§ 18.01 Introduction

This paper offers a practical overview of federal criminal antitrust enforcement by the Department of Justice’s Antitrust Division (the “Antitrust Division”), the lone criminal enforcer of U.S. antitrust laws. Price fixing, bid rigging, and market allocation are criminal violations of U.S. antitrust laws, and a felony conviction for these offenses can lead to corporate criminal fines of $100 million or more and imprisonment of up to ten years for individuals.

Among the most critical aspects of the Antitrust Division’s criminal enforcement program is the potential for “leniency” or “amnesty.” In other words, a guarantee of no criminal prosecution for the first company that self-reports its involvement in wrongdoing (as well as for the first individual to self-report his or her involvement in an antitrust offense). Pursuant to the Corporate and Individual Leniency Programs, which are described in the written policies of the Antitrust Division, the offer of leniency is subject to conditions, including a truthful admission of wrongdoing, an agreement to fully cooperate with the government’s ongoing investigation, and a commitment to pay restitution to victims of the conduct. Self-reporting criminal violations raises significant concerns, but the potential value of leniency to early cooperators has grown materially with the dramatic rise in fines and prison sentences since the Leniency Programs were first adopted. As a result, seeking leniency may prove to be a prudent course when a company is confronted with evidence of an antitrust violation.

To qualify for leniency, it is critical that corporate and individual counsel recognize the potential for criminal antitrust violations as early as possible, and determine whether the company or individual can qualify for the Antitrust Division’s Leniency Programs. This paper provides an overview of the legal foundations for criminal antitrust enforcement and the enforcement prerogatives that guide whether an antitrust prosecution is brought (Section 1.02), examples of how this framework has been applied in recent antitrust prosecutions (Section 1.03), and practical strategies for taking action should a company or individual discover a potential antitrust violation (Section 1.04).
§ 18.02 Framework for U.S. Criminal Antitrust Prosecutions

[1] Sherman Antitrust Act § 1

The foundation of U.S. criminal antitrust prosecutions is Section 1 of the Sherman Act, which provides that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” This prohibition applies to virtually all sectors in the U.S. economy, as well as overseas companies and individuals whose conduct harms U.S. consumers. The Sherman Act is enforceable through civil and criminal actions by DOJ, civil actions by the Federal Trade Commission and, under some circumstances, State Attorneys General, and through actions for damages by private plaintiffs.

Put simply, Section 1 violations occur when competitors enter into agreements – whether formal or informal – to unreasonably restrain trade or competition. An agreement is “a unity of purpose or a common design and understanding or a meeting of the minds in an unlawful arrangement,” and can be an express agreement in the form of a written contract, implied in the form of a “Gentlemen’s” or oral agreement, or inferable from conduct, such as telephone calls, meetings, e-mails, and text messages. Only parties that are independent of each other to some degree can reach an unlawful agreement, and therefore parent companies and their wholly-owned subsidiaries cannot agree or conspire in violation of Section 1.

U.S. case law describes two different approaches to analyzing potentially unlawful agreements. The first approach is a categorical rule that some agreements between competitors are “per se” illegal. These agreements “so often prove so harmful to competition and so rarely prove justified that the antitrust laws do not require proof that an agreement of that kind is, in fact, anticompetitive in the particular circumstances.” As a practical matter, this means that the business justification or procompetitive reason for a per se agreement is not a legal defense to prosecution. This is strong medicine and, over time, courts have limited the per se category under Section 1 primarily to agreements fixing prices, limiting output, rigging bids, allocating markets (by geography, customer, etc.), and to some group boycotts. It is per se unlawful conduct that gives rise to criminal liability, and we will return to the types of per se agreements that trigger criminal liability in Section 1.03 below.

The second approach is known as the “rule of reason” analysis, which involves a three-step burden-shifting test to evaluate the anticompetitive effects and procompetitive benefits of the agreement at issue. The analysis begins with the plaintiff making a showing of anticompetitive effects, moves to the defendant to show legitimate business purpose and/or procompetitive benefits, and ends with the plaintiff (on the ultimate issue of whether the former

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2 The extraterritorial reach of the Sherman Act has been a hotly litigated issue in recent years. It is clear that the Antitrust Division can prosecute overseas conduct, Hartford Fire Insurance Co. v. California, 113 S. Ct. 2891 (1993), but the disputed issue has been how significant of a nexus is required to establish the domestic impact of such conduct. See 15 U.S.C. § 6a; United States v. AT&T Corp., 534 F.3d 336 (7th Cir. 2008); Motorola Mobility v. AT&T Corp., 775 F.3d 816 (7th Cir. 2015); Lotes Co. v. Hon Hai Precision Industry Co., 753 F.3d 395 (2d Cir. 2014); Animal Science Products, Inc. v. China Minmetals Corp., 654 F.3d 462 (3d Cir. 2011).
outweigh the latter). When the Antitrust Division has decided to prosecute a case, it has determined that the conduct is *per se* illegal, and therefore in criminal cases, the rule of reason analysis typically does not apply. The Antitrust Division also investigates civil cases, in which this second mode of analysis may apply and allows for consideration of whether the agreement has anticompetitive effects, or instead, procompetitive benefits and efficiencies.

**[2] The Antitrust Division and Criminal Enforcement**

The Antitrust Division has long exercised its responsibility for enforcement of criminal antitrust law to target hardcore violations of Section 1—*i.e.*, *per se* unlawful agreements to fix prices, rig bids, or allocate markets among competitors.5 In pursuing a criminal investigation, the Division also considers the volume of commerce (*e.g.*, sales or revenue) affected, potential for expansion of the investigation into broader geographies or industry areas, visibility and deterrent effect of the investigation, degree of culpability of the participants, and any impact on the government.

Since 1974, the government has been able to charge Sherman Act violations as felonies. Corporations, their directors, officers, and agents who “knowingly participate[] in effecting the illegal contract, combination, or conspiracy,”6 and other involved individuals are subject to prosecution. The current penalty regime authorizes fines of up to $100 million for corporations, and up to $1 million, 10 years’ imprisonment, or both for individuals.7 Alternatively, the government may seek fines equal to twice the gain to the defendant or the loss to the victim resulting from the conduct at issue, and the government often does so when that figure exceeds the otherwise applicable statutory maximum.8 This alternative approach has led to corporate fines that exceed $100 million, including a corporate fine after trial of $500 million.

Although antitrust prosecutions are similar in some ways to other federal criminal cases, there are some legal and procedural differences that practitioners should know. In addition to the Corporate Leniency Program, which only applies to antitrust offenses, the proof of intent needed for an antitrust prosecution is also unique. In *United States v. United States Gypsum Co.*, the Supreme Court held a showing of criminal intent is necessary for criminal antitrust conviction.9 However, in the case of *per se* offenses, nearly every appellate court has interpreted *Gypsum’s* intent requirement to be satisfied where the government shows the defendant intended to participate in the conspiracy.10 Thus, what the government must show to support a conviction is (1) the existence of a *per se* illegal agreement, (2) the defendant knowingly entered into the

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5 See U.S. Department of Justice, Antitrust Division Manual at III-12 (2015), available at https://www.justice.gov/atr/division-manual. While many antitrust statutes contain criminal provisions, it has been decades since the last indictment was based on violations other than of Section 1. For a summary of other criminal penalties under federal antitrust law see Federal Control of Business: Antitrust Laws, Ch. XV, § 205 (“Criminal Provisions”).


10 See, *e.g.*, *United States v. Rose*, 449 F.3d 627, 630 (5th Cir. 2006) (“To show that Rose actually intended to enter into the conspiracy, the government was required to show that [he] knowingly joined or participated in [it]”).
conspiracy, and (3) the conspiracy affected interstate commerce. The government does not need to show that a defendant had intent to defraud or any other specific intent towards a victim.

Once a criminal investigation is opened, the Antitrust Division has several tools at its disposal to gather information.¹¹ Leniency applicants that cooperate with the government’s investigations are a significant source of information about who has participated in an antitrust conspiracy and the nature of the conduct involved. Federal agents and victims are also sources of leads and information. Once the Antitrust Division has a lead, it has formal means of investigation via a grand jury proceeding, which favors the Division for several reasons—proceedings are secret, far reaching discovery is available and can be enforced through contempt penalties, witnesses are not represented by counsel, and so on. The Antitrust Division may also employ the tools available in all federal criminal investigations—e.g., search warrants, witness interviews, consensual monitoring and electronic surveillance through informants, etc.—the most important of which in most cases is support from leniency cooperators as well as other targets who have come forward to cooperate.

§ 18.03 Spotting Per Se Violations in Antitrust Prosecutions

What conduct constitutes a per se violation of the Sherman Act that the Antitrust Division could criminally prosecute? We describe price fixing, bid rigging, and market allocation in the next sections.

[1] Price Fixing

Price fixing is an agreement between competitors to establish, stabilize, alter, manipulate, or otherwise agree to prices or terms and conditions of sale. These agreements are treated as per se illegal because “[t]he aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition,” competition over price.¹² Competitors need not agree to an exact price to be prosecuted for price fixing; agreeing to maintain market pricing levels, coordinating on discounts or rebates, or reaching an understanding about future strategies are all violations of the antitrust laws. As the Supreme Court explained in its 1940 decision in United States v. Socony-Vacuum Oil Co.,

Nor is it important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible. Price-fixing . . . has no such limited meaning. An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price-fixing was used. . . . Hence, prices are fixed . . . if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various


formulae they are related to the market prices. They are fixed because they are agreed upon.\(^\text{13}\)

A recent example of a price-fixing prosecution is the 2014 case of *United States v. Hui Hsiung, et al.* (*“AU Optronics”*), in which the Ninth Circuit affirmed after trial the convictions of a Taiwanese electronics manufacturer and two of its executives for their role in a larger conspiracy to fix prices for Liquid Crystal Display (*“LCD”*) screens.\(^\text{14}\) The Ninth Circuit rejected defense arguments about the extraterritorial reach of the Sherman Act (as DOJ can prosecute foreign nationals and overseas companies), as well as the applicability of the rule of reason in a criminal antitrust prosecution.

In *AU Optronics*, the company and its employees were charged with participating in a price-fixing conspiracy that formed in 2001 during in-person competitor meetings in a Taiwanese hotel room between top executives from numerous Asian LCD manufacturers. The participants produced price target reports for LCD monitors at these meetings, which their retail businesses used to benchmark sales to wholesale customers (*e.g.*, Dell, Hewlett Packard, etc.). The conspiracy continued through meetings at various locations for five years before the Antitrust Division learned of its existence.

In the course of the Antitrust Division’s subsequent investigation, from 2008 to 2012, seven of the involved manufacturers pleaded guilty, agreeing to fines in excess of $890 million.\(^\text{15}\) AU Optronics and its executives opted instead for trial and were convicted for their role in the horizontal price-fixing arrangement. The company was fined $500 million, under the alternative approach to calculating criminal fines, and the Court sentenced executives of the company to 3 years in federal prison.

**[2] Bid Rigging**

It is unlawful for competitors to reach an agreement on the method or contents of bid submissions. Common examples of *per se* violations in this category are agreements not to submit competing bids, in particular geographies, or to particular customers; to submit bids pursuant to a pre-set rotation or schedule, including submitting fake or “courtesy” bids so a competitor can win; or to set price caps for bid submissions. The Antitrust Division has prosecuted bid rigging in both private sector and government settings, *e.g.*, bidding for government contracts.

In recent years, natural gas companies have seen a series of bid-rigging investigations. In one of the highest profile individual antitrust prosecutions, a federal grand jury indicted former Chesapeake Energy CEO, Aubrey McClendon, in March 2016 on one count of bid rigging in connection with acquisitions of natural gas leaseholds and producing properties in northwest Oklahoma. The indictment\(^\text{16}\) alleged that McClendon (on behalf of Company A) and a co-

\(^{13}\) *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940).

\(^{14}\) *United States v. Hui Hsiung*, 778 F.3d 738 (9th Cir.), cert. denied, 135 S. Ct. 2837, 192 L. Ed. 2d 875 (2015).


conspirator (on behalf of Company B) agreed in December 2007 that (i) Company B would not bid and/or would withdraw previously submitted bids to reduce the price at which Company A could acquire the leaseholds and producing properties; and (ii) Company A would sell to Company B a share of the leaseholds and producing properties it acquired at the reduced cost Company A paid. The indictment alleged that the participants employed measures to keep this agreement secret from owners of the leasehold interests, and that the agreement remained in effect until March 2012. McClendon died the day following his indictment, and the government subsequently dismissed the case.

In another recent matter, the Antitrust Division and the State of Michigan investigated Chesapeake Energy and Encana in 2012 for alleged bid-rigging in connection with auctions for oil-and-gas leases in Michigan.\textsuperscript{17} The State of Michigan brought criminal antitrust charges against both companies in 2014.\textsuperscript{18} The companies allegedly entered into agreement not to bid against each other in lease auctions in order to limit bid prices. As evidence of the alleged agreement, the State relied on a series of emails between Chesapeake and Encana executives that purportedly divided up Michigan counties where each company would be the exclusive bidder for leases. The companies also allegedly cooperated to reduce the prices of leases from private land holders. Both companies conducted internal investigations that they publicly announced revealed no wrongdoing and both ultimately settled with the State of Michigan, Encana for $5 million and Chesapeake for $25 million. A private plaintiff also brought a lawsuit against the companies in U.S. federal court in Michigan, alleging antitrust violations based largely on the same allegations as the Michigan criminal case.\textsuperscript{19} The parties settled that case, \textit{NorthStar Energy LLC v. Encana Corp.}, in January 2017.\textsuperscript{20}

An interesting question about the distinction between criminal and civil enforcement is raised by the Antitrust Division’s 2013 civil settlement in an oil-and-gas rights case. In \textit{United States v. Gunnison and SG Interests},\textsuperscript{21} the DOJ’s civil complaint alleged that the companies, competitors in natural gas exploration, conspired not to compete in bidding on federal lands that the Bureau of Land Reclamation auctioned off in 2005. The parties had engaged in on-again, off-again discussions about joint exploration and forming a broad collaboration. In February 2005, the companies entered into a written agreement that SG would submit bids on behalf of both, sell 50\% of any interests won to Gunnison at cost, and the two would form a joint venture to develop the leases thereafter. Later that year, in the summer of 2005, the parties made an “agreement to engage in a broad collaboration to jointly acquire and develop leases and pipelines in the Ragged Mountain area.” The court initially rejected a proposed final judgment settling the case for $550,000 as “nothing more than [a] nuisance” and insufficient to deter future misconduct\textsuperscript{22}, before approving that arrangement in the months that followed.\textsuperscript{23}

\textsuperscript{17} Chesapeake Energy Corp., Quarterly Report (Form 10-Q), at 20 (Aug. 9, 2012).
Although the DOJ did not explain its decision to seek civil enforcement rather than criminal enforcement, there are some alleged facts that might have made a criminal case difficult. There were discussions about joint exploration before and after the February 2005 agreement, which the parties could argue showed that they were not operating as competitors during the entire period in question. In addition, the DOJ’s response to public comments indicates that it viewed the parties’ bidding after the AMI agreement as a legitimate joint collaboration, not bid-rigging. Even with these points, this fact pattern reflects that companies should exercise caution and seek legal review for competitor collaborations. We provide some practical tips in this respect in Section 1.04 of this paper.


Market and customer allocation involves agreement among competitors to divide up economic opportunities with respect to particular products, regions, or customers, and thereafter, to stay out of each other’s way. Each competitor has greater pricing power within their assigned geography or customer base, with no risk of being undercut by the other competitors in the conspiracy.

In energy sectors, utilities and other companies may be subject to regulatory or other legal arrangements that result in a specific regional focus or customer base. Under such circumstances, there may be a question of whether regulatory requirements trigger antitrust immunity. However, in the absence of antitrust immunity – which often requires significant legal analysis and argument to prove – arrangements among energy companies to allocate markets are per se illegal. A European Commission case against natural gas providers is instructive.

In 2009, the European Commission fined natural-gas providers E.ON (Germany) and GDF Suez (France) € 553 million each for a market-sharing agreement—the first antitrust fine levied on utilities in the European Union. The agreement began legally in 1975 during the joint construction of the MEGAL pipeline to deliver Russian natural gas to Germany and France. As part of that project, E.ON and GDF agreed not to sell natural gas in their respective home markets until September 2005. The agreement became illegal in 2000 following the EU’s decision to open the natural gas market to competition. In June 2012, the EU’s second highest court affirmed the Commission’s decision, but reduced the fines to € 320 million for each participant based upon its finding that E.ON and GDF had agreed to suspend the anticompetitive aspects of the agreement a year prior to the date on which the Commission’s fine calculation was based.24

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§ 18.04 Practical Tips for Preventing and Responding to Potential Antitrust Violations

[1] Identify Antitrust Risks and Implement Concrete Compliance and Audit Policies

A criminal antitrust violation is unlikely to occur unless competitors are involved. The first step is knowing when and under what circumstances contact with competitors may occur. Common risk scenarios:

1. You are in a highly concentrated industry or product area in which a few dominant players have pricing power.

2. Your business unit frequently participates in bidding for contracts or projects, and there are few, repeat bidders for the type of contract. You have previously sought to collaborate or team with the other bidders.

3. In your area, sales and marketing executives move from competitor to competitor, and maintain relationships socially and professionally.

4. Trade association meetings are important in your industry, and competing companies meet to talk about business, regulatory, and policy issues.

5. You do not have a written antitrust compliance program or antitrust training.

6. A competitor has contacted you in the past, and sought pricing, strategy, or other competitively sensitive information from you or others in your business.

7. Your product or market segment has been subject to government investigation or private antitrust claims in the past.

8. You frequently sell or buy products from a company that also competes with your company in one or more areas.

If any of these circumstances apply to your company, a practical tip to consider is drafting specific antitrust compliance guidelines for your business, and also developing compliance training to avoid problematic competitor communications.

Even if your company has existing guidelines, review them with a critical eye. The Antitrust Division has made clear that compliance policies have to be effective, and that companies will lose valuable credibility if they have a written policy that still allows employees to engage in antitrust violations. As Deputy Assistant Attorney General Brent Snyder stated in his speech “Compliance is a Culture, Not Just a Policy,” executives who have received training can “walk out of that compliance training and do the very things the training was designed to prevent.” 25

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Another practical tip to consider is reviewing any existing antitrust policies or guidelines your company has in place with the following questions in mind: Are they simple and practical enough for any employee to understand? Do they provide a clear contact for employees to report any suspicious contacts or events? Are they consistent with and integrated within broader integrity or compliance guidelines of the company? Do you undertake periodic audits to confirm that they are understood and actually working? If employees violate them, are there disciplinary and other consequences?

[2] Evaluate Joint Ventures and Collaborations with Competitors Carefully

Another practical tip is to evaluate any joint business efforts or collaborations with a competitor carefully. Labels such as “joint venture” or “consortium” are only effective with antitrust enforcers if there is an actual, concrete, and lawful basis for the arrangement. The DOJ/FTC Antitrust Guidelines For Collaboration Among Competitors are a useful resource, and include examples of the types of arrangements that do not raise concerns and some that do. Here are some initial tips for considering a potential collaboration:

- Evaluate whether a joint collaboration for bidding or other activity will bring value and new resources to the market (procompetitive benefits), rather just an opportunity to communicate with a competitor about pricing or commercial strategies. The latter is likely to be viewed by the Antitrust Division as a sham arrangement. An example of a procompetitive benefit is where two companies could not bid independently on a project, and team together in order to include technical and other resources required.

- The scope of a joint collaboration should be specifically identified and align with the procompetitive benefits. For example, if the collaborators have agreements about how and when they will bid together, those rules or restrictions should be reasonably related to achieving the benefits of the collaboration.

- The parties must continue to compete vigorously in all areas not covered by the collaboration, and avoid information-sharing and coordination in competing areas.

- The parties should be exceedingly circumspect in agreeing as part of the collaboration to restrictions on their individual conduct outside the scope of the collaboration, and in allowing other would-be competitors to join the collaboration (and thereby further reduce competition in the relevant market) after its formation.

Even with these precautions, companies should be aware that if the Antitrust Division views joint conduct as bid rigging or price fixing, procompetitive benefits will not be a defense to a prosecution.

[3] Understand the Leniency Program and When It Could Help Your Company

[a] The Essentials of Leniency Applications

Timing is of the essence when a potential criminal violation is discovered. A potential issue can arise when e-mails are reviewed for other purposes (unrelated internal investigations or contemplated transactions), or an employee is contacted by a competitor. Only the “first in the
door” is eligible to apply for leniency, so knowing the program basics is critical to protecting the company’s interests. A “perfected,” i.e., accepted leniency application means no criminal conviction, no criminal fine, and protection for current employees. A leniency applicant may also be eligible for reduced damages in any subsequent private civil actions, which generally seek treble damages under joint-and-several liability.

The Antitrust Division adopted its current Corporate Leniency Program in August 1993, and it has since acknowledged that the Leniency Program is now its most effective investigative tool.26 As the Individual Leniency Program parallels the Corporate Leniency Program, we focus on the corporate requirements here.

There are six conditions to leniency when the government has not initiated an investigation into the conduct that the leniency application discloses:27

1. At the time the company comes forward to self-report, the Division has not received information about the illegal activity being reported from any other source;
2. The company, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;
3. The company reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Antitrust Division throughout the investigation;
4. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individuals;
5. The company is not a ringleader or originator, i.e., did not lead or coerce others to participate in the conspiracy; and,
6. The company makes restitution to the injured parties where possible.

The benefits to a corporation that qualifies under this Program are considerable, and spelled out in a letter issued by the Antitrust Division to the applicant. In addition to full amnesty for itself as to the reported activity, all directors, officers, and employees who cooperate are eligible to be covered under the company’s leniency application. Individuals may also apply

27 Even if the Antitrust Division has already initiated an investigation (for example, if it receives information from a non-participant source such as a federal agent), a company may still qualify for leniency (known as Type B leniency) if it is the first company to self-report and the government “determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward.” A company that fails to qualify for leniency with regard to a particular product or market, may nevertheless qualify for “Amnesty Plus,” on another product or market for which the Division has not yet received information. In such instances, the company may be prosecuted for a violation regarding the first product, but may receive sentencing credit if it qualifies for leniency on the second product. See U.S. Department of Justice, Antitrust Division, Corporate Leniency Policy (Aug. 10, 1993), available at https://www.justice.gov/sites/default/files/atr/legacy/2007/08/14/0091.pdf.
for leniency on their own through the Individual Leniency Program, and this is important for corporations to keep in mind in deciding whether to file an application themselves – individuals can be a source of disqualifying information for the corporation as a whole under the first requirement. As noted, leniency applicants can also avoid treble damages and joint-and-several liability in private plaintiff civil suits (which are exceedingly common and often result in awards in far excess of the statutory maximums for criminal prosecutions) in exchange for “satisfactory” cooperation, as judged by the presiding court.

[b] The Antitrust Division’s Recent Revisions to Leniency Program FAQs

The Antitrust Division’s November 2008 “Frequently Asked Questions” paper has long been seen as one of its most important policy statements regarding the Leniency Programs. On January 17, 2017, the Antitrust Division issued a revised version of the FAQs. Though much is the same between the prior and current versions, including the six key requirements for leniency described above, there were some meaningful changes. We describe three such changes here that may impact a company’s assessment of whether to self-report, and also the scope of conduct to self-report in submitting a leniency application.

[i] FAQ # 6 – Effect of leniency on non-antitrust crimes

The Antitrust Division has never guaranteed that successful leniency applicants will avoid prosecution for non-antitrust crimes, for example, fraud or tax charges. However, the November 2008 FAQ paper suggested this had been the ordinary result in practice where other unlawful conduct reported was integral to the antitrust violation. The revised FAQ paper changes some of the language to this effect in the prior version, including by deleting the following sentence in its entirety:

To date, in situations where the additional offense has consisted of conduct that is usually integral to the commission of any criminal antitrust violation, such as mail or wire fraud or conspiracy to defraud resulting from the mailing or wire transmission of announcements of fixed prices, there have been no instances where a separate prosecuting agency has elected to prosecute such conduct by a leniency applicant.

The 2017 FAQs provide instead that “[i]t has been the Antitrust Division’s experience that other prosecuting agencies do not use other criminal statutes to do an end-run around leniency,” and offers some additional explanation of what such an end-run might look like.


Compare Note 28, supra, at 6-7, with Note 29, supra, at 7-8.
[ii] FAQ # 7 – Scope of leniency protection after original reporting

The November 2008 FAQs answered affirmatively, subject to certain conditions, the following question:

If during the course of its internal investigation, an applicant discovers evidence that the anticompetitive activity was **broader** than originally reported, for example, in terms of its geographic scope or the products covered by the conspiracy, **will the applicant’s leniency protection be expanded** to include the newly discovered conduct?

(emphasis added). These “conditions” were in essence that the applicant had not tried to conceal the activity from its initial report, and otherwise satisfied the regular requirements for leniency. If the newly discovered conduct was part of the “original conspiracy reported,” the prior FAQs provided that the leniency letter “will” be expanded through addendum, while if it was part of “a separate conspiracy,” a separate conditional leniency letter “will” issue.

The Antitrust Division amended this question in the updated 2017 FAQs to apply to both “broader and narrower” conduct, and to provide only that the scope of an applicant’s leniency protection **can** change, not that it will. The answer it provides is also longer than in the prior version, and includes several departures from the November 2008 answer, which reflect the Antitrust Division’s ability to make scope determinations **after** a leniency applicant has already exposed itself by providing evidence in support of its application. This raises the obvious concern about proffering information to the Division that is somehow not covered by leniency, and subsequently results in a charge against the company.

**First,** the new FAQ #7 emphasizes at the outset that the initial scope of a leniency grant is tailored to and coextensive with the facts the applicant proffers regarding the conspiracy at the time of its application. This opens the possibility for changing the scope of leniency based upon the Antitrust Division’s conclusions regarding that evidence, to the extent those conclusions depart from the ones drawn by the applicant at the time of submission.

**Second,** FAQ #7 describes that when “occasionally[] the **investigation**” reveals a conspiracy is narrower than initially reported, leniency will “be tailored to the scope of the conspiracy that **the evidence supports,**” subject to the applicant meeting the same requirements for broadening the scope of leniency. This leaves unresolved whether the “investigation” is that of the applicant, or of the Antitrust Division, into the facts proffered. It is also unclear whether and to what degree leniency is available in the following scenario: Company A, in an abundance of caution, broadly reports a conspiracy involving Products X, Y, and possibly Z. The proffered facts are sufficient only to show a conspiracy as to Products X and Y. Before Company A’s internal investigation uncovers additional evidence to support inclusion of Product Z, Company B discloses that conspiracy independently. Does Company A receive leniency for Product Z?

**Finally,** as to the applicant’s discovery of conduct constituting a “separate conspiracy,” the following answer in FAQ #7 is provided:

In this case, if a marker is available for the separate conspiracy, the applicant can request another marker. If the Division gives the applicant the new marker, like
all markers, it will be tailored to the facts that the applicant proffers when requesting it.

Additional commentary from the Antitrust Division will be necessary to determine to what extent, if any, this represents a departure from the rule announced in the prior FAQs that, so long as the requirements are met, leniency “will be provided in a separate corporate letter” for the separate conspiracy the applicant reported.31

[iii] FAQs # 8-10 – “Leniency Plus” vs. “Penalty Plus” policies

The Antitrust Division changed from “Amnesty Plus” to “Leniency Plus” the name of its policy announced in FAQs # 8 and 9 in both the original and revised versions of the FAQs. The substance of the policy appears largely unchanged, and provides for credit to be given in the scenario in which a company under investigation seeks leniency for a second product. For example, Company A may report Conspiracy Y in the midst of being prosecuted for Conspiracy X. Under the Leniency Plus policy, Company A can receive “dual-credit” for doing so in the form of (i) leniency with respect to Conspiracy Y, and (ii) a recommendation from the Antitrust Division that the sentencing judge reduce penalties with respect to Conspiracy X.32

To this carrot, the updated 2017 FAQs also include the “stick” in the form of the “Penalty Plus” policy, which was previously described in prior Division speeches, but was not included in the FAQs.33 Imagine instead that Company A pleads guilty to Conspiracy X, but fails to report Conspiracy Y. If the Antitrust Division uncovers Conspiracy Y independently, the Penalty Plus policy provides that it will seek enhanced penalties upon successful prosecution of Conspiracy Y. The severity of the enhancement that the Antitrust Division seeks will turn on the reason that Company A failed to uncover the separate conspiracy. Active concealment by Company A, or failure to conduct an internal investigation to uncover other antitrust violations in connection with the prosecution of Conspiracy X, will result in the Antitrust Division seeking greater enhancements, including appointment of an external monitor to ensure changes to Company A’s compliance culture in the “most egregious cases.” While failure to report because Company A conducted an investigation, but did not uncover Conspiracy Y, would result in the Antitrust Division recommending a lower starting enhancement under the penalty regime, and the possibility for a downward adjustment recommendations would be open if Company A entered a guilty plea and fully cooperated with the Division’s investigation.34

[4] Understand How to Respond to Search Warrants or Other Law Enforcement Inquiries

Be knowledgeable and prepared for any law enforcement contact. The Antitrust Division may investigate criminal antitrust violations without notice by issuing search warrants and conducting dawn raids. A prompt and effective response to a search warrant may make a

31 Compare Note 28, supra, at 8, with Note 29, supra, at 8.
32 See Note 27, supra.
34 See Note 29, supra, at 10-11.
significant difference in the company’s defense in an antitrust investigation. We offer the following practical tips:

- Notify counsel immediately.

- Do not resist the search. Forcible resistance or interference with a search is a criminal offense.

- Establish a respectful and constructive relationship with the lead agent. It should be clear, however, that the company is not giving consent or waiving the ability to contest later the scope or execution of the warrant.

- Obtain a copy of the search warrant and a list of all materials seized pursuant to the search.

- Request that counsel and relevant company representatives are present during the search.

- Agents may seek to interview employees. It is an employee’s right to consent to an interview (and have counsel present) or to refuse to be interviewed. If employees are interviewed, they should provide truthful statements.

[5] Helpful Antitrust Resources


