

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

USE OF MARKERS IN LENIENCY PROGRAMS

-- United States --

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This document reproduces a written contribution from the United States submitted for Item III of the 120th meeting of the Working Party No. 3 on Co-operation and Enforcement on 16 December 2014.

*More documents related to this discussion can be found at:
<http://www.oecd.org/daf/competition/markers-in-leniency-programmes.htm>*

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1. Describe any marker system you have and its relationship to your leniency program?

1. The Antitrust Division's leniency program is designed to incentivize self-reporting of criminal antitrust conduct. A corporation that receives leniency is not charged criminally for the conduct it reports, provided it meets all the requirements of the program.

2. Corporate counsel often obtains information indicating some likelihood that a client has broken the law, without having enough evidence to know for sure. To qualify for leniency, however, a corporation must admit and provide evidence of its involvement in a criminal antitrust violation. A potential applicant that wants to self-report, but does not yet have evidence of a completed crime, can request a marker. If the Division grants it, the corporation secures the opportunity to be the sole leniency applicant. The marker holds the corporation's position as the first to request entry into the leniency program. While the applicant holds the marker, no other conspirator can apply for leniency — the Division will reject all subsequent requests for a marker. The applicant then has time to conduct its internal investigation and determine whether it is culpable in an antitrust conspiracy. If it determines it is not culpable, it can withdraw the marker request and the marker becomes available to the next applicant to request it.

2. What is the principal purpose of your marker system? What are the potential benefits of your marker system to the agency and for marker applicants?

3. The marker system supports a critical incentive of the leniency program — it promotes a race to the Antitrust Division's door to admit wrongdoing and provide evidence against co-conspirators. There can be only one marker holder, and, if the holder meets its obligation of self-reporting a criminal violation and cooperating, the Division will not prosecute it criminally. Upon discovering indicators of criminal activity, a corporation is thus incentivized to report its findings immediately, before a co-conspirator takes advantage of the extraordinary opportunity the leniency program offers.

4. A conspirator brings the evidence to the Division, so the Division is able to open an investigation without expending significant resources. If the leniency applicant wishes to benefit from the extraordinary benefits of leniency — including no prosecution for the criminal conduct it reports — it must provide complete and continuing cooperation. The applicant thus continues to provide the Division with documents, witnesses, and other sources of information that advance the Division's investigation. Division prosecutors use the evidence to develop cases against co-conspirators that have their own incentives to cooperate and provide additional evidence of the same conspiracy, or in many cases of other conspiracies. The marker system thus facilitates the development of multiple cases against the conspirators, both individuals and corporations.

3. Is your marker system created by statute or regulation, or simply by agency practice? How have you communicated the system to the public?

5. The Division's marker system is an aspect of its leniency policy. The Corporate Leniency Policy is an official Division policy statement; it is not a product of legislation. That policy statement does not directly address the availability of a marker. Markers are described and explained in a publication entitled "Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters" ("FAQs"). Both the Corporate Leniency Policy and FAQs are available to the public at <http://www.justice.gov/atr/public/criminal/leniency.html>. Additionally, Division personnel periodically give presentations, participate in panel discussions, and give official public speeches elaborating the Corporate Leniency Policy and how it works. These often include information regarding markers, how an applicant to the program obtains one, and the obligations of an applicant fortunate enough to hold a

marker. Many of these public speeches are posted at the same web address as the Corporate Leniency Policy and FAQs.

4. Who is eligible to obtain a marker under your system? Is a marker available only to the first applicant, or also to subsequent applicants?

6. A marker is available to a corporate or individual applicant that proffers indicia of criminal antitrust activity sufficient to warrant holding the applicant's place, as the first to request a marker, while it investigates whether it can proffer evidence of a crime and thereby enter the leniency program. As the FAQs explain, "The Division grants only one corporate leniency per conspiracy, and in applying for leniency, the company is in a race with its co-conspirators and possibly its own employees who may also be preparing to apply for individual leniency." A company that loses the race for a marker to a co-conspirator may still want to self-report and cooperate with the Division. The advantages of doing so and what the Division expects from such a company (accepting responsibility for antitrust crimes and cooperating toward a negotiated resolution) are subjects beyond the topic of the marker system.

5. What steps must be taken to initiate the process, and what are the threshold requirements for obtaining a marker?

7. Contacting the Division is the first step toward obtaining a marker. Usually, counsel for a prospective applicant contacts an attorney in one of the Division's five criminal offices. Counsel may contact an attorney with whom counsel has some experience, or the chief of the office. A resulting investigation will not necessarily stay with the office that receives the request, but will be assigned to the appropriate criminal office. Requests for markers are reviewed by the Deputy Assistant Attorney General for Criminal Enforcement. During the initial contact, counsel must report the discovery of some information or evidence indicating that the client has engaged in a criminal antitrust violation. Counsel must provide a general description of the conduct, and identify the industry, product, or service involved with enough specificity to allow the Division to determine if a marker is available, because another applicant may have already requested and received a marker for the conspiracy. Counsel must also identify the client, although there are narrow exceptions to this disclosure requirement.

8. The specificity required when disclosing the industry, product, or service, depends on the scope of the Division's current investigations. If it has no open investigations into the industry, the Division can likely determine easily whether it has already granted a marker. Where the Division is already investigating the industry, or a related industry, an applicant must provide more specific information. This requirement of specificity is a function of the Division's policy of granting only one marker per conspiracy. This maintains the incentive for culpable corporate and individual offenders to race to the Division to provide evidence against co-conspirators and cooperate in exchange for non-prosecution.

6. Is the grant of a marker automatic upon meeting these requirements, or does the agency retain some discretion? If the agency has some discretion, what factors does it consider?

9. The granting of a marker is discretionary. Generally, where the applicant meets the threshold requirements explained above, the Division will grant the marker. Importantly, the Division retains the discretion to withdraw the marker or to determine it has expired. A marker is granted for a finite period of time, generally 30 days, but the Division will usually extend it freely for a few months so long as the applicant is cooperating with the investigation and making progress in providing the Division with evidence of a criminal antitrust conspiracy. Markers will not, however, be extended indefinitely. In a recent speech, Assistant Attorney General Bill Baer said this about the leniency program:

Our policy requires complete and continuing cooperation with the Division throughout our investigation and resulting prosecutions. It involves a thorough and prompt investment of time and resources. Speed is crucial at the early stages of an investigation. In our experience a company that invests the time and the resources can typically satisfy the initial requirements for conditional leniency within a few months.

We expect leniency applicants to make those investments, including conducting a thorough internal investigation, providing detailed proffers of the reported conduct, producing foreign-located documents, preparing translations, and making witnesses available for interviews. Companies unwilling or unable to make the investments necessary to meet these obligations, or those that think they can do so on a timetable of their own choosing, will lose their opportunity to qualify for leniency.¹

10. A marker holder, corporate or individual, must make prompt and genuine progress in bringing evidence of its criminal conduct to the Division. If it fails, the Division retains the discretion to take the marker away and offer it to another potential applicant prepared to meet these requirements and further the Division's investigation into illegal antitrust activity.

7. At what point does the marker ripen into a conditional offer of leniency? What is the process for obtaining the conditional offer of leniency, and what showing by the applicant is necessary for this step?

11. A marker ripens into conditional leniency when the applicant provides sufficient evidence that it is involved in a criminal antitrust conspiracy and meets the six requirements enumerated in Part A. of the Corporate Leniency Policy. Corporations and individuals that have not committed criminal violations do not need leniency, and it is not available to them.

12. While the applicant may not be able to confirm that it committed a criminal antitrust violation when the Division gives it a marker, the applicant must admit to participation in a criminal conspiracy before receiving a conditional leniency letter. An applicant may not argue merely that its proffered evidence implies an agreement to fix prices, rig bids, or allocate markets. Without producing witnesses who will admit the applicant in fact made an illegal agreement, the applicant will not receive a conditional leniency letter.

13. For a corporate applicant to meet the Policy's six requirements, it must have provided evidence from which the Division concludes:

1. At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;
2. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;
3. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation;
4. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;

¹ Prosecuting Antitrust Crimes — Bill Baer, Assistant Attorney General, September 10, 2014 (available at www.justice.gov/atr/public/speeches/speech-criminal.html).

5. Where possible, the corporation makes restitution to injured parties; and
6. The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

8. Describe any rules or policies with respect to confidentiality of applications for a marker, and waivers of such confidentiality.

14. The Division's policy is to hold in strict confidence the identity of leniency applicants and the information they provide. The applicant provides information that precipitates or furthers a criminal investigation, and in this respect is analogous to a confidential informant in other criminal investigative contexts. Consequently, the Division does not publicly disclose the identity of leniency applicants. This policy may not apply, however, where the applicant has publicly self-disclosed, agrees to public disclosure, or where a court order requires public disclosure.

15. An applicant may face exposure to antitrust penalties in foreign jurisdictions. The threat of disclosure to other jurisdictions would dis-incentivize self-reporting under the leniency program. Therefore, the Division will not disclose to foreign antitrust authorities an applicant's identity or any information obtained from an applicant, without the applicant first agreeing to the disclosure. This does not insulate the applicant from liability in other jurisdictions, but it protects it from disclosure by the Division without the applicant's consent. The Division's confidentiality policy is similar to that of most other jurisdictions.

9. If you do not have a marker system, have you considered adopting one? If so, what considerations led you to decide against doing so?

16. Not applicable.

10. If you have a marker system, please describe your experience with it. Has it been amended over time? Are you considering further amendments?

17. Since its inception, the marker system has served the Division's leniency program well. In our experience, it incentivizes immediate self-reporting upon discovery of a potential violation of American criminal antitrust laws. In at least one instance, two co-conspirators requested a marker for the same conspiracy within the same hour. The extraordinary benefits of the program likewise incentivize an applicant to cooperate to the fullest extent possible in hopes of qualifying for leniency. To date the Division has not found the need to amend its marker system.