DEPARTMENT OF JUSTICE

A Matter of Trust: Enduring Leniency Lessons for the Future of Cartel Enforcement

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Good morning, and thank you for the kind introduction. It is a great privilege to welcome not only my fellow enforcers from around the world, but other distinguished faculty, and participants from the cartel bar. As I think we all recognize, this workshop has become a premier event in the world of international cartel enforcement, and today I am especially pleased to see it return to the United States for the first time in 12 years, here in San Francisco.

As everyone in the room knows, international cartel investigations are multi-jurisdictional endeavors that inevitably involve a number of enforcers and defense counsel, and a collective understanding and shared perspective help all of us navigate the challenges posed by these complex investigations.

When the organizers approached us about participating this week, we asked for the opportunity to say a few words at the beginning of the program. And we did so for two reasons. First, we thought this would be the ideal venue and audience to underscore our firm commitment to the Leniency Program and the core principles that make it effective. Although these are familiar concepts to this group, it is essential for all to know that the Antitrust Division remains fully committed to what has been our most important prosecutorial tool over the last 26 years. Second, our approach to cartel enforcement is not, and cannot be, static. Some of our practices have evolved over time and in the spirit of transparency, we wanted to highlight some of those changes.

I plan to focus my remarks today on enduring lessons that we, at the Antitrust Division, have learned from nearly three decades of our modern Leniency Program. The first lesson is a simple one—an effective leniency program must be more than words; it must come with a track record of vigorous and effective enforcement. Second, trust is a prerequisite for a leniency program to flourish. For leniency to work, trust must go both ways—applicant and enforcer

alike must honor their commitments in order to reap the significant benefits of the leniency bargain. Third, leniency does not operate in a vacuum and as the cartel enforcement landscape in the United States and around the world continues to evolve, we must stay vigilant to external factors that may affect leniency's incentive structure. Finally, as important as leniency is, we must not overlook the Antitrust Division's broader cartel enforcement program and leniency's role in it.

Before I explain each of these lessons, let me clarify that I'll be using leniency to refer to complete immunity from criminal prosecution for the first company to self-report and cooperate, as well as its covered cooperating employees.[1] It is worth emphasizing that only one company per conspiracy can qualify for leniency in the United States. A company that is second in the door even if by only a matter of days or hours, as has been the case in a number of our investigations, is not eligible for leniency—it could be the difference between a complete pass versus fines in the hundreds of millions, single damages versus treble damages, and immunity for executives and employees versus prison time.

I. Reaffirming Leniency's Three Key "Cornerstones"

The most basic lesson we've learned is that an effective leniency program must be built on certain key "cornerstones": (a) the threat of severe and significant sanctions, (b) a heightened fear of detection, and (c) transparent and predictable enforcement policies.[2] These are the

[1] U.S. DEP'T OF JUSTICE, ANTITRUST DIV., CORPORATE LENIENCY POLICY (1993), https://www.justice.gov/atr/file/810281/download. Note, that since 1994, the Antitrust Division has also had a leniency policy for individuals as a mechanism for individuals to come forward when their employers do not. U.S. DEP'T OF JUSTICE, ANTITRUST DIV., LENIENCY POLICY FOR INDIVIDUALS (1994), www.justice.gov/atr/public/guidelines/0092.pdf. The Individual Leniency Program is primarily intended to create the possibility of a race to the Division between a whistle blowing employee and its recalcitrant company. We believe this applies additional pressure on companies and motivates them to come forward quickly.

[2] *See* Scott D. Hammond, Dir. of Criminal Enf't, U.S. Dep't of Justice, Antitrust Div., Cornerstones of an Effective Leniency Program, Speech Before the ICN Workshop on Leniency Programs (Nov. 22-23, 2004), https://www.justice.gov/atr/file/518156/download.

indispensable components of every effective leniency program. And over time, we've learned in the United States that more than simply espousing their virtues, we have to reaffirm these cornerstones continuously through our actions.

Sanctions on Individuals

We've long held the view that individual liability and criminal sanctions, including prison sentences for culpable executives and employees, are the most severe and significant sanctions available for cartel activity.[3] The Division has prosecuted executives at the highest levels of their companies after their employers missed leniency by a matter of days or even hours. And in our international cartel cases, we have made it a point to hold executives accountable for conduct affecting the United States regardless of their nationality or country of residence. For executives who choose to remain fugitives, we have invested significant time and effort, using all available international tools to bring these individuals to justice. And our recent successes speak to this point directly. Just last month, the Division announced a favorable extradition ruling by the Italian courts—the seventh country to extradite a defendant in an Antitrust Division case in recent years, and the second to do so based solely on an antitrust charge.[4] This extradition is a reminder that individuals who violate U.S. antitrust laws and seek to evade justice will find no place to hide.

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[3] *See* Scott D. Hammond, Dir. of Criminal Enf't, U.S. Dep't of Justice, Antitrust Div., 'When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom?,' Speech at the 15th Annual National Institute on White Collar Crime (Mar. 8, 2001), https://www.justice.gov/atr/file/519066/download. *See also* U.S. DEP'T OF JUSTICE, ANTITRUST DIV., FREQUENTLY ASKED QUESTIONS (FAQ) ABOUT THE ANTITRUST DIVISION'S LENIENCY PROGRAM AND MODEL LENIENCY LETTERS, question 10 (updated Jan. 26, 2017), www.justice.gov/atr/public/criminal/239583.pdf.

[4] Press Release, U.S. Dep't of Justice, Former Air Cargo Executive Extradited from Italy for Price-Fixing (Jan. 13, 2020), https://www.justice.gov/opa/pr/former-air-cargo-executive-extradited-italy-price-fixing.

Corporate Fines and Penalties

But the punishment cannot stop at the individuals who commit these crimes. Cartel sanctions must also be sufficiently severe and significant for the corporations that benefit from the illegal conduct of their employees.

Not because we measure the efficacy of our enforcement by the magnitude of the fines collected, but because experience tells us that significant monetary penalties accomplish several important objectives. First, significant criminal fines serve to punish companies by divesting some of their ill-gotten gains—corporate fines should be commensurate with the harm to U.S. consumers and businesses caused by cartels. Second, criminal fines serve to deter illegal conduct if they are severe enough that they cannot easily be written off as one of "the costs of doing business." And third, the prospect of such fines is a major incentive to companies already engaged in these crimes to seek leniency.

There are, of course, ways for companies to mitigate their penalties.

And we have learned lessons here as well. In the past, the Division's approach to reductions on fines and penalties for second-in and subsequent cooperators had been misunderstood by some as exclusively focused on the order in which companies came in the door and agreed to cooperate and plead guilty. The Division has since clarified that the extent of any fine reduction will not merely reflect the timing of cooperation, but also will reflect the nature, extent, and value of that cooperation to the investigation.[5] Of course, the earlier

[5] *See* Brent Snyder, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Individual Accountability for Antitrust Crimes, Address to the Yale Global Antitrust Enforcement Conference (Feb. 19, 2016), https://www.justice.gov/opa/file/826721/download. This shift in emphasis is consistent with a trend that places increasing weight on the value prong of the discount consideration and marks a change from the Division's prior practice. *See also* Bill Baer, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Prosecuting Antitrust Crimes, Remarks for the Georgetown Univ. Law Center Global Antitrust Enforcement Symposium (Sept. 10, 2014), https://www.justice.gov/atr/file/517741/download.

cooperation is provided, the more valuable it usually is in assisting the Division's efforts to hold other corporate and individual conspirators accountable.

The Division takes great care in recognizing and rewarding valuable cooperation. But if a company's cooperation is lacking, the Division will not hesitate to withhold any fine reduction for cooperation. Nor will we hesitate to deny a company a two-point culpability score reduction and/or move the company's fine up in the applicable Guidelines range. [6] We believe this approach complements the Leniency Program by providing incentives for other companies to cooperate while maintaining full immunity only for the leniency applicant.

Compliance Credit

Staying on the topic of incentives, I'd like address some concerns that have been raised about the Antitrust Division's recent compliance policy change and the impact that the availability of deferred prosecution agreements (DPAs) could have on incentives of would-be leniency applicants. Prior to the change, companies that failed to obtain leniency were charged and could either plead guilty or risk a guilty verdict after trial. By opening the door to the possibility of a DPA, companies with effective compliance programs may qualify for an option that avoids a felony conviction. We have heard concerns that companies uncovering cartel conduct may no longer feel the need to seek leniency as quickly as possible, but may instead sit tight and later advocate for a DPA if leniency is no longer available.

These concerns are premised on a fundamental misunderstanding of what it takes to qualify for a DPA. As Assistant Attorney General Makan Delrahim explained in his remarks

[6] *See* Richard Powers, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., The State of Criminal Antitrust Enforcement in 2020, Remarks for the Global Competition Review Live 9th Annual Antitrust Law Leaders Forum (Feb. 7, 2020), https://www.justice.gov/opa/speech/file/1246076/download. *See also* U.S.S.G. § 8C2.5(g).

announcing the policy change,[7] the adequacy and effectiveness of a company's compliance program is one of the ten factors the Justice Manual directs prosecutors to consider when weighing charges against a corporation. [8] He also highlighted prompt self-reporting, cooperation, and remedial action as factors that go hand in hand with compliance as the hallmarks of good corporate citizenship.[9] And therefore, the choice to take a wait-and-see approach when a company uncovers evidence of cartel conduct could prove to be a costly mistake.

And although it's early days yet, our experience so far is that leniency marker requests have remained steady following the compliance announcement. We aren't surprised by this because there is a meaningful difference between leniency and a DPA. Leniency's exclusive benefits include complete immunity from criminal prosecution for the company and its covered cooperating employees, as well as detrebling and other benefits available under the Antitrust Criminal Penalty Enhancement & Reform Act (ACPERA).[10] A DPA provides none of these extraordinary benefits. That is why leniency is and "will continue to be the ultimate credit for an effective compliance program that detects antitrust crimes and allows prompt self-reporting."[11]

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[7] Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs, Remarks at the New York Univ. School of Law, Program on Corp. Compliance and Enf't (July 11, 2019), https://www.justice.gov/opa/speech/file/1182006/download.

[8] *See* Justice Manual § 9-28.300 [updated November 2018].

[9] *See* Delrahim, Wind of Change, *supra* note 7, at 9. *See also* Justice Manual §§ 9-28.300 [updated November 2018], 9-28.700 [updated November 2018], 9-28.800 [updated November 2018], 9-28.900 [new November 2015], 9-28.1000 [renumbered November 2015].

[10] *See* Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, tit. II, 118 Stat. 661 (codified as amended in scattered sections of 15 U.S.C.).

[11] *See* Delrahim, Wind of Change, *supra* note 7, at 9.

Heightened Fear of Detection

I'd like to turn now to the next cornerstone: a heightened fear of detection. When it comes to creating an enforcement regime with a credible threat of detection, we have learned that leniency cannot be a stand-alone tool; to function properly it must work side-by-side with the full complement of other enforcement tools. Since the 1990s, the Antitrust Division has steadily expanded its arsenal to include traditional criminal enforcement tools such as informants, search warrants, subpoenas, consensual monitoring, audio and video tape recordings, and more recently, undercover agents and wiretaps to investigate cartels.[12]

The years have also taught us the importance of relationships with our partners. We have boosted our detection capabilities by building and maintaining strong relationships with our law enforcement and agency partners at the local, state, and federal levels in the fight against cartels and other crimes that undermine competition. Just last November, AAG Delrahim announced the Justice Department's Procurement Collusion Strike Force (PCSF), which is an interagency partnership among the Antitrust Division, 13 U.S. Attorneys' Offices, investigators from the Federal Bureau of Investigation and four federal Offices of Inspectors General.[13] The PCSF works to harness and leverage the investigative resources of its members to better deter, detect, and prosecute cartels in the public procurement space.[14] And it is already bearing fruit; the Division has opened multiple grand jury investigations in connection with the PCSF.

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[12] For a full discussion of investigative tools used in U.S. cartel investigations, *see* Gregory J. Werden, Scott D. Hammond and Belinda A. Barnett, 'Deterrence and Detection of Cartels: Using All the Tools and Sanctions,' presented to the ABA Criminal Justice Section's 26th Annual National Institute on White Collar Crime (Mar. 1, 2012), https://www.justice.gov/atr/file/518936/download.

[13] Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Remarks at the Procurement Collusion Strike Force Press Conference (Nov. 5, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-procurement-collusion-strike.

[14] Press Release, U.S. Dep't of Justice, Justice Department Announces Procurement Collusion Strike Force: a Coordinated National Response to Combat Antitrust Crimes and Related Schemes in Government Procurement,

Predictability and Transparency

The final cornerstone of an effective leniency program is predictability and transparency. Based on our experience, transparency must include not only explicitly stated criteria and policies, but also clear explanations of how these work in practice. The Division has sought to provide this transparency by publishing a written Leniency Policy, several speeches and papers explaining the policy, and a Frequently Asked Questions (FAQs) document that addresses many of the recurring questions raised by prospective leniency applicants and their counsel. We have also published model conditional leniency letters for prospective applicants to review. We drafted all of these materials in simple, non-technical language and posted them to the Division's website to ensure accessibility not just to antitrust specialists but to the business community as well.[15]

Let me stress that there are no unwritten rules, hidden caveats, or unique exceptions or practices specific to particular offices or sections. From the initial marker request to the final leniency letter, the Antitrust Division's consistent approach across offices is to adhere to the publicly available rules in the Leniency Policy and the FAQs. The Division's prosecutors recognize that no one applicant is more important than the integrity of the program, and a prospective leniency applicant must be able to predict with a high degree of confidence its obligations and the outcome following its leniency application. As for members of the defense bar and business community, they should be reassured to know that the same Leniency Policy is applied to every applicant and investigation—regardless of whether it's an investigation into

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Grant and Program Funding (Nov. 5, 2019), https://www.justice.gov/opa/pr/justice-department-announces-procurement-collusion-strike-force-coordinated-national-response.

[15] U.S. DEP'T OF JUSTICE, ANTITRUST DIV., LENIENCY PROGRAM (1993), https://www.justice.gov/atr/leniency-program.

global financial markets or local foreclosure auctions, into wage fixing or price fixing, or into a no-poach or a customer allocation agreement.

II. Maintaining Trust and Confidence in the Leniency Program

These observations bring me to the next lesson worth highlighting from our experience: trust is a prerequisite for leniency to work. My predecessors stressed, and I completely agree, that the bar and the business community must have confidence in the program.[16] As prosecutors, we inspire that confidence by adhering to the written Leniency Policy and public statements about the Division's practices. Indeed, the Antitrust Division has an impressive track record of adhering to the Policy, even when it required us to provide immunity to otherwise culpable actors.

When it comes to common issues encountered by applicants, we strive to adhere closely to the approach outlined in the FAQs. Our FAQs, however, cannot anticipate every situation, and when we have encountered an unusual set of facts that required us to clarify how we would apply the policy, we have done so.[17] And with the sole exception of Stolt-Nielsen, the Division has not encountered a situation that resulted in us revoking an applicant's conditional leniency.[18]

But trust is a two-way street and companies applying for leniency must be prepared to meet the publicly stated criteria for either Type A leniency or Type B leniency.[19]

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[16] *See* Scott D. Hammond, Dir. of Criminal Enf't, U.S. Dep't of Justice, Antitrust Div., Fighting Cartels – Why and How?: Lessons Common to Detecting and Deterring Cartel Activity (Sept. 12, 2000), https://www.justice.gov/atr/file/518526/download; Scott D. Hammond, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., 'The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades,' presented to the 24th Annual National Institute on White Collar Crime (Feb. 25, 2010), https://www.justice.gov/atr/file/518241/download.

[17] *See* FAQ, *supra* note 3, at question 6.

[18] *Id.* at question 27.

[19] *Id.* at question 3.

We recognize that it generally takes longer now to receive a conditional letter than it did 20 years ago; attorney proffers and hot documents are no longer sufficient and multiple witness interviews are almost always requested by staff. We must be satisfied that we have received, and will continue receiving, "full, continuing, and complete, cooperation throughout the investigation." We know this can take time especially for companies simultaneously conducting an internal investigation. But the Division's marker system allows a leniency applicant to hold its spot at the front of the line even as counsel conducts a thorough internal investigation and provides the necessary information to the Division.[20]

And we continue to encourage companies to race in for a marker at the first hint of cartel activity.[21] Companies do not have to have evidence of a crime or be in a position to admit to a crime in order to request a marker. It is enough to for counsel to represent that she or he has uncovered information or evidence suggesting a possible criminal antitrust violation. This could be evidence of communications with competitors even if counsel is unsure if it ultimately ended up as a criminal agreement, or when counsel is uncertain whether the agreement is a *per se* criminal antitrust violation, or even when it is unclear whether the agreement affected the U.S. market. We will work with counsel as they sort through the evidence, and if the evidence indicates that there has not been a U.S. criminal antitrust violation, a company may withdraw its marker or let it expire.

For leniency applicants that choose to perfect their markers, our expectation is that they will provide truthful, continuing, and complete cooperation. What this entails is well known by this group. Cooperation includes conducting a timely and thorough internal investigation,

[20] *Id.* at question 5.

[21] *Id.* at question 2.

providing detailed proffers of the reported conduct, producing documents no matter where they are located, and making cooperative witnesses available for interviews.[22]

To put a finer point on it, though, the Division expects to receive motivated and engaged cooperation throughout the investigation beginning with the grant of the marker until the very last prosecution in that conspiracy. And as you can well imagine, any attempt by a leniency applicant to artificially limit the breadth and scope of the Division's investigation will undermine our trust and confidence in that company and its counsel. We follow the facts where they lead and expect leniency applicants to cooperate with the investigation every step of the way.

We recognize that in the early days of large international cartel investigations the company and its counsel may need time to fully ramp up the investigation. We will work with counsel to set realistic timelines for initial attorney proffers and document productions. But experience has taught us that "[s]peed is crucial at the early stages of an investigation" and we expect leniency applicants to move expeditiously to provide early cooperation, which could allow us to develop the facts quickly, in some cases by using covert techniques to expose more information about the nature and extent of the conspiracy.[23] Leniency applicants should expect the Division to move quickly as well.

When it comes to key employees of the leniency applicant, proffers from counsel are no longer sufficient to ensure coverage under the company's conditional leniency letter. While we may ask counsel to provide helpful proffers in advance of our own interviews, we expect to meet with these key employees to confirm that they are committed to meeting their leniency

[22] *Id.* at question 16.

[23] Baer, *supra* note 5.

obligations.[24] In essence, we are assessing whether they are being candid and fully forthcoming and telling us all that they know. We may also require covered employees to assist with proactive investigative techniques, where appropriate.

I just emphasized the need to move investigations quickly. But, as we all know, arranging the necessary interviews with key employees and assessing their willingness to cooperate may not always be feasible in complex investigations on an expedited timetable. These individual determinations, however, need not hold up the company's leniency application. If there is a concern that a particular employee may not be willing to meet his or her cooperation obligations, assuming the company is otherwise able to perfect its marker, we can proceed with the conditional leniency letter without covering that individual. What does this mean for that individual? He or she will be provided an opportunity to cooperate with the investigation and possibly enter into a non-prosecution agreement separate from the company's leniency letter. But individuals must earn non-prosecution protections as they would under any other circumstances.

While on the topic of individuals, I'll note that in recent years we've observed certain behavior by companies during the criminal investigation that could undermine the credibility of their cooperating employees. A pattern of such behavior could erode the Division's confidence that the leniency applicant is truly using its best efforts to secure the cooperation of current employees. As the FAQs note, "the steps taken by the company to secure cooperation, would be relevant to the Division's determinations of whether there is a corporate confession, … and

[24] U.S. DEP'T OF JUSTICE, ANTITRUST DIV., MODEL CORPORATE PLEA AGREEMENT ¶ 4 (Mar. 14, 2019), https://www.justice.gov/atr/page/file/1124876/download.

whether the Division is receiving the benefit of the leniency bargain."[25] The Division expects leniency applicants to uphold their commitments throughout the investigation.

Leniency's Value

One last observation on cooperation. We know that the costs of leniency cooperation can be significant particularly in large international cartel investigations. But a company's decision to seek leniency is often validated when co-conspirators are prosecuted. Take a recent example from right here in San Francisco—the Antitrust Division's packaged seafood investigation. For confidentiality reasons, I will not comment on press reports about a leniency applicant. [26] I will, however, highlight the fates of two companies that did not obtain leniency in this investigation. Bumble Bee Foods pleaded guilty and was sentenced to pay $25 million, which reflected its inability to pay a larger fine, while StarKist pleaded guilty and was sentenced to pay the statutory maximum fine of $100 million.[27] Four executives total from both companies were also charged and three pleaded guilty. The fourth executive—Bumble Bee's former CEO—was recently found guilty by a jury.[28] Had either company received leniency, it would have avoided a criminal conviction, paid *zero* dollars in criminal fines and none of its employees would have been prosecuted. These are the real-world benefits of leniency that should not be overlooked.

III. <u>Preserving the Leniency Program's Incentives</u>

I'd like to turn now to another lesson we've learned, which is that the Leniency Program does not operate in a vacuum. There are external challenges to leniency's incentives structure

[25] FAQ, *supra* note 3, at question 18.

[26] The Division's longstanding policy is not to disclose a leniency applicant's identity absent prior disclosure by, or agreement with, the applicant. *See id*. at question 33.

[27] Press Release, U.S. Dep't of Justice, StarKist Ordered to Pay $100 Million Criminal Fine for Antitrust Violation (Sept. 11, 2019), https://www.justice.gov/opa/pr/starkist-ordered-pay-100-million-criminal-fine-antitrust-violation.

[28] Press Release, U.S. Dep't of Justice, Former CEO Convicted of Fixing Prices For Canned Tuna (Dec. 3, 2019), https://www.justice.gov/opa/pr/former-ceo-convicted-fixing-prices-canned-tuna.

today that were not present (or as pressing) when the program was first conceived in its modern form over 26 years ago. Accordingly, we at the Antitrust Division must be proactive in safeguarding and preserving leniency's incentives to ensure its longevity and continued success.

Cross-border Cartel Enforcement

These external challenges to leniency's incentives are nowhere more evident than in the arena of cross-border cartel enforcement, where the increased costs of self-reporting and cooperating in multiple jurisdictions have been flagged by the cartel defense bar as a potential disincentive to seeking leniency.

The Division has a history of successfully conducting parallel international cartel investigations, and where appropriate, deferring to other jurisdictions, or reaching coordinated resolutions that address the enforcement priorities and deterrence goals of multiple jurisdictions.[29] For example, we coordinated with our Canadian counterparts in the auto parts investigation to reach a corporate resolution and fine in the U.S. that recognized and accounted for the harm caused by the defendant in both jurisdictions.[30] And in the marine hose investigation, individuals sentenced to prison in the U.K. and U.S. were able to serve their sentences concurrently in one jurisdiction.[31] Although these resolutions pre-dated the Justice

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[29] The Justice Department also has a policy requiring prosecutors to "coordinate with one another to avoid the unnecessary imposition of duplicative fines, penalties and/or forfeiture against [a] company," and further instructs them to "endeavor, as appropriate, to … consider the amount of fines, penalties and/or forfeiture paid to federal, state, local or foreign law enforcement authorities that are seeking to resolve a case with a company for the same misconduct." *See* Memorandum from Rod Rosenstein, Deputy Att'y Gen. U.S. Dep't of Justice, to Heads of Dep't Components: U.S. Att'ys, Policy on Coordination of Corporate Resolution Penalties (May 9, 2018), https://www.justice.gov/opa/speech/file/1061186/download.

[30] Press Release, U.S. Dep't of Justice, Nishikawa Agrees to Plead Guilty and Pay $130 Million Criminal Fine for Fixing Prices of Automotive Parts (July 20, 2016), https://www.justice.gov/opa/pr/nishikawa-agrees-plead-guilty-and-pay-130-million-criminal-fine-fixing-prices-automotive.

[31] Press Release, U.S. Dep't of Justice, Three United Kingdom Nationals Plead Guilty to Participating in Bid-Rigging Conspiracy in the Marine Hose Industry (Dec. 12, 2007), https://www.justice.gov/archive/opa/pr/2007/December/07_at_995.html.

Department's announcement of the policy against "piling on," they were animated by the same guiding principle "to enhance relationships with our law enforcement partners in the United States and abroad, while avoiding unfair duplicative penalties."[32]

We continue to explore ways to improve and evolve our cartel practice to maximize deterrence, detection, and self-reporting. We want to ensure that we are strengthening and improving our relationships with our counterparts around the world for more effective cartel detection. We also want to coordinate international investigations to ensure leniency applicants are able to meet the competing demands of all of the jurisdictions where they have exposure. In this endeavor, we also welcome input from the cartel bar and value your unique perspective representing clients navigating the leniency application process in multiple jurisdictions.

Treble Damages Private Litigation & ACPERA

No discussion of the external challenges to leniency's incentives would be complete without mentioning ACPERA, the availability of treble damages in the United States, and civil damages actions in a growing number of jurisdictions. Without getting too far into the weeds, I'll leave you with a few observations.

First, as many of you know, ACPERA's detrebling provisions are set to expire in June 2020 due to a sunset in the original legislation. The Division supports reauthorization and the elimination of the sunset provision. Second, AAG Delrahim has made it clear that ACPERA's cooperation requirement and detrebling incentive will apply to any Clayton Act Section 4A claims pursued by the Division to recover damages for the Government.[33] And third, the time is

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[32] Rod Rosenstein, Deputy Att'y Gen., U.S Dep't of Justice, Remarks to the New York City Bar White Collar Crime Institute (May 9, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar.

[33] *See* Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., 'November Rain': Antitrust Enforcement on Behalf of American Consumers and Taxpayers, Remarks at the ABA Antitrust Section Fall Forum (Nov. 15, 2018), https://www.justice.gov/opa/speech/file/1111651/download.

now ripe for international convergence on the laws governing the intersection of leniency, private damages, and cooperation among enforcers. Greater convergence would increase the incentives to seek leniency in multiple jurisdictions and decrease burdens on applicants. It would also remove some of the confusion and complexity for those who are weighing the risks and benefits of applying for leniency.

IV. Leniency in the Broader Context of the Antitrust Division's Cartel Enforcement Efforts

Finally, I want to take a moment and explain how we view the Leniency Program in the broader context of our enforcement efforts. We are focused on all three parts of our mission: to deter, detect, and prosecute criminal violations of the antitrust laws and related federal statutes. Of these, common sense tells us that deterrence is the most important because our primary goal must be the elimination of these costly crimes. When it comes to detecting, destabilizing, and disrupting large-scale domestic and international cartels, leniency is and has been the most important tool. But we cannot rely on leniency alone.

For example, corporate compliance programs play an important role in deterring cartel conduct. Companies with robust, effective compliance programs are the first line of defense in preventing these crimes, which is why we recently reconsidered our longstanding approach, and opened the door to crediting effective compliance programs.

When it comes to other critical aspects of the economy, such as public procurement, different approaches are required for us to accomplish our mission. When U.S. federal government discretionary spending (of taxpayer dollars) is in the neighborhood of $500 billion annually, we must make this a priority area on par with other large scale domestic and

international cartel enforcement efforts focused on private sector spending.[34] The reality is that small and medium-sized businesses that are tempted to collude on government contracts or subcontracts are more likely to be deterred by wide-spread awareness of the illegality of bid rigging and active enforcement, which is why the Justice Department established the PCSF.

None of this, however, changes the critical role that leniency plays in our enforcement efforts to deter, detect, and prosecute cartels. These initiatives are meant to complement leniency, not supplant it.

V. **Conclusion**

I'll close simply by noting that while the Leniency Policy itself has not changed since it was announced in 1993, the cartel enforcement landscape certainly has. Notwithstanding these changes, the Antitrust Division's track record for predictability and transparency is unmatched and we are committed to preserving leniency's incentives to ensure its continued success.

Thank you.

[34] *See Contracting Spending Analysis*, U.S.A. SPENDING DATA LAB, https://datalab.usaspending.gov/contracts-over-time.html (last visited Feb. 18, 2020).