COMMENTS OF THE ABA SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW IN RESPONSE TO THE COMMISSION OF THE EUROPEAN COMMUNITIES' REQUEST FOR PUBLIC COMMENT ON THE DRAFT COMMISSION NOTICE ON IMMUNITY FROM FINES AND REDUCTION IN FINES IN CARTEL CASES

NOVEMBER 2006

The Section of Antitrust Law and the Section of International Law ("the Sections") of the American Bar Association ("ABA") appreciate the opportunity to present their views concerning the Commission of the European Communities' (the "Commission") draft Notice on Immunity From Fines and Reduction of Fines in Cartel Cases ("Draft Notice"). The views expressed in these comments are those of the Sections and have been approved by the Sections' Councils. They have not been approved by the House of Delegates or the Board of Governors of the ABA and should not be construed as representing the policy of the ABA.

EXECUTIVE SUMMARY

The Sections are grateful for the Commission's efforts to provide more guidance and clarity for undertakings applying for immunity from and reduction of fines, to adopt a marker system for those applying for immunity from fines, and to safeguard the integrity and confidentiality of information obtained from leniency applicants.

The Sections support the Commission's efforts to provide greater guidance and clarity to potential immunity applicants in assessing the information and evidence required to meet the "immunity threshold." However, by creating a list of specific information that must be provided in each case and introducing new, undefined concepts, such as "targeted" inspections and "compelling evidence," the effect of some of these amendments is to reduce predictability and increase uncertainty and discretion, to the detriment of the goals of the Leniency Notice.

The Sections urge caution in adopting a listing of mandatory information required to meet the immunity threshold. In practice, this proposal may significantly *increase* the effective burden associated with obtaining immunity by requiring (or expecting) too much, too soon (immediately at the time of an application). Although the change is designed to clarify and explicitly identify the requirements to obtain immunity, in practice the benefits of establishing specific criteria may be overshadowed by the uncertainty and potential for the exercise of prosecutorial discretion generated by the requirement that the immunity applicant's information be "detailed" and "precise." In addition, while the Commission should obtain and review all contemporaneous evidence from an applicant during the course of its cooperation, the Sections are concerned that "*all* contemporaneous evidence" is made a threshold requirement, because such a broad requirement certainly will slow potential applicants' ability to report.

The introduction of what appears to be a new evidentiary standard for immunity, i.e., evidence sufficient, in the Commission's view, to allow the Commission to carry out a "targeted" inspection with respect to the alleged cartel, raises issues that need to be clarified. If "targeted" signifies a departure from past Commission practice (i.e., "dawn raids"), then the Commission should provide clarification as to how "targeted" investigations will differ from the current

practice and what criteria will be applied to determine if the required evidence and information, in the Commission's view, will enable it to carry out a "targeted" inspection.

The Commission's decision to introduce a marker system into its immunity program is a very important step forward. However, the Sections are concerned with the discretionary nature of the marker procedure and that the information required is too detailed and may deter undertakings from approaching the Commission quickly in order to place a marker. The Draft Notice provides that the Commission *may* grant a marker and requires the undertaking to provide the Commission with information concerning "its name and address, the parties to the alleged cartel, the affected product(s) and territory(-ies), the duration of the alleged cartel and the nature of the alleged cartel conduct." The purpose of a marker system is to encourage the race among cartel members to report cartels to the enforcement authority. Yet, by requiring information that often takes days or even weeks in an internal investigation to develop, the proposed marker system may actually slow the race, particularly as compared to existing successful marker procedures, which permit undertakings seeking a marker to do so on the basis of very limited information, such as the suspected type of infringement and the affected product, and often on a no-names (anonymous) basis. The undertaking that joins the race for a marker too quickly and provides what turns out to be incorrect specifics in obtaining its marker may find itself having lost the race to an undertaking that waits until the completion of its internal investigation before going forward to the Commission. Thus, undertakings will be fearful of "getting it wrong" if they move quickly. The experience of other jurisdictions over many years confirms that a program requiring only a minimal amount of information up front is sufficient to permit the Commission to determine if the undertaking seeking a marker is indeed "first in" to initiate a claim for immunity. More detailed information about the cartel can be provided subsequently as part of the formal immunity application process.

In connection with applications for reduction in fines, the Sections agree with the Commission that direct incriminating evidence should be considered to have a greater value than indirect evidence. The Sections are concerned, however, that some of the proposed language is ambiguous. Specifically, the Sections submit that the terms "degree of corroboration" and "compelling evidence" as used in Paragraph 25 are unclear, introduce an unwarranted level of uncertainty and discretion into the reduction in fines program, and may in practice deter undertakings from cooperating with Commission investigations in exchange for a reduction in fines. The Sections believe that an applicant should be able to satisfy the "added value" requirement by providing information and documents that advance the Commission's ability to establish an infringement. The Sections submit that establishing a second-level, higher threshold, if that is what is intended by the proposed language, may discourage a significant number of potential applicants from coming forward.

The Sections' gravest concern is that the net effect of these well-intentioned changes will be to introduce a level of uncertainty, unpredictability, and discretion into the Commission's leniency program that will actually impede the "race-to-the-enforcement-authority" that leniency policies were designed to create not just in Europe, but around the world. The Sections believe that the Draft Notice deviates substantially from the recent trend in leniency policies around the world by re-introducing a substantial level of unpredictability, discretion, and lack of clarity into the program. The negative consequences of these changes likely will be felt not only in Europe

but in other major anti-cartel enforcement jurisdictions as well. Because the Commission is one of the major anti-cartel enforcement authorities in the world, any undertaking, and its counsel, faced with the prospect of developing a multi-jurisdictional leniency strategy must consider the consequences in Europe. The lack of clarity and increased discretion provided for in the Draft Notice invariably will introduce delay and indecision for parties considering applications in multiple jurisdictions, and in some cases may result in decisions not to self-report at all due to the inability to predict outcomes in Europe. This would be a most undesirable result for anti-cartel enforcement around the world and for undertakings wishing to self-report and obtain the advantages of the leniency policies in the major anti-cartel enforcement jurisdictions.

It is very important for the Commission to protect the integrity of its investigations. However, requiring an undertaking not to disclose the fact or the content of its leniency application, or the contemplation thereof, until such time as the Commission has issued a Statement of Objections, could put a public undertaking in direct conflict with disclosure obligations under the U.S. securities laws.[1] The Sections are concerned that undertakings that must abide by the disclosure requirements under U.S. securities laws and equivalent laws in other jurisdictions would become, in effect, ineligible to participate in the Commission's leniency program unless they violate the securities laws. The Sections encourage the Commission to consider further clarifying the conditions of the Draft Notice for undertakings that are required to disclose certain information in order to comply with the U.S. or other applicable securities or other laws and regulations.

The Sections support the Commission's efforts to limit access to oral statements of leniency applicants as provided in Paragraphs 33, 34, and 35 of the Draft Notice. These procedures reduce the risk that the Commission's files will be used in other proceedings, particularly in U.S. civil litigation. This enhances the incentives and benefits for the leniency applicant to self report and strengthens the Commission's anti-cartel enforcement system.

However, the Sections are particularly concerned about the use of the transcript of an oral leniency statement as evidence in the Statement of Objections issued by the Commission in cartel cases. The Section of Antitrust Law submitted extensive comments to the Commission in April 2006 on that and a number of other issues raised by the Commission's proposed amendments to the 2002 Leniency Notice when they were first issued, and the Sections again respectfully encourage the Commission to give serious consideration to those comments.[2]

Having regard to the balance of incentives and disincentives for the leniency applicant, the Sections respectfully recommend that the Commission utilize a process that does not tip the balance against applying for leniency in cartel cases and follow the principle that the leniency

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1 By "U.S. securities laws," the Sections refer to the U.S. Securities Act of 1933, the Securities Exchange Act of 1934, and the Sarbanes-Oxley Act of 2002.

2 Comments of the ABA Section of Antitrust Law in Response to the Commission of the European Communities' Request for Public Comment on the Draft Amendment of the 2002 Commission Notice on Immunity from and Reductions of Fines in Cartel Cases (April 2006) (http://www.abanet.org/antitrust/at-comments/2006/04-06/ec-leniency.shtml#) (*hereinafter* "Antitrust Section Comments").

applicant should never be worse off for having applied for leniency than it would have been if it did not cooperate with the Commission.

INTRODUCTION

This submission presents the views of the ABA Section of Antitrust Law and Section of International Law concerning the Commission's proposed revisions to the 2002 Leniency Notice. The Sections have previously commented both on matters relevant to the United States' investigation and criminal prosecution of cartel conduct[3] and issues arising in other jurisdictions related to international cartel enforcement.[4] In particular, in 2001 the Sections provided comments to the Commission with respect to its then-proposed 2002 Leniency Notice[5] as well as the April 2006 Comments on the 2002 Leniency Notice.[6]

As with past comments concerning the Commission's and other jurisdictions' immunity policies, the Sections proceed from the premise that, while consistency among the various competitive enforcement systems is a desired objective, no particular system is necessarily preferred. In the area of immunity – or "leniency" or "amnesty" – the Sections have the benefit of substantial experience with international cartel enforcement and have observed a variety of leniency programs in operation around the world. Some of the Sections' members have significant direct experience with the 2002 Leniency Notice, including first-hand familiarity with the Commission's evolving and prevailing approach to: (i) the quantum of evidence sufficient to meet the "immunity threshold"; (ii) company statements provided to the Commission in connection with an application for immunity from or reduction in fines; (iii) the level of cooperation required of applicants; and (iv) access to the Commission's files in cartel cases. In addition, members of the Sections have interacted with representatives of the Commission with respect to these issues in connection with bar association meetings, conferences, and the International Competition Network. Moreover, some of the most significant written interpretive guidance concerning the 2002 Leniency Notice provided by the Commission staff – including the first public comment concerning the Commission's "paperless" process – was published in the Section of Antitrust Law's ANTITRUST magazine and came in response to questions raised by

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3 *E.g.*, Comments of the ABA Section of Antitrust Law in Response to the Antitrust Modernization Commission's Request for Public Comment on Criminal Remedies (November 2005) (http://www.abanet.org/antitrust/at-comments/2005/11-05/criminal-remedies.html); Comments of the ABA Section of Antitrust Law on S.443: "Antitrust Criminal Investigation Improvements Act of 2005" (June 2005) (http://www.abanet.org/antitrust/at-comments/2005/06-05/criminal-investigat.html).

4 *E.g.*, ABA Sections of Antitrust and International Law's Joint Comments on the Japan Fair Trade Commission Draft Leniency Rules (August 2005) (http://www.abanet.org/antitrust/at-comments/2005/08-05/japan-fair-trade.html); Comments of the ABA Section of Antitrust Law in Response to the Canadian Competition Bureau Request for Public Comments Regarding Immunity Program Review (May 2006) (http://www.abanet.org/antitrust/at-comments/2006/05-06/canadian-leniency.shtml); ABA Section of Antitrust Law Submission to the OECD Competition Committee Working Party 3 Concerning Information Exchanges in International Cartel Investigations (February 2004) (www.abanet.org/antitrust/at-comments/2004/01-04/oecd.pdf).

5 *See* Comments of the ABA Section of Antitrust Law on Draft Commission Notice on Immunity From Fines and Reduction of Fines in Cartel Cases (September 2001) (http://www.abanet.org/antitrust/at-comments/2001/2001.shtml) (*hereinafter* "2001 ABA Leniency Notice Comments").

6 Antitrust Section Comments, *supra* note 2.

members of that Section.[7] Based on this depth of experience, the Sections offer the observations that follow for the Commission's consideration.

COMMENTS

A. Sufficiency Of The Evidence To Meet The "Immunity Threshold"

The Sections commend the Commission's desire to provide greater guidance and clarity for undertakings applying for immunity from, and reduction in, fines. In an effort to provide that guidance and clarity, the Commission has listed specific types of information, including the requirement of a corporate statement detailing the specifics of the cartel, that an applicant, at a minimum, must provide in order to qualify for immunity from fines.[8] Materials published together with the Draft Notice express the Commission's concern that "numerous immunity applications have not given the necessary insider information and evidence on the alleged cartel to meet the immunity threshold."[9] According to the Commission, the 2002 Leniency Notice "does not give enough guidance to the applicants as to what to submit in order to qualify for the immunity threshold."[10]

Paragraph 9(a) introduces the requirement of a corporate statement (either written or oral) identifying the precise details of the cartel's aims, activities, functioning, geographic scope, duration, and estimated market volumes affected, and the dates, locations, content, and participants of alleged cartel meetings.[11] In addition, the applicant, at the time of its application, must provide all evidence relating to the cartel in its possession or available to it, including all contemporaneous evidence. In general, this type of information is appropriate for disclosure in connection with an immunity applicant's cooperation with an enforcement authority. However, the Sections are concerned that the suggested revisions will in practice significantly *increase* the effective burden associated with obtaining immunity by requiring (or expecting) too much, too soon (immediately at the time of an application). The additional burden in the quantum of

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7 *See* Bertus van Barlingen, *A View From the Inside: The European Commission's 2002 Leniency Notice After One Year of Operation*, ANTITRUST 84 (Spring 2003) (reprinted in Competition Directorate-General of the European Commission, EC COMPETITION POLICY NEWSLETTER 16 (Summer 2003) (http://europa.eu.int/comm/competition/publications/cpn/cpn2003_2.pdf)).

8 Draft Notice, ¶ 9.

9 FAQ, Draft Notice.

10 *Id*.

11 The requirement of such a detailed corporate statement (including the full disclosure of its own participation in the cartel) prepared or given solely for the purpose of obtaining leniency also highlights the need for procedures that ensure such information will not be available to parties to private civil proceedings such that the immunity applicant is placed in a worse position in respect of civil damages claims than cartel members that do not cooperate. The discovery in civil damage proceedings of corporate statements that have been made to the Commission in the context of its leniency program risks creating this very result and, by dissuading cooperation in the Commission's leniency program, could undermine the effectiveness of the Commission's fight against cartels. Such a result could also have a negative impact on the fight against cartels in other jurisdictions. (See Section G *infra*.)

evidence necessary to meet the immunity threshold may have the unintended consequence of, in effect, slowing the race to the enforcement authority that leniency programs are designed to foster.

The Sections observe that the proposed language does qualify the mandated information with two caveats: "in so far as [the information] is known to the applicant"[12] and is "available to [the undertaking] at the time of the submission."[13] Even accounting for the noted caveats, the Sections are concerned with the potential for tension between the information and evidence an undertaking "must provide" at the time of its application with the information "known to the applicant" at the time of the application. This is of particular importance if the Commission will now be less inclined to permit an undertaking to cure any shortcoming after the time it makes an application. Collecting the type of information and materials necessary to prepare and then "perfect" an immunity application is not a simple task in any jurisdiction. Internal investigations often entail interviewing scores of current and/or former employees (usually several times) together with reviewing thousands of hard copy and electronic documents, frequently in multiple countries and, indeed, across multiple continents.

Potential immunity applicants may hesitate to apply for leniency if they are unsure whether the information known to them is "detailed" and "precise" enough. In addition, the information and evidence must be sufficient, in the Commission's view, to allow the Commission to carry out a "targeted" inspection with respect to the alleged cartel. The addition of "targeted" in Paragraph 8(a) to describe the type of investigation at issue[14] also could increase the level of uncertainty in the Draft Notice. The text does not explain why "targeted" was inserted, what it means, or how it differs from the requirements of the 2002 Leniency Notice, which require that the evidence be sufficient to allow the Commission to carry out a dawn raid. If "targeted" signifies a departure from past Commission practice, the Commission should provide clarification as to how "targeted" investigations will differ from the current practice and what criteria will be applied to determine whether the required evidence and information, in the Commission's view, will enable it to carry out a "targeted" inspection.[15]

It is now an accepted principle in anti-cartel enforcement that successful leniency programs eliminate, to the extent reasonably feasible, prosecutorial discretion as a factor in the determination of whether an applicant is entitled to immunity or a reduction in fines.[16] In fact, it

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12 *Id.*

13 *Id.*, ¶ 8(b).

14 The term "targeted investigation" is also referenced in Paragraph 9 of the Draft Notice.

15 Of course, it may be that any investigation carried out after receipt of the information required by Draft Notice Paragraph 9 would be considered a "targeted" investigation. If so, then the addition of an undefined term to Draft Notice Paragraph 8(a) seems only to confuses and not clarify the requirements to meet the immunity threshold. If it means something else, the Commission should make clear what that meaning is.

16 Competition officials in the United States and elsewhere comment frequently about the importance of removing prosecutorial discretion from the leniency process. *See, e.g.*, Scott Hammond, Director of Criminal Enforcement, Antitrust Division, U.S. Department of Justice, *Cornerstones of an Effective Leniency Program*, address before the ICN Workshop on Leniency Programs, Sydney, Australia (Nov. 22-23, 2004) ("Prospective amnesty

was high levels of uncertainty, prosecutorial discretion, and lack of predictability that made the United States Department of Justice's initial Corporate Leniency Policy[17] far less attractive to, and little used by, prospective leniency applicants for seventeen years, until it was revised in 1993.[18] From the prospective applicant's viewpoint, the ambiguity associated with the possibility that its disclosures may fall short under the mandatory conditions found in Paragraph 9(a) could reduce the incentive to self-report as soon as wrongdoing is discovered. Alternatively, applicants might elect to forego self-reporting altogether because the information in their possession, while indicative of a cartel arrangement, is thought to be insufficient under the Commission's proposed mandatory requirements and sufficiency standard.

The Sections suggest replacing the mandatory "must provide" in Paragraph 9(a) with more flexible language, such as "should provide." This revision would be consistent with corresponding language in the ECN's Model Leniency Program.[19] The ECN equivalent of Paragraph 9 provides: "With a view to enabling the [competition authority] to carry out targeted inspections, the undertaking *should* be in a position to provide the [competition authority with information concerning the applicant and cartel]."[20] In addition, the Sections suggest either deleting the requirement of measuring the information and evidence in terms of its sufficiency to enable a "targeted" inspection, or defining "targeted" in such a way as to make it an objective standard. In the Sections' view, this approach would better fulfill the aim of Leniency Notice to invite more, not less, timely self-reporting and cooperation in order to detect and punish cartel behavior.

B. The Requirement Of Contemporaneous Incriminating Evidence

The Draft Notice requires applicants under Paragraph 8(a) to provide "all contemporaneous evidence" in their possession or available to them, in addition to specifically identified details of the alleged cartel.[21] While the Sections concur that the Commission should review all contemporaneous evidence from an applicant during the course of its cooperation, it is concerned that "*all* contemporaneous evidence" is made a threshold requirement, because such a broad requirement will slow potential applicants' reporting.[22]

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applicants come forward in direct proportion to the predictability and certainty of whether they will be accepted into the program. If a company cannot accurately predict how it will be treated as a result of its corporate confession, our experience suggests that it is far less likely to report its wrongdoing, especially where there is no ongoing government investigation. Uncertainty in the qualification process will kill an amnesty program.").

17 *See* John H. Shenefield, *The Disclosure Of Antitrust Violations And Prosecutorial Discretion*, address before the 17th Annual Corporate Council Institute (Oct. 4, 1978).

18 U.S. Department of Justice, Antitrust Division, *Corporate Leniency Policy*, Aug. 10, 1993.

19 ECN Model Leniency Program, ¶ 6.

20 *Id.* (emphasis added).

21 Draft Notice, ¶ 9(b).

22 *See* Section D *infra*.

In addition, Paragraph 11 of the Draft Notice introduces a new requirement that in order to obtain immunity a Paragraph 11(b) applicant must produce both (i) "contemporaneous incriminating evidence of the alleged cartel, which would enable the Commission to find an infringement of Article 81," and (ii) a corporate statement setting out the information called for in Paragraph 9(a).[23] The Sections are concerned that this heightened evidentiary requirement would reduce predictability in the immunity program and, therefore, would likely decrease self-reporting and reduce the detection and termination of cartels. Specifically, an undertaking will be less likely to self-report if it has little or no "contemporaneous, incriminating" evidence to provide. Even an undertaking that is willing to cooperate fully with the Commission's investigation and has some "contemporaneous incriminating evidence" may hesitate to come forward because of its inability to predict whether that evidence is sufficient to "enable the Commission to find an infringement." Thus, although an undertaking may have information that would alert the Commission to an infringement, and possibly even provide sufficient evidence to prove that an infringement occurred, it may refrain from self-reporting because of this lack of predictability.

In the Sections' view, contemporaneous evidence, without more, is often of uncertain probative value absent an explanation. Documents may appear to be benign unless taken together with witness statements and/or other subsequently created documents. Likewise, contemporaneous documents may sometimes appear to be incriminating when in fact they are not. Finally, the Sections note that as competition authorities around the world increasingly crack down on cartel activity,[24] conspirators are becoming more sophisticated. Recent experience shows some of the most pervasive cartels are executed without a paper trail. The Sections believe an applicant can still bring value under Paragraph 8(b) even without submitting "contemporaneous, incriminating evidence . . . which would enable the Commission to find an infringement" – provided that the applicant meets the other conditions and guidelines established in the Draft Notice.[25]

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23 Draft Notice, ¶ 11.

24 "Antitrust authorities around the world have become increasingly aggressive in investigating and sanctioning cartels that victimize their consumers. Seemingly with each passing day, the antitrust community learns of a foreign government that has enacted a new antitrust law, created a new cartel investigative unit, or obtained a record antitrust penalty. In particular, many nations are following the Division's successful "carrot and stick" approach and developing voluntary disclosure programs that mimic the Division's Corporate Leniency Policy and reward self-reporting, while simultaneously imposing stiffer sanctions for companies and executives who lose the race for leniency." Scott Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, U.S. Department of Justice, *Charting New Waters in International Cartel Prosecutions,* address before The Twentieth Annual National Institute on White Collar Crime, San Francisco, California (Mar. 2, 2006).

25 If it was not the Commission's intent to require that the sufficiency of the evidence to enable the Commission to find an infringement of Article 81 be based only on the "contemporaneous incriminating evidence" provided by the applicant, then simply moving the phrase "which would enable the Commission to find an infringement of Article 81 EC" to the end of Paragraph 11 would correct that drafting error. Making that change would result in the sufficiency of the evidence being based upon both the contemporaneous incriminating evidence and the required corporate statement.

Finally, the Sections are concerned that the Commission, having apparently increased the evidentiary standard required to meet the immunity threshold in applications under both Paragraphs 8(a) and 8(b), also intends to adopt the procedure of notifying applicants in writing – "as appropriate" – should the applicant fail to meet those standards.[26] The Sections are unaware of any compelling reason for that notice to be given in writing. Moreover, to do so certainly could place an undertaking that attempted to cooperate with the Commission in a worse position than a non-cooperating party in related civil litigation.

The combination of (i) the increased risk that an applicant's evidence will be deemed insufficient to meet the heightened evidentiary standards of the Draft Notice, (ii) the lack of predictability and increased discretion implicit in the new evidentiary standards, and (iii) the written notice to an undertaking that fails to meet those standards, substantially increases the risks of – and the disincentives for – applying for immunity under the Draft Notice.

C. Requirements For Reduction In A Fine – "Compelling Evidence"

In Paragraph 25 of the Draft Notice, the Commission describes what constitutes "added value" for purposes of qualifying for a reduction of fines. The Sections agree that direct incriminating evidence has greater value than indirect evidence. In addition, contemporaneous evidence is valuable, especially if viewed together with corporate and/or witness statements.

However, some of the proposed language is ambiguous. Specifically, the Sections submit that the terms "degree of corroboration" and "compelling evidence" as used in Paragraph 25 are unclear, introduce an unwarranted level of uncertainty and discretion into the leniency program, and may in practice deter undertakings from cooperating with Commission investigations in exchange for a reduction in fines.

An applicant should be able to satisfy the "added value" requirement by providing information and documents that advance the Commission's ability to establish an infringement. The Sections submit that establishing a second-level, higher threshold, if that is what is intended by the proposed language, may discourage a significant number of potential applicants from coming forward.

D. Marker Procedure

The Sections applaud the Commission for its decision to introduce a marker system into its immunity program.[27] The Commission's decision is in line with the approach taken by antitrust authorities in the United States, Canada, and Australia, amongst others, and the

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26 Paragraph 20 of the Draft Notice provides: "If it becomes apparent that immunity is not available or that the undertaking failed to meet the conditions set out in points (8)(a) or (8)(b), as appropriate, the Commission will inform the undertaking in writing."

27 *Id.*, ¶¶ 14-15.

recommendations of the Cartel Working Group of the International Competition Network.[28] The Sections' comments below are intended to identify certain clarifications and additions that the Sections believe would further improve this aspect of the Leniency Notice.

The Sections are concerned first, with the discretionary nature of the marker procedure, and second, that the information required is too detailed and may deter undertakings from approaching the Commission quickly in order to place a marker.

Regarding the discretionary nature of the marker procedure, the Draft Notice provides that the Commission *may* grant a marker protecting an immunity applicant's place in the queue. The experience of the Sections' members is that there must be certainty that a marker will be available in a particular jurisdiction in order to encourage potential applicants to come forward in that jurisdiction, to secure their place in the queue, and to conduct an internal investigation to collect the information and evidence regarding the suspected cartel conduct. The predictability that an enforcement authority will grant a marker is often critical to an undertaking's decision to initiate the process. If an undertaking were not confident in a jurisdiction's implementation of its marker policy, it would believe that it had to meet the requirements for immunity at the time that it first reports to the enforcement authority. The Sections are concerned that the introduction of prosecutorial discretion about whether to grant markers when immunity is available is a disincentive to undertakings considering whether to self-report.

Regarding the detailed information required for a marker, the Draft Notice requires so many particulars that it converts a "marker" in the Commission's procedure into what would be called a "first proffer" in the North American jurisdictions that have used a marker procedure for more than a decade. To be eligible under the Draft Notice, the undertaking must provide the Commission with information concerning "its name and address, the parties to the alleged cartel, the affected product(s) and territory(-ies), the duration of the alleged cartel and the nature of the alleged cartel conduct."[29] In addition, the applicant "should also inform the Commission on other past or possible future leniency applications."[30] The United States and Canada permit undertakings seeking a marker to do so on the basis of very limited information, such as the suspected type of infringement and the affected product. In fact, those jurisdictions will grant a marker on a no-names (anonymous) basis.

The Commission's "frequently asked questions" accompanying the Draft Notice state that "the aim of this [marker] system is to encourage a race between cartel members to report

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28 *See* Competition Bureau (Canada*), Immunity Program Under the Competition Act* (2000) and *Responses to Frequently Asked Questions* (October 2005) (http://www.competitionbureau.gc.ca/internet/index.cfm?itemID =2000&lg=e); U.S. Department of Justice *Corporate Leniency Policy* (http://www.usdoj.gov/atr/public/guidelines/ lencorp.htm); Australia Competition and Consumer Commission *Immunity Policy for Cartel Conduct* and *Immunity Policy Interpretation Guidelines* (August 2005) (http://www.accc.gov.au/content/index.phtml/itemId/708758; International Competition Network, Cartel Working Group (http://www.internationalcompetitionnetwork.org/ cartels/gen_framework2.html.

29 Draft Notice, ¶ 15.

30 *Id.*

cartels to the Commission."[31] In fact, the proposed marker system slows the race as compared to existing successful marker procedures. The eligibility requirements for a marker in the Draft Notice require an applicant to complete a pre-race obstacle course before beginning the race for the marker. It often requires days or even weeks in an internal investigation to develop accurate information in the categories required for marker eligibility. The Draft Notice creates a perverse incentive. The undertaking that joins the race for a marker too quickly and provides what turns out to be incorrect specifics in obtaining its marker may find itself having lost the race to an undertaking that waits until the completion of its internal investigation before going forward to the Commission. Thus, undertakings will be fearful of "getting it wrong" if they move quickly.

The Sections recommend that the Commission adopt an approach similar to that used in the North American jurisdictions, although given the specific circumstances of the European Communities, the Sections recognize that the Commission may also wish to require disclosure of the Member States affected either by the immunity applicant or by the Commission through the ECN. The experience of other jurisdictions over many years confirms that a program requiring only a minimal amount of information up front is sufficient to permit the Commission to determine if the undertaking seeking a marker is indeed "first in" to initiate a claim for immunity. More detailed information about the cartel can be provided subsequently as part of the formal immunity application process.

The Draft Notice also provides that an applicant should "justify" its request for a marker.[32] It is not clear what the Commission intends by this requirement. For the reasons stated above, the Sections believe that any requirement to provide "justification" for a marker is unnecessary and counterproductive. The fact that the undertaking is the first entity willing to provide information to the Commission about an alleged cartel should be sufficient justification in and of itself for the marker request. In addition, to "justify" its request for a marker, the applicant, under the Draft Notice, must provide detailed information about the cartel that ordinarily would not be known at the time an undertaking first learns of a violation, at which point it would want to seek a marker while completing its internal investigation.

The Section of Antitrust Law reiterates the views it has expressed previously to the Commission that the immunity process should be conducted as far as possible orally and without the need for written materials.[33] This extends to the marker procedure as well. Accordingly, it should be acceptable that the request for a marker be made orally. Similarly, the Sections believe that written exchanges pertaining to the marker process should be avoided or kept to an absolute minimum. For example, there need not be written exchanges between the applicant and the Commission confirming the marker or regarding possible extensions to perfect the marker. The Sections submit that all marker-related exchanges should be conducted orally, with each party keeping its own internal notes to confirm the accuracy of any understanding or

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31 European Commission, *Commission Proposes Changes To The Leniency Notice – Frequently Asked Questions* (September 29, 2006).

32 Draft Notice, ¶ 15.

33 *See infra* Section G. *See also* Antitrust Section Comments, *supra* note 2.

arrangements that have been concluded. The Draft Notice would benefit from express statements to this effect.[34]

The Sections support the Commission's decision to adopt a flexible approach by not detailing a specific time period within which a marker must be perfected.[35] This is similar to the approach taken in the United States and the United Kingdom.[36] However, the Sections note the statement in the "frequently asked questions" that accompanied the Draft Notice that the purpose of the marker is to allow an applicant a "short time period" to complete its internal investigation and obtain the necessary information to meet the immunity threshold. The Sections suggest that the Commission not pre-judge the necessary duration of this period as it will clearly depend – as the Draft Notice indicates – on the circumstances of each individual case. The Sections believe that the period of time afforded to perfect a marker should be adequate to allow a party to complete its internal investigations while at the same time reasonably accommodating the Commission's own timetable.[37]

As stated elsewhere in these Comments, the Sections agree with the Commission that its immunity program should be structured to ensure that an immunity applicant is placed in no worse position than a non-cooperating party. Accordingly, the Sections recommend that the Commission include in its Notice (e.g., in Paragraph 22) an express statement that, absent bad faith on the part of a marker applicant, the Commission will refrain from using any evidence provided by the applicant against it where the marker is not perfected or is otherwise revoked. The Sections believe that this type of express reassurance is desirable so as not to compromise the willingness of leniency applicants to come forward with potentially incriminating information.[38]

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34 In addition, Paragraph 15 of the Draft Notice also states that undertakings that have been granted a marker cannot perfect by making a formal application in hypothetical terms. This is inconsistent with the approach taken, for example, in Canada**,** where conditional immunity may be granted on the basis of hypothetical information only. *See* Note 23, Canadian Competition Bureau *Responses to Frequently Asked Questions* (October 2005), at Question 13.

35 "The Commission services may grant a marker protecting the immunity applicant's place in the queue for a period to be specified on a case-by-case basis in order to allow for the gathering of the necessary information and evidence." Draft Notice, ¶ 15.

36 *E.g.*, United Kingdom Office of Fair Trading, *Leniency and no-action, OFT's interim note on the handling of applications* (July 2005) ¶ 2.12 (http://www.oft.gov.uk/Business/Cartels/default.htm).

37 The Sections note that the Canadian Competition Bureau and the Australian Competition and Consumer Commission have generally opted for fixed time periods to perfect a marker. For example, unless the Bureau concludes that a delay is reasonable, a marker may be revoked if the immunity applicant cannot produce its "proffer" of information within 30 days. The Sections also note that concerns have been expressed that Canada's 30-day time period is too short.

38 In keeping with its view that, to the greatest extent possible, the immunity process should be structured to avoid the need for the creation of any written materials, the Sections commend the Commission's decision to provide that written notification of the Commission's receipt of an immunity application (Draft Notice, ¶ 17) or application for a reduction in fine (*id.*, ¶ 28) will be given only upon the request of the applicant. However, the Sections question the need for what appears to be mandatory written notification to the applicant if its application for immunity from fines (*id.*, ¶ 20) or reduction in fine (*id.*, ¶ 29) fails to meet the applicable conditions.

E. Divergence From International Norms For Leniency Policies

Perhaps the Sections' gravest concern about the Draft Notice is the extent to which it deviates from the recent trend in leniency policies around the world by re-introducing a substantial level of unpredictability, discretion, and lack of clarity into the program. The negative consequences of these changes likely will be felt not only in Europe but in other major anti-cartel enforcement jurisdictions as well. Because the Commission is one of the major anti-cartel enforcement authorities in the world, any undertaking, and its counsel, faced with the prospect of developing a multi-jurisdictional leniency strategy must consider the consequences in Europe. The lack of clarity and increased discretion provided for in the Draft Notice invariably will introduce delay and indecision for parties considering applications in multiple jurisdictions, and in some cases, may result in decisions not to self-report at all due to the inability to predict outcomes in Europe. This would be a most undesirable result for anti-cartel enforcement around the world and for undertakings wishing to self-report and obtain the advantages of the leniency policies in the major anti-cartel enforcement jurisdictions.

As noted, there is a substantial increase in prosecutorial discretion and lack of clarity and predictability arising out of the provisions of the Draft Notice relating to: (i) the sufficiency of the evidence necessary to meet the immunity threshold – sufficient to allow the Commission to carry out a "targeted" inspection; (ii) the necessity of contemporaneous incriminating evidence; (iii) the discretionary marker system; and (iv) the need for the production of "compelling evidence" in connection with an application for reduction of fine. These amendments appear to deviate from the trend over the past several years toward convergence among leniency programs around the world. It has been the experience of enforcement authorities that one of the hallmarks of an effective leniency policy is transparency and predictability.[39] In fact, the 2002 amendments to the Commission's 1996 Leniency Notice were highly praised and welcomed by other enforcement authorities as a significant step toward convergence with the principles of leniency policies in other jurisdictions.[40] The importance of convergence in clarity, transparency,

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39 *See, e.g.*, Scott Hammond, Director of Criminal Enforcement, Antitrust Division, U.S. Department of Justice, *Cornerstones of an Effective Leniency Program*, address before the ICN Workshop on Leniency Programs, Sydney, Australia (Nov. 22-23, 2004) ("Prospective amnesty applicants come forward in direct proportion to the predictability and certainty of whether they will be accepted into the program. If a company cannot accurately predict how it will be treated as a result of its corporate confession, our experience suggests that it is far less likely to report its wrongdoing, especially where there is no ongoing government investigation. Uncertainty in the qualification process will kill an amnesty program."). *See also* "Report on Leniency Programmes To Fight Hard Core Cartels," Organization for Economic Co-operation and Development, Committee on Competition Law and Policy, (DAFFE/CLP(2001)13)) (27 April 2001) p.2 ("Clarity, certainty, and priority are critical, as firms may be more likely to come forward if the conditions and the likely benefits of doing so are clear. To maximise the incentive for defection and encourage cartels to break down more quickly, it is important not only that the first one to confess receive the 'best deal', but also that the terms of the deal be as clear as possible at the outset.")

40 *See, e.g.*, James M. Griffin, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, *The Modern Leniency Program After Ten Years*, address before the ABA Section of Antitrust Law Annual Meeting, San Francisco, California (August 12, 2003). ("Most significant was the European Union's recent adoption of a revised leniency program in February 2002. The new program establishes a far more transparent and predictable policy than its predecessor and brings the EC's program closely in line with the Division's Corporate Leniency Policy. In fact, in greatly reducing the amount of discretion involved in assessing amnesty applications and in creating the opportunity for companies to qualify for full immunity after an investigation has begun, the blockbuster

and predictability in leniency programs does not lie solely in the convenience and attractiveness it provides to undertakings weighing the advantages of simultaneously self-reporting in multiple jurisdictions. Rather, the convergence of transparency and predictability has had a positive impact on the leniency programs in multiple countries and has enhanced the success of enforcement efforts across jurisdictions.[41] The re-introduction of uncertainty and discretion into the Commission's Draft Notice threatens to have a negative impact on not just the Commission's leniency program, but on leniency programs around the globe, and particularly on the ability of those programs to work in tandem to detect and punish major international cartels.[42]

Another area in which the Draft Notice seems to deviate from international norms is the manner in which the quality and quantity of the first-in applicant's evidence is weighed once a subsequent applicant submits some evidence.[43] Paragraph 21 of the Draft Notice provides (as does Paragraph 18 of 2002 Notice) that "[t]he Commission will not consider other applications for immunity from fines before it has taken a position on an existing application in relation to the same alleged infringement." While the language of the provision seems to provide protection to the first-in applicant from being leap-frogged by a subsequent applicant, the Commission's practice in this regard has rendered that protection largely illusory. According to one senior Commission official, "the moment a second applicant submits evidence, the first applicant can no longer supplement its application with further evidence. Its application will then be evaluated

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revisions are similar to the ones made by the Division when we successfully expanded our program in August 1993. The convergence in leniency programs has made it much easier and far more attractive for companies to simultaneously seek and obtain leniency in the United States, Europe, Canada, and in other jurisdictions where the applicants have exposure.")

41 *See, e.g.*, R. Hewitt Pate, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, *International Anti-Cartel Enforcement*, address before the ICN Workshop on Leniency Programs, Sydney, Australia (Nov. 21, 2004). ("One key area in which governments have developed enforcement procedures for the detection of cartels has been the development and use of corporate amnesty policies. As amnesty policies were developed in multiple jurisdictions, it became clear that convergence in effective policies was needed. Over time, we learned that occasionally members of international cartels did not apply for amnesty in one jurisdiction because they had greater exposure in another jurisdiction that did not have a transparent and predictable amnesty policy. Recent convergence in amnesty policies in multiple jurisdictions, however, has led to many simultaneous amnesty applications, which has enhanced enforcement by providing opportunities for coordinated raids, interviews, and service of subpoenas.")

42 *Id.* ("Governments that do not have transparent, predictable amnesty policies will not receive many applications, and they will not be able to participate in the information sharing that occurs among jurisdictions with effective amnesty policies. . . . Amnesty applicants in one jurisdiction will not, however, apply for amnesty in other jurisdictions that have ineffective, unpredictable leniency policies, and they will not grant waivers allowing the sharing of information with governments that have deficient amnesty policies. Thus, the more jurisdictions that have effective amnesty policies, the greater the incentives that will exist for simultaneous amnesty applications in multiple jurisdictions and waivers from amnesty applicants allowing the sharing of amnesty information. Simultaneous amnesty applications and information sharing will lead, and have led, to greater opportunities for multi-jurisdictional cooperation, including the coordination of initial investigative steps, such as raids, interviews, and service of subpoenas, which can minimize the premature disclosure of an investigation and the potential for destruction of evidence. Better investigations lead to more efficient and effective prosecutions, and hence the termination and punishment of more cartels.")

43 The Sections recognize that there has been no change to this provision in the Draft Notice but takes this opportunity to comment on the Commission's practice in this regard, which the Sections believe is inconsistent with the international enforcement community's goals of transparency and predictability.

on the basis of the evidence it had submitted until the moment the second application was made."[44] Thus, a first-in applicant, acting in good faith, that miscalculates in its first submission the quantum of evidence that the Commission believes necessary to carry out a "targeted" inspection could lose its place in the queue for immunity from fines if it fails to provide the Commission the "missing" evidence prior to the submission of evidence by a subsequent applicant. In light of the increased level of evidence that the Commission seems to be requiring of undertakings under the Draft Notice to meet the immunity threshold, the Commission's practice seems to be extremely harsh and certainly undermines the clarity and predictability of the leniency program.[45]

The Sections are unaware of any other corporate leniency policy that provides for such unpredictable and discretionary treatment of a good faith first-in applicant. The Sections urge the Commission to take this opportunity to make it clear that the Commission will provide a first-in applicant the opportunity to supplement its application within an agreed time period even after a subsequent applicant has submitted evidence to the Commission.

F. Requirement That Applicant Not Disclose It Has Applied For Immunity

Under the Commission's Draft Notice, a condition that must be met by the undertaking in order to qualify for immunity or for a reduced fine is that it must cooperate "genuinely, fully, on a continuous basis and expeditiously from the time it submits its application throughout the Commission's administrative procedure."[46] This includes, among other things, "not disclosing the fact or any of the content of its application before the Commission has issued a statement of objections in the case, unless otherwise agreed."[47] In addition, when "contemplating making" its application to the Commission, the undertaking must not have disclosed the fact or any of the content of its contemplated application, except to other competition authorities.[48] If the undertaking fails to meet these conditions, it will not benefit from any favorable treatment under the Draft Notice.[49]

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44 *See* Bertus van Barlingen, *A View From the Inside: The European Commission's 2002 Leniency Notice After One Year of Operation*, ANTITRUST 84 (Spring 2003) (reprinted in Competition Directorate-General of the European Commission, EC COMPETITION POLICY NEWSLETTER 16 at 18 (Summer 2003) (http://europa.eu.int/comm/competition/publications/cpn/cpn2003_2.pdf)).

45 In addition, Paragraph 21 is far from clear and predictable, Does it mean that the other parties also will be given some sort of ranking based on the order in which they approached the Commission? This could be of importance if the first applicant's marker is not perfected or is otherwise revoked. Similarly, will these other parties be expected to cooperate with the Commission in the interim while the first applicant's immunity status is being considered? The Sections suggest that it would be helpful for the Commission to provide more details on how it intends to treat – and what will be expected of – subsequent applicants while considering the first immunity application it receives.

46 Draft Notice, ¶ 12(a).

47 *Id.*

48 *Id.*, ¶ 12(c).

49 *Id.*, ¶¶ 22, 30.

The Sections appreciate that the Commission has a significant and justifiable interest in ensuring that the neither the fact nor the content of an application (actual or contemplated) for immunity or reduction of fines be disclosed during a period when doing so can jeopardize the investigation. The Sections believe, however, that the conditions under Paragraph 12 of the Draft Notice could create a conflict for public companies that are obligated to comply with the disclosure rules of Section 409 of the U.S. Sarbanes-Oxley Act of 2002 and Form 8-K of the U.S. Securities Exchange Act of 1934.[50] In effect, Paragraph 12(a) may place applicants in the untenable position of having to choose between violating the requirements of the Draft Notice – and, thereby losing the benefit of immunity or reduction in fine for which they otherwise qualify – or violating the regulatory and/or criminal securities laws of their home jurisdiction.[51]

The Sarbanes-Oxley Act of 2002 required the SEC to enact rules requiring public company officers to certify that they are responsible for establishing, maintaining, and regularly evaluating the effectiveness of the company's internal controls; that they have made certain disclosures to the company's auditors and the audit committee of the board of directors about the company's internal controls; and that they have included information in the company's quarterly and annual reports both about their evaluation and about whether there have been significant changes to the company's internal controls or to other factors that could significantly affect internal controls subsequent to the evaluation. Section 409 of this Act requires companies to disclose "on a rapid and current basis" material information regarding changes in a company's financial condition or operations. Form 8-K of the Securities Exchange Act of 1934 sets out 17 categories of events that are required to be disclosed and mandates that the disclosures be made within four business days of the triggering event. The events that trigger disclosure under Form 8-K include material changes in the financial condition of the company,[52] material impairments to the company's assets,[53] material modifications to the rights of security holders of the company,[54] and changes in control of the company (including the departure of principal officers).[55]

None of the categories listed under Form 8-K specifically discusses a contemplated or pending application for leniency as a triggering event that requires disclosure. Furthermore,

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50 Financial disclosures (and certifications signed by management) are also required on a quarterly and annual basis under Form 10-Q and Form 10-K of the Securities Exchange Act of 1934.

51 Similarly, if an Australian Company listed on the Australian Stock Exchange Limited (ASX) were put in that position, it could be in breach of the continuous disclosure obligations that require public companies to disclose any information "concerning it that a reasonable person would expect to have a material effect on the price value of the entities securities." ASX Listing Rule 3.1. While there has not been any judicial consideration of the issue in Australia, companies in Australia have made disclosures in such circumstances. *See, e.g.*, Amcor Limited, announcement to the ASX, November 23, 2004.

52 *See generally* Section 2 of Form 8-K.

53 Item 2.06 of Form 8-K.

54 Item 3.03 of Form 8-K.

55 Items 5.01 and 5.02 of Form 8-K.

under U.S. law, it is fair to say that courts have not traditionally interpreted a company's knowledge of a pending investigation that has not yet ripened into criminal charges as requiring, in and of itself, disclosure about the investigation.[56] However, where a company makes affirmative statements concerning its business or prospects (such as those required under Form 8-K) that are materially misleading in the face of a known pending investigation, courts have been more willing to impose liability for failure to disclose the investigation or the facts underlying it.[57] In addition, where the events giving rise to the leniency application trigger required management changes or claims by injured parties that could have a material impact on the company's financial condition, those facts would be required to be disclosed by Form 8-K.

The SEC has recently taken a strong position on the disclosure obligations for a company under investigation. On March 1, 2005, the SEC released a report of its investigation of the Titan Corporation ("Titan"), a military intelligence and communications solutions provider, in which it found Titan made a false and misleading material disclosure by making a representation in a merger agreement that, to its knowledge, neither it nor anyone acting on its behalf had taken any action which would cause Titan to be in violation of the Foreign Corrupt Practices Act ("FCPA"), when it in fact was under investigation for violating the FCPA.[58] The SEC reported that Titan could be liable under the U.S. securities laws for materially misleading the public by not disclosing the government investigation.[59]

Therefore, if the facts underlying the leniency application could materially affect the financial condition of the company, then not revealing the information could be considered a materially false or misleading statement and a violation of U.S. securities laws. Consequently, a public company complying with these SEC-imposed requirements could be barred from meeting the requirements of Paragraph 12 of the Draft Notice and rendered ineligible for immunity or a reduced fine.

In addition, changes in the corporate structure (e.g., a merger or sale of stock or assets) could trigger disclosure requirements during the course of the Commission's investigation that could cause the applicant to lose its immunity from fines even after meeting all of the other requirements of the Draft Notice and providing the Commission with evidence sufficient to impose fines against other cartel members. In addition, under recent U.S. legislation an amnesty applicant under the Antitrust Division's Corporate Leniency Policy can obtain relief from treble damages and joint and several liability. In order to do so, the applicant must identify itself as the

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56 *See, e.g., United States v. Matthews,* 787 F.2d 38 (2d Cir. 1986); *United States v. Crop Growers Corp.,* 954 F. Supp. 335 (D.D.C. 1997).

57 *See, e.g., In re Par Pharmaceutical, Inc. Securities Litigation,* 733 F. Supp. 668 (S.D.N.Y. 1990); *Greenfield v. Professional Care, Inc*., 677 F. Supp. 110 (E.D.N.Y. 1987).

58 *See* "Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on Potential Exchange Act Section 10(b) and Section 14(a) Liability", Exchange Act Release No. 51283 (http://www.sec.gov/litigation/investreport/34-51238.htm). The public announcement of a Section 21(a) Report of Investigation is infrequently used by the SEC, and generally indicates the SEC's desire to use the particular investigation to spotlight something it views as an issue of broad concern.

59 Specifically, the SEC reported that Titan could be liable under Section 14(a) and Rule 14a-9, or, if the requisite scienter were present, Section 10(b) and Rule 10b-5.

amnesty applicant and cooperate with the plaintiffs in the civil damage cases. In those international cartel cases where an undertaking obtains conditional leniency under the Commission's Draft Notice and the Antitrust Division's Corporate Leniency Policy, the applicant could be forced to choose between foregoing the benefits of de-trebling of damages or immunity from fines under the Draft Notice for which it otherwise had qualified. Of course, a decision by the applicant to comply with the Draft Notice, and not reveal its status as the U.S. amnesty applicant, not only would deprive the applicant of substantial financial benefits, it would have the unfortunate effect of depriving the plaintiffs in the damage actions of the benefit of its cooperation. Such a result would have an unwanted negative effect on the overall scheme of public and private anti-cartel enforcement that is designed to have the greatest deterrent effect on such economically abhorrent conduct. Finally, faced with the choice of obtaining the benefits of de-trebling or of immunity from fines under the Draft Notice, an undertaking might decide not to self-report to the Commission, which also would have an undesired impact on overall deterrence of international cartel conduct.

For all these reasons, the Sections encourage the Commission to consider further clarifying the conditions set forth under Paragraph 12 of the Draft Notice so that they apply only in situations where disclosure would surely jeopardize the integrity of the Commission's investigation and where failure to disclose would not cause an undertaking to be in violation of, or deny it the benefits of, other applicable laws or regulations.

G. Corporate Statements And Access To File

The Section of Antitrust Law provided extensive comments to the Commission in April 2006 regarding the Draft Amendments to the 2002 Leniency Notice, and it respectfully refers the Commission to those comments.[60]

60 Antitrust Section Comments, *supra* note 2.

CONCLUSION

The Commission's success in achieving its admirable objective of identifying and deterring cartel conduct through the Draft Notice depends upon the balance of incentives and disincentives that applicants face when determining whether to be the "whistleblower." One of the most important factors in tipping that balance in favor of self-reporting and cooperation is the extent to which the leniency program – in its form and application – is certain, predictable, and, to the greatest extent possible, lacking in prosecutorial discretion. The Sections commend the Commission's desire to provide additional guidance and clarity through the adoption of these amendments to the 2002 Leniency Notice and provide these comments and suggestions as means by which the stated goals of the Commission may be enhanced.

Respectfully submitted,

SECTION OF ANTITRUST LAW
SECTION OF INTERNATIONAL LAW
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