Legal Opinion Letter

WLF Washington Legal Foundation

Advocate for freedom and justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302

Vol. 18 No. 5 March 27, 2009

JUSTICE DEPARTMENT CLARIFIES ITS ANTITRUST LENIENCY POLICY

by
Brian L. Flack and Felice Segura

On November 19, 2008, the Antitrust Division of the Department of Justice ("Division"), issued new guidelines on how its leniency program would be implemented in the wake of the *Stolt-Nielsen* case. In that case, DOJ revoked the conditional leniency that it had previously extended to shipping company Stolt-Nielsen. After a great deal of controversy and litigation, a federal District Court found that DOJ must adhere to the terms of the leniency agreement, and dismissed the charges against Stolt-Nielsen.[1] The case damaged the reputation of the Antitrust Division's Leniency Program and may have driven away potential self-reporters, fearing arbitrary leniency revocation. To address some of the lingering issues in *Stolt-Nielsen*, the Division published new Model Conditional Leniency Letters (collectively, "Letter") as well as a Frequently Asked Questions document that provided further guidance on leniency application procedures and the criteria for obtaining leniency under the corporate and individual policies.[2] The changes should be viewed as an effort to bolster the "transparency and predictability" of qualifying for full amnesty under the Leniency Program.[3]

On DOJ's web site, the Division posted an interview with Scott Hammond, DOJ's Deputy Assistant Attorney General of the Division, in which Hammond discussed the Division's decision to formally revoke the company's leniency while noting that the case was factually unique. Hammond contended that the revisions to its Letter only reinforced the Division's longstanding positions on the implementation of its leniency program. The Division's new guidance brings new focus to four issues: 1) cooperation with the Division and the applicant's burden of proving its eligibility for the Leniency program; 2) the time lapse between discovery of the violation and reporting; 3) the Division's discretion in accepting a leniency application; and 4) the Division's 1993 Corporate Leniency Policy.

1. Cooperation and Proving Eligibility. The Letter emphasizes the conditional nature of the leniency agreement and twice states that the Division's acceptance of the application is contingent on the applicant "(1) establishing that it is eligible for leniency as it represents in paragraph 1 of this Agreement, and (2) cooperating in the Antitrust Division's investigation as required by paragraph 2 of this agreement." The Letter furthermore places the burden of proving eligibility on the applicant. The Division also changed the title of paragraph 1 from "Representations" to "Eligibility."

---

[1] *U.S. v. Stolt-Nielsen*, No. 06-cr-466, 2007 U.S. Dist. LEXIS 88011 (E.D. Pa. Nov. 29, 2007).

[2] *See* U.S. Department of Justice, Antitrust Division, Leniency Program, http://www.usdoj.gov/atr/public/criminal/leniency.htm (last visited Jan 7, 2009).

[3] *See* Scott Hammond on *Stolt-Nielsen* (May 1 2008), *available at* http://www.usdoj.gov/atr/public/speeches/234840.htm.

Brian L. Flack is a partner at the Washington, D.C. office of Venable LLP practicing in the area of white collar criminal defense. **Felice Segura** is an associate with Venable.

These changes reflect DOJ's contention that the specific facts of *Stolt-Nielsen* ultimately disqualified the company from leniency, and that its revocation of antitrust leniency was not an arbitrary act. Regardless, the Letter outlines the steps a disclosing company can follow to avoid revocation. These include full and complete disclosure, immediate discontinuance of the antitrust conspiracy, and the ability to prove eligibility. The new provisions in the Letter attempt to clarify how a company's actions after discovering a violation affect its eligibility for leniency and address the impression that such revocation is at the whim of the Antitrust Division.

2. Time Lapse. The *Stolt-Nielsen* case focused attention on the gap of time between when the leniency took effect and when the antitrust violation ceased. The Division has added three footnotes laying out the consequences if "there is a significant lapse in time between the date the applicant discovered the anticompetitive activity being reported and the date the applicant reported the activity to the Antitrust Division." The Letter gives the Division discretion to require the reporter to disclose the dates of discovery and termination of antitrust activity and limit the time period for which the reporter and individuals receive leniency. The express conditions of cooperation and eligibility in the Letter will also force reporters to acknowledge that they must cease violations after reporting them to receive leniency. These provisions are designed to avoid the dispute that arose in *Stolt-Nielsen*, reinforcing the importance of prompt and voluntary disclosure upon discovery of antitrust activities.

3. Division Discretion. The Letter also ensures that Applicants consent to being bound by the Division's discretion in granting leniency. The previously mentioned footnotes grant the Division discretion to change the agreement if the applicant does not meet certain conditions. Additionally, in paragraph 3 the applicant must acknowledge the Division's discretion in revoking leniency and agree not to appeal the revocation until the applicant is indicted for their antitrust activities. The paragraph also outlines the procedure of the revocation process. The Division added another clause in paragraph 1, in which the applicant acknowledges an understanding of the consequences of a potential revocation. Finally, the Division has altered the letter to remind applicants of the conditionality of the agreement, to bind applicants to the outcomes if they do not meet conditions, and to emphasize the Division's discretion. The clauses reinforce the fact that applicants do not have leniency until they receive notice of the Division's unconditional grant.

4. Corporate Leniency Policy. The first unmarked paragraph of the Letter reads, "Applicant represents that it is fully familiar with the Antitrust Division's Corporate Leniency Policy dated August 10, 1993 (attached), which is incorporated by reference herein."[4] The policy has been in effect for fifteen years, but this clause is new. The clause reiterates Hammond's message that the changes to the letter and the Division's web site do not represent new developments in the Leniency Program. At the same time, the Division's decision to revoke Stolt-Nielsen's leniency was unprecedented. The Division is recovering from the subsequent controversies and loss in the District Court. Such an express acknowledgement of the clause exists to assure applicants that the Division is still committed to leniency.

Conclusion. The response to the outcome of the *Stolt-Nielsen* case by the Division is an attempt to repair the Leniency Program's credibility in the eyes of potential self-reporters of antitrust conspiracies. The real change is the focus on applicant activity and the articulation of the Division's authority. In many ways, however, the Leniency Program is the same, and the Division has issued these materials to put the controversy of *Stolt-Nielsen* behind it.

[4]U.S. Department of Justice, Antitrust Division, Corporate Leniency Policy (Aug. 10. 1993), *available at* http://www.usdoj.gov/atr/public/criminal/leniency.htm.

ISBN 1056 3059