and if Type B leniency, then (2) whether the individual is considered "highly culpable" by the division. An employee involved in wrongdoing may have a difficult time deciding whether to cooperate with an investigation because of the lack of knowledge as to how these conditions will ultimately be resolved by the division.

For example, even where a corporation is told that Type A leniency is available, this information would provide no guarantee for the individual employee that the corporation will ultimately qualify for Type A leniency, and lead to that employee's own immunity. A corporation may ultimately fail to achieve Type A leniency if the division ultimately determined that the corporation coerced another company to participate in the wrongful conduct, but the corporation could still qualify for Type B leniency if it would not be unfair to others under the circumstances.[11] This would not matter under the 2008 FAQs, as immunity would still be granted to the individual employee regardless of whether the corporation ultimately achieved Type A or Type B leniency.

Perhaps a larger concern is that employees have no way of knowing whether the Antitrust Division will ultimately consider them highly culpable. To begin with, there is little to nothing in the way of practical guidance available as to what makes an employee highly culpable. Even experienced practitioners may not be able to foresee how this policy will affect an individual employee without more guidance from the division or more experience with how the division will enact this new policy. Even if, as time goes on, it becomes more clear what type of conduct results in the highly culpable designation, an employee may still have trouble properly evaluating whether to cooperate because the employee may not have the full picture of their role in the overall conspiracy.

Whether armed with the full picture or not, each employee now faces a complicated prisoner's dilemma related to the full disclosure of his or her own role in the conspiracy that simply did not exist under the 2008 FAQs. An employee who fully implicates herself may be labeled highly culpable; an employee who mitigates his own involvement may not be labeled highly culpable if others do not point the finger at him; if each employee implicates others, but mitigates his or her own involvement, then the Antitrust Division could be left with a much less accurate picture of what actually happened.

Corporate Incentives To Apply for Leniency May Change

In addition to the possibility that this new policy prevents companies from fully understanding the nature and scope of any potentially criminal conduct because its employees do not cooperate in internal investigations, the new policy could also alter the decision making process for corporations under certain circumstances. Certainly, if a corporation would have decided not to apply for leniency under the understanding from the 2008 FAQs, then it would have no more reason to do so under these provisions of the 2017 FAQs. Even if a corporation would have applied for the corporate leniency program under the 2008 FAQs, the calculus may not change. There are, of course, still substantial benefits to leniency, whether Type

A or Type B, including immunity from prosecution and avoidance of a substantial fine. Even where the primary goal of the corporation is to protect its employees to the maximum extent possible, and this policy change leaves some employees less protected, many companies may still decide to participate in the leniency program, which would offer immunity to all but the highly culpable individuals.

There is, however, a potentially sizeable complication. If the decision on whether a company applies for leniency is being made by individuals who could be considered highly culpable (e.g., privately held corporations controlled by a small number of individuals), the individuals may now elect not to come forward on behalf of the corporation, when they otherwise would have, because of the risk that the company may not be able to obtain Type A leniency. Under the prior policy, if a corporation approached the government through counsel and learned that only Type B leniency was available because an anonymous tip had led the division to begin an investigation already, it would likely still have come forward to claim the first-in marker on the expectation that its employees (including the highly culpable ones in charge of the decision) would have been protected. Under the updated policy, any potentially highly culpable employees at the helm of companies would have a much tougher decision to make.

Individual Counsel May Be Required for Highly Culpable Employees

While the benefits of the leniency program are undeniable, it is easy to underestimate all of the costs that go into the process of cooperation. Particularly for conspiracies affecting a smaller volume of commerce, this policy change may also increase the cost of cooperating, another factor that may affect a company's decision to self-report. There comes a point in most investigations of wrongful antitrust conduct when the interests of the corporation and the interests of some individual employees may diverge. It frequently arises for corporations that cooperate with an investigation by the Antitrust Division, but are not entitled to leniency (e.g., corporations that are second-in or later). Under those circumstances, when the corporation reaches a plea agreement with the division, the division will often provide immunity from prosecution to low or mid-level employees that were involved in the wrongful conduct and cooperate in the investigation. However, the division will insist on "carving out" certain higher level employees involved in the wrongful conduct from any nonprosecution protections of plea agreements, thus subjecting them to individual prosecution.[12] To its credit, when the division has typically identified individuals it believes that it may carve out from the corporate plea agreement and has usually suggested that those individuals need to retain separate counsel.

Getting individual counsel for employees is an expense which did not arise at all for a corporation that was eligible as a "first-in" leniency applicant, because all of its employees would be given immunity. Given the policy shift in the 2017 FAQs, corporations that are first-in, but cannot be certain whether they qualify for Type A leniency, will now likely need to retain individual counsel for certain highly culpable employees. Given that most corporations choose to pay for the costs of separate counsel for employees, that is likely to raise the cost some corporations seeking leniency will ultimately pay. Moreover, it creates a host of unanswered questions as to when the obligation to get separate counsel arises under these circumstances, which could conceivably require separate counsel be obtained for a very broad section of employees that could somehow fit within the highly culpable category.

Conclusion

The full impact of the new policies contained in the Antitrust Division's updated FAQs will of course depend on how exactly the division implements them, especially under the new administration. At least until more guidance arises, these factors will have to be carefully considered by any company considering reporting a potential violation through the leniency program.

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[1] U.S. Dep't of Justice, Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters (January 17, 2017), available at https://www.justice.gov/atr/page/file/926521/download.

[2] Yates Memorandum, Department of Justice, September 9, 2015, available at http://www.justice.gov/dag/file/769036/download.

[3] U.S. Dep't of Justice, Corporate Leniency Policy (1993), available at http://www.justice.gov/atr/public/guidelines/0091.pdf.

[4] U.S. Dep't of Justice, Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters (November 19, 2008), available at https://www.justice.gov/sites/default/files/atr/legacy/2014/09/18/239583.pdf.

[5] Id. at 4-5 (Question 3).

[6] Id. at 5-6 (Question 4).

[7] Id. at 20 (Question 23).

[8] See supra note 1. The Antitrust Division issued a further updated version on January 26, 2017, re-inserting a footnote on the availability of short-term, anonymous markers, which was accidentally deleted from the earlier draft. See U.S. Dep't of Justice, Updated FAQs Provide Answers To The Antitrust Division's Leniency Program and Model Leniency Letters (January 26, 2017), available at https://www.justice.gov/opa/blog/updated-faqs-provide-answers-antitrust-division-s-leniency-program-and-model-leniency-0. The older version has been removed from the website and replaced with the January 26, 2017 version, which is available at https://www.justice.gov/atr/page/file/926521/download. Except for the re-insertion of the footnote, that January 26, 2017 version is substantively identical to the January 17, 2017 version.

[9] See supra note 1 at 20-21 (Question 22).

[10] See supra note 2 at 5.

[11] See supra note 4 at 4 (Question 3).

[12] See, e.g., Scott D. Hammond, Deputy Assistant Att'y Gen. for Criminal Enforcement, Antitrust Division, Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations, Presented at the ABA Antitrust Section Spring Meeting (March 29, 2006), available at https://www.justice.gov/atr/speech/measuring-value-second-cooperation-corporate-plea-negotiations.

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