

The Skadden logo consists of the word "Skadden" in white serif font, centered within a red rectangular box. This box is positioned in the upper left corner of a dark blue vertical sidebar. The sidebar also features a faint, light blue grid pattern resembling a globe's latitude and longitude lines.

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The US Experience: Leniency Programs

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Overview

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- History
- US Leniency Program
- Challenges
- Implementation of an Effective Leniency Program
- Questions

History of US Leniency

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- 1978 Program Produced Few Applicants
 - Presented in terms of prosecutorial discretion
 - DoJ retained too much discretion
 - About 1 leniency applicant a year
- 1993 Program Found Success
 - Expanded incentives and certainty
 - Influenced by input from private bar and business community
 - Average nearly 20 leniency applicants a year
 - Most effective investigative tool for detection
 - Creates “race” for conspirators to disclose

Elements of US Success

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- “Carrot”
 - Leniency Program
- “Stick”
 - Increase in penalties
- Global convergence of leniency programs
 - European Commission, Australia, Austria, Brazil, Bulgaria, Canada, Chile, Croatia, Czech Republic, Denmark, France, Germany, Greece, Hungary, Japan, Korea, Mexico, Netherlands, New Zealand, Norway, Pakistan, Poland, Portugal, Peru, Russia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, and others
 - Increased fear of detection

US Leniency Program

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- Titled “Corporate Leniency Policy” (Amnesty program)
- Type “A” Leniency
 - “Automatic” Amnesty
 - No prior investigation
 - Requirements met
- Type “B” Leniency
 - Post-investigation amnesty option
 - More opportunities for individuals to receive benefit of corporate leniency
- Distinguishing US Program
 - Only one company can apply and receive leniency
 - Others in cartel can enter plea agreement or obtain “Amnesty Plus”

Type “A” Leniency

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- 6 Conditions
 - Prompt and effective action to terminate upon discovery
 - Corporate confession
 - Full, continuing and complete cooperation
 - Restitution
 - Division has not received information yet
 - Not ringleader

Type “B” Leniency

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- 7 Conditions
 - Prompt and effective action to terminate upon discovery
 - Full, continuing and complete cooperation
 - Corporate confession
 - Restitution
 - First in
 - Division does not have evidence likely to result in sustainable conviction
 - Granting leniency would not be unfair to others

Challenges

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- Granting Leniency
- Enforcing Eligibility Requirements
- Sentencing
- Civil Redress

Granting Leniency

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- Still a level of agency discretion
- Requirements
- Type “A” v. type “B”
- Internal process

Enforcing Eligibility Requirements

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- Prompt and effective action to terminate upon discovery requirement
 - Race for the marker
 - Certainty for applicants v. integrity of program and fairness
 - Isolated incident
 - Court upheld leniency in Stolt
- Ringleader
 - Type “A” leniency
 - Not “*the* leader” and “*the* originator”
 - Clearly the single ringleader or single organizer
 - Generally construe to accept an applicant
 - Must represent that it did not coerce any other participant
 - Leniency applicant bears the burden of proof

Sentencing

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- Calculating fines
 - Consistency and fairness
- Guilty Pleas
 - Florida West (Air Cargo) Pled Nolo Contendere under unique circumstances and DoJ objected
- Twice the gain of defendant or entire conspiracy
 - AU Optronics (LCD) Jury found at least \$500 Million in illicit gains
 - Based on ill-gotten gains of all members of the cartel, not just AUO's

Civil Redress

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- Restitution
- Confidentiality
- Access to leniency documents
- Ongoing criminal investigations

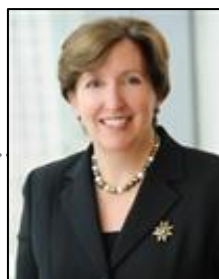
Implementing an Effective Leniency Program

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- Feedback from bar
- Process for internal input
- Consistency up the chain
 - Communicating with applicants and targets

Questions

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Sharis A. Pozen joined Skadden as a leader in the antitrust and competition practice after serving in the U.S. Department of Justice (DOJ) as acting assistant attorney general of the Antitrust Division. Ms. Pozen advises clients on a broad spectrum of antitrust issues related to mergers and acquisitions, litigation, criminal investigations and counseling across national and multinational industries — including technology and telecommunications, health care and pharmaceutical, energy, financial services, transportation and agriculture. Ms. Pozen utilizes her extensive government and private practice experience to assist clients on some of their most complex antitrust, competition and distribution issues, and is one of the few antitrust practitioners who has served in high-level positions at both the DOJ and the Federal Trade Commission.

While serving as Acting Assistant Attorney General at the DOJ, Ms. Pozen led many high-profile matters and worked extensively with leaders of international antitrust authorities. Most recently, she oversaw the DOJ's successful efforts in blocking AT&T's proposed \$39 billion purchase of T-Mobile and played a crucial role in one of the division's most notable litigation victories by securing an injunction stopping H&R Block's acquisition of TaxAct. She also oversaw several criminal antitrust matters, including the successful investigation and prosecution of criminal price fixing activity in the autoparts industry — the largest criminal matter in the division's history. Additionally, she has represented the U.S. on international competition issues on behalf of the Organisation for Economic Co-operation and Development and the International Competition Network.

Previous to her DOJ experience, Ms. Pozen was a partner at a major Washington, D.C.-based firm, where she served as a director of the firm's Antitrust Group. Her practice focused on antitrust issues and trade regulation across a broad spectrum of industries. She began her professional career at the Federal Trade Commission, where she held several positions, including attorney adviser to two Commissioners, assistant to the director of the Bureau of Competition and staff attorney.

Ms. Pozen was profiled in 2009 as a leading antitrust attorney by Global Competition Review in its "Women in Antitrust" issue.