AntitrustConnect Blog

Some Comparisons Between the Antitrust Division's Corporate Leniency Program and the Criminal Division's FCPA "Pilot Program"

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On April 5, 2016 the Department of Justice held a press conference to announce a "new" program involving enforcement of the Foreign Corrupt Practices Act (FCPA)(press release here). The program, generally referred to as the Pilot Program, is outlined in a document released by the Fraud Section of the Criminal Division of DOJ entitled: "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance." The Guidance more fully lays out the specifics of this Pilot Program and provides more background and information for the defense/compliance community. The Pilot Program follows on the heels of the requirements detailed in the Deputy Attorney General's Individual Accountability memorandum issued last September, popularly known as the Yates Memo.

Under the Pilot Program, a company that voluntarily and promptly discloses all relevant facts known to it (including, and especially, facts about culpable individuals), fully cooperates with the government's investigation and timely and appropriately remediates *may* receive up to a 50 percent reduction off the bottom end of the applicable US Sentencing Guidelines fine range calculation. Also, if a company has implemented an "effective compliance program" by the time of resolution it *may* avoid the dreaded compliance monitor. The government will also *consider* declining prosecution for companies that meet the requirements of the Pilot Program.

There has been extensive coverage of the Pilot Program announcement. Two of the sources I read for FCPA analysis are the FCPA Professor see e.g., Six Reasons Why the Corporate Community Should Take the DOJ's Pilot Program With a Grain of Salt and Thomas Fox see e.g., The New DOJ Guidance and FCPA Pilot Program–Part 1: Introduction. My interest in the FCPA stems largely from the intersection of criminal antitrust enforcement with FCPA enforcement. "Bid rigging" is a generic term that can apply to paying a bribe to a foreign official to obtain a contract, or secretly colluding with competitors to fix the outcome. Sometimes the belt and suspenders approach is applied by wrongdoers—pay off the inside guy to limit the number of competitors and then rig the bid to, among other things, cover the cost of the payoff. Antitrust and FCPA violations can be two ways to achieve the same anticompetitive result.

What is interesting is that while an FCPA violation and a criminal antitrust scheme can both corrupt the bidding process, there are substantial differences between the approach of the Antitrust Division and the Criminal Division in the treatment of early cooperators. Specifically, the Antitrust Division has its Corporate Leniency Policy while the Criminal Division now has its Pilot Program.

While this is not an in-depth comparison of the two programs, a few things jumped out at me regarding how the best elements of the two programs might eventually be combined for a more unified, effective DOJ approach to self-disclosure.

1. **Certainty of the Benefits of Self-Reporting**

The biggest defect in the Pilot Program is that there is no certainty offered to a cooperating company as to whether its cooperation will result in leniency [i.e. a 50% discount off the low-end of a guidelines fine]. The Pilot Program guidelines leave complete discretion in the hands of the prosecutor as to whether to give the cooperator a full 50% benefit, or any benefit at all. The Guidance Memo says that DOJ "may accord up to a 50 percent reduction," that cases in which companies meet the designated criteria "generally should not require the appointment of a monitor" and, in those cases DOJ "will consider a declination of prosecution." The complete discretion the DOJ leaves itself will clearly scare off at least some, and likely many, companies that might otherwise self report.

The Criminal Division could look to the Antitrust Division for guidance on this issue. The Antitrust Division has one consistent message about its voluntary disclosure program: The certainty of non-prosecution for those that fulfill the Corporate Leniency Program's conditions is necessary. The quote below, from a speech by Scott Hammond, former Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division entitled *Cornerstones of an Effective Leniency Program* is but one chorus from the Antitrust Division's hymnal on the need for transparency:

"The third and final hallmark of an effective Amnesty Program is the need for transparency to the greatest degree possible throughout the enforcement program. Self-reporting and cooperation from offenders have been essential to our ability to detect and prosecute cartel activity. Cooperation from violators, in turn, has been dependent upon our readiness to provide transparency throughout our anti-cartel enforcement program so that a company can predict with a high degree of certainty how it will be treated if it reports the conduct and what the consequences will be if it does not. Our Leniency Program is inherently transparent because we have eliminated, to a great extent, the exercise of prosecutorial discretion in its application."

While the message of the need for certainty in the application of the program has not been heard upstairs by the Criminal Division (or heard and rejected), countries around the world have heeded the advice of the Antitrust Division and established competition leniency regimes that provide certainty to self-reporters who meet certain pre-established conditions.

An objection of the Criminal Division to providing certainty is that they don't know the extent of the violation early on and therefore can't make any promises. This is a weak objection. Again, the Antitrust Division has significant experience in crafting its conditional leniency letter to limit protection to the contours of the self-reported conduct. In other words, if a company admits to rigging bids in Pennsylvania, the leniency letter covers only conduct in Pennsylvania. This protects the Division from granting more protection than the scope of the self-reporting. It also greatly incentivizes cooperating companies to quickly "clean house" and report as much illegal conduct as they can find. It seems the Criminal Division could similarly draft cooperation/leniency letters that are only coextensive with the cooperation being offered and only vests if the company fulfills its conditions. The Antitrust Division is a model of having models and it has a Model Corporate Conditional Leniency Letter.

It seems reasonable that the Criminal Division's Pilot Program provides a 50% discount—not a complete pass. [Disgorgement of ill-gotten profits is also required.] While there are some collateral consequences to an FCPA violation besides a Criminal Division prosecution (such as the SEC), little compares to the litigation hell that awaits a company that self reports an antitrust violation. See Cartel Capers, In the Competition for Compliance $$, Don't Forget Antitrust: Here's Why. While the Antitrust Division gives a complete pass to its successful leniency applicants, years of follow on civil litigation await the leniency winner and prosecution by other countries is fairly certain for international conduct.

2. **Timing of Cooperation**

Under the Pilot Program, a company will only be considered for favorable treatment if the self-disclosure occurs "prior to imminent threat of disclosure or government investigation" and must be "within a reasonably prompt time after becoming aware of the offense." This contrasts with the Antitrust Division's Leniency Policy, which allows a company to seek amnesty as long as the investigation has not yet produced indictable evidence against the company. Leniency is still available if "The Division, at the time the corporation comes in, does not yet have evidence against the company that is likely to result in a sustainable conviction."

If the objective of both programs is to increase the certainly of having a successful investigation, particularly against individuals, with the least amount of government resources, it seems to make sense to allow a company to come forward and cooperate even after the investigation has begun, but before the investigation has obtained indictable evidence. The "indictable evidence" standard will help prevent a corporate subject from gaming the Pilot Program and seeing how things turn out before deciding whether to cooperate. Cooperation offered early in the investigation that may save years of investigation, seems sensible. Offering "amnesty" or non-prosecution to a company even after an investigation has begun still leaves the individuals responsible left to prosecute, which is the focus of the Yates Memo. The Antitrust Division has created it "Race to the Courthouse" among companies competing to get the one amnesty per investigation. The FCPA Pilot Program could create a race to cooperate between the company being investigated and its culpable executives.

3. **Prosecution of Individuals**

This is another area where the Antitrust Division's leniency and the Criminal Division's Pilot Program differ. The Antitrust Division will grant protection to company executives who also come forward and offer "full, continuing and complete" cooperation. On the other hand the Criminal Division seeks the corporate cooperation to prosecute the culpable individuals in the company. In some ways, this difference makes sense due to the fact that the Antitrust Division is seeking witnesses to testify against other companies/individuals in the cartel, while an FCPA violation involves only one company and someone, its individual actors, needs to be held accountable. The Criminal Division's Pilot Program seems to be more in line with the Yates Memo, which has directed DOJ attorneys to focus on holding individual actors accountable.

The Antitrust Division's Corporate Leniency Program has been deemed by most to be a great success in breaking up and prosecuting cartels. As mentioned above, the basic elements of the Leniency Program have been exported all over the world. But, it is a legitimate question, at least to me, whether the Antitrust Division pays too high a price for corporate leniency? What if the program was limited to corporations, but like the Criminal Division, non-prosecution was

discretionary as to employees? In other words, a company could come in to cooperate under leniency, but the Antitrust Division may choose to only immunize certain employees below the CEO, or Vice President. [The Antitrust Division has already begun to exercise this discretion with ex-employees. The Antitrust Division used to routinely cover former employees in leniency agreements (with limited exceptions) but now that coverage is on a case-by-case basis at the Division's discretion]. The Antitrust Division could shape Corporate Leniency to limit the employees covered based on their culpability and the prosecutor's need, which early on in an investigation may not include the CEO or most culpable actor within the organization. To make individual employee coverage discretionary would be a significant change in the Antitrust Division leniency program, and the caution "Don't Mess with Success" comes to mind. On the other hand, there can be tremendous unfairness in the leniency program where the CEO of very culpable company can walk, while a lower level employee at some other company goes to jail. See Cartel Capers, The Sad Sentencing of Alex Yeh. It may be that the Antitrust Division can get the cooperation it needs with the Corporate Leniency Program at a lower and fairer price.

In sum, if I were picking some elements from Column A (the Antitrust Division Leniency Program) and some from Column B (the Criminal Division's Pilot Program) it would look something like this:

1. A company can offer complete and continuing cooperation and meet the other terms of the program, as long as the investigation has not yet developed indictable evidence of a violation.
2. If the corporate actor meets the conditions of the program, the benefits would be automatic, but limited to the conduct for which self-disclosure has been made.
3. Coverage would be automatic for the corporate entity. It would be within the discretion of the government which individuals to cover under the agreement.

While I'm on the Subject

As long as I'm discussing (and you're still reading) about the differences between cartel and FCPA enforcement, here's another that stands out. The Foreign Corrupt Practices Act of 1977 and the Foreign Trade Antitrust Improvement Act of 1982 play an important role in expanding the extraterritorial reach of United States law. But they take conflicting approaches to the reach of US laws to regulate foreign conduct. The FCPA makes it a federal crime for anyone with a connection to the US financial system to bribe a foreign official to obtain a contract. Conversely, the FTAIA *removes* from the reach of the Sherman Act conduct that harms only foreign customers, regardless of how anti-competitive it may be. Therefore, if certain competitors agreed with each other to rig a bid for a foreign contract and paid off a foreign official to make sure no non-conspirator companies were allowed to bid, the payoff would be an FCPA offense, but the collusion would be outside the reach of the Sherman Act.

The FCPA was passed largely in response to concern over the hundreds of millions of dollars in bribes paid by US corporations to foreign officials, exposed as part of the Watergate investigation. American companies argued that to do business overseas, they had to "pay-to-play" as was often the norm in the countries where they operated. But with the passage of the FCPA, the US became the first country in the world to criminalize bribery of a foreign official to obtain a foreign government contract. Five years later, Congress passed the FTAIA, which took a different approach to the extraterritorial reach of US law. It provides that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless such conduct has a direct, substantial, and reasonably foreseeable effect" on

domestic commerce. The principal proponents of the legislation were American companies doing business overseas, who wanted clarity that US antitrust law would not follow them into foreign commerce. The companies that lost the battle over the FCPA won the FTAIA battle. As the Supreme Court explained in *F. Hoffman-LaRoche v Empagran*, "The FTAIA seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint selling arrangements), however anti-competitive, as long as these arrangements adversely affect only foreign markets."

In other words, you can't pay a bribe to a foreign official to rig a bid, but if you can collude with your competitors, well, that's OK. I've written several articles arguing that this is just plain silly. (see Cartel Capers, Motorola Mobility and the FTAIA). Now, this isn't the biggest issue out there, but if Congress ever amends the FTAIA for other reasons, (such as its confusing phrasing), perhaps they can address the little embarrassment of giving the green light to domestic companies fixing prices to foreign consumers while the Antitrust Division prosecutes and jails foreigners for fixing prices to US consumers.

Thanks for reading.

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