

**COMMENTS OF THE AMERICAN BAR ASSOCIATION
ANTITRUST LAW SECTION REGARDING THE PROPOSED
DRAFT REGULATORY PROVISIONS FOR COFECE'S
LENIENCY AND IMMUNITY PROGRAM**

November 22, 2019

The views stated in this submission are presented on behalf of the Antitrust Law Section. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association.

I. Introduction

The American Bar Association's Antitrust Law Section¹ (the Section) is pleased to offer these comments to the Mexican Federal Economic Competition Commission (*Comisión Federal de Competencia Económica*, COFECE) on new draft regulations for the Leniency Program (New Regulations), published for public consultation on October 15, 2019. The New Regulations would update the legal framework of the current Regulatory Provisions of the Federal Economic Competition Law and the Guidelines for the Leniency Program by adding new standards, procedures and mechanisms for the revocation of leniency.

The New Regulations aim to provide greater transparency regarding COFECE's decisions to revoke leniency and would set as formal criteria various elements that were included in earlier non-binding leniency guidelines. The New Regulations would also clarify inconsistencies regarding second or subsequent applicants for leniency. We recognize the efforts made by COFECE to clarify how decisions to revoke leniency are made, but the Section has concerns that the proposed new rules could undermine basic principles of the leniency program. As explained below, in the Section's view the New Guidelines do not create sufficient limitations on COFECE's abilities to revoke leniency, nor do they create sufficient safeguards or mechanisms by which

¹ The Antitrust Law Section of the American Bar Association is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection, data privacy as well as related aspects of economics. Section members come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors and law students. The Section provides a broad range of conferences, committee programs, webinars, books, periodicals and other publications, as well as discussion groups and updates on recent developments in all facets of antitrust and the other listed fields. Numerous Section members have extensive experience and expertise regarding the laws of non-U.S. jurisdictions, as reflected in many of the Section's programs and publications. For more than twenty years, the Section has provided input (often joining with other Sections of the ABA) to enforcement agencies around the world conducting consultations on a wide variety of antitrust, consumer protection and other topics within the Section's remit. Recipient agencies often adopt Section recommendations and/or express appreciation for its input. Past comments can be accessed at https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs/.

applicants can correct deficiencies and forestall revocations. The proposed New Regulations may have the unintended effect of weakening leniency by disincentivizing legal counsel from recommending leniency, thus discouraging economic agents from applying for leniency.

COFECE is currently facing a significant downturn in numbers of leniency applications. According to a report made available by COFECE, in 2018 COFECE received a total of ten leniency applications, as opposed to twenty-six and fifteen in 2016 and 2017, respectively.² Three recent decisions by COFECE to revoke leniency,³ which were contested by the leniency applicants, may have had some chilling effect on other would-be leniency applicants, particularly in international cartel cases.

Although there are notable differences in how leniency programs are implemented across the globe, features of all effective leniency programs include “clarity on the rules and procedures” and “transparency and certainty” in how policies are implemented.⁴ The Section urges COFECE to modify the New Regulations and reflect policies that create incentives to seek leniency rather than provide rationales for denying or revoking leniency. The leniency program should be strengthened by making the program as transparent and predictable as possible, and by adopting approaches that place leniency applicants in a better position than other cartel participants.

II. Suggested Revisions

Below, the Section offers specific recommendations that may help to improve the transparency and predictability of the New Regulations.

A. Create a “Paperless” Leniency Application

The New Regulations provide that a leniency applicant must leave a voice message or send an email to document its leniency application before a conditional immunity agreement may be issued. However, leniency applicants have well-founded concerns that these records are retained by the competition authority and may later be used against the applicant. In Mexico, applicants have concerns that the emails or voice mail messages may also be used by other authorities in Mexico or by foreign authorities and potential plaintiffs in private damage claims.

The Section recommends that, consistent with guidance from the International Competition Network (“ICN”), COFECE allow for oral leniency applications, and subsequently provide the applicant with a certificate that contains all the information set forth in Article 3, Section I of the Draft Regulatory Provisions, as well as the ranking of the applicant. Opportunities for applicants

² COMISIÓN FEDERAL DE COMPETENCIA ECONÓMICA, LA COFECE EN NÚMEROS 2018 P.10 (Mar. 2019), *available at* https://www.cofece.mx/wp-content/uploads/2019/03/CFCN2018_v270319.pdf#pdf.

³ Two of these are case file numbers (número de expediente) IO-003-2015 and IO-001-2013. The third case file number is not publicly available.

⁴ OECD, RECOMMENDATION OF THE COUNCIL CONCERNING EFFECTIVE ACTION AGAINST HARD CORE CARTELS II.1.a (July 2, 2019), *available at* <https://www.oecd.org/daf/competition/recommendationconcerningeffectiveactionagainstharcocartels.htm>. See also INT’L COMPETITION NETWORK, ANTI-CARTEL ENFORCEMENT MANUAL, CHAPTER 2, DRAFTING AND IMPLEMENTING AN EFFECTIVE LENIENCY POLICY 2.3-2.5 (April 2014) (hereinafter ICN ANTI-CARTEL ENFORCEMENT MANUAL), *available at* https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_ACEMLeniency.pdf.

to provide oral presentations would allow COFECE to assess whether or not a conditional immunity should be granted, without raising concerns for applicants that are otherwise obligated to produce written statements or recorded messages. It is important that no document signed by the applicant (or voice recording) is kept in the possession of the authority at this early stage.⁵

B. Permit COFECE to Provide Additional Extensions to Applicants

Article 3, Section II of the New Regulations provides that within five days of a request for leniency, COFECE will set the date by which the applicant must provide all required documents and other available information related to the request. The earlier legal framework gave COFECE considerably more discretion to grant extensions for the time, as needed, to allow applicants to meet deadlines to produce required documents. The New Regulations, by contrast, provide that COFECE can grant only one extension.

The Section recommends that the New Regulations be modified to allow COFECE additional discretion to approve more than one extension for applicants that need to produce supporting documentation. Firms that seek leniency need time to select antitrust counsel, who must then have time to interview employees, review files, assess the cartel activity, and prepare the leniency application. In many cases, unforeseen events will require additional time beyond what the applicant initially anticipates. For these reasons, the Section suggests that COFECE retain its discretion and be permitted to extend the deadline more than once for a leniency applicant's submission of documents and other information.

C. Revert to Earlier Requirements Requiring Leniency Applicants to Not Deny Participation in the Cartel When Answering the Formal Accusation (Known as the *Dictamen de Probable Responsable* or DPR)

Article 6, Section B of the New Regulations provides that, within a trial-like examination procedure, the leniency applicant must recognize its participation in the cartel activity for which it is seeking leniency. In the earlier legal framework set forth in non-binding leniency guidelines, the applicant's obligation was limited to not denying the cartel conduct, which is very different and requires less potential legal exposure.

Due to the nature of COFECE's trial-like procedure, including COFECE's practice of making an applicant's response to the accusation available to other parties involved in the procedure, leniency applicants are often concerned that confidential information, including the identity of the applicant, may be disclosed and later used against them.⁶ To provide leniency applicants with greater certainty, the Section recommends retaining the earlier obligation—requiring the applicant, within the trial-like procedure and specifically when answering the DPR,

⁵ ICN ANTI-CARTEL ENFORCEMENT MANUAL 3.2.2 ORAL APPLICATIONS (“Oral applications for leniency have developed in response to the potentially self-incriminating nature of providing a written application. Many jurisdictions now use a “paperless process” under which leniency applicants are not required to generate and provide written submissions/statements, but are still required to provide all pre-existing documents. . . . Where oral statements by the leniency applicant receive greater confidentiality protections than a written application, a paper process may increase an incentive to apply for leniency.”)

⁶ A leniency applicant must recognize its participation in the cartel conduct within COFECE's leniency procedure, and that information is kept confidential. Recommendation C pertains to a feature of the New Regulations that requires an applicant to recognize its participation when answering the formal accusation.

to not deny the cartel activity—rather than force the applicant to affirm its participation in the cartel.

D. Place Some Limits on the Ability of the Investigatory Authority to Revoke Leniency

Article 6, Section A of the New Regulations provides a list of obligations that a leniency applicant must meet during the investigative stages of COFECE's proceedings. In the New Regulations, the Investigatory Authority may revoke conditional leniency if, among other considerations, it determines that the applicant did not cease a practice, did not disclose all unlawful conduct, or did not recognize participation in certain conduct.

The Section is concerned that the New Regulations lack any guiding principles to restrict or limit the instances in which the Investigatory Authority may revoke conditional leniency. Under the New Regulations, the Investigatory Authority would seemingly have the ability to prejudge the legality or illegality of the applicant's conduct, a power granted exclusively to COFECE's decision-making body, the Plenum.

The Section respectfully recommends retaining the earlier legal framework, which allowed the Plenum to evaluate the cooperation of the leniency applicants within the investigative process and the trial-like procedure. The Section recommends (a) not allowing the Investigatory Authority to revoke conditional leniency, but rather, make recommendations to the Plenum regarding the cooperation of the applicant within the investigation process, or (b) limit the scope of instances in which the Investigatory Authority can revoke leniency.

The Section recognizes that some of the procedures set forth in the New Regulations are also found in earlier non-binding leniency guidelines. However, recent decisions by the Investigatory Authority to revoke leniency, as well as the new rules, could have a chilling effect on future decisions to apply for leniency. The Section recommends that COFECE use the issuance of the New Regulations as an opportunity to enhance the predictability of the leniency process and narrow the instances in which leniency may be revoked.

E. Harmonize the Processes for Revocations of Conditional Leniency in Investigative and Trial-Like Procedures

Article 9 of the New Regulations sets forth a lengthy list of instances in which the Investigative Authority may revoke conditional leniency during the investigative stages of COFECE's proceedings. The New Regulations provide little or no limitation on the ability of the Investigative Authority to revoke conditional leniency.

Article 10 of the New Regulations, which govern leniency revocation during trial-like procedures, provides for a more predictable and transparent process for leniency applicants. Article 10 states that if the Technical Secretariat considers that the applicant failed to comply with any of the applicant's obligations, the Technical Secretariat must inform the applicant so that the applicant may remedy or address the non-compliance. If the applicant fails to do so, the Plenum may then revoke the applicant's leniency.

The Section respectfully suggests that Article 9 be modified to better harmonize with the provisions of Article 10, which would provide needed certainty and predictability for leniency applicants.

III. Conclusion

The Section appreciates the opportunity to offer comments on the New Regulations and would be pleased to respond to any questions that COFECE may have.



AMERICAN BAR ASSOCIATION

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Via Email:

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Mexican Federal Economic Competition Commission
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Colonia Santa María Nonoalco,
Alcaldía Benito Juárez
Ciudad de México,
Código Postal 03700

Dear Chairwoman Palacios:

SUBJECT: Comments Regarding the Proposed Draft Regulatory Provisions
for COFECE's Leniency and Immunity Program

On behalf of the American Bar Association Antitrust Law Section, I am pleased to submit the attached comments regarding the Proposed Draft Regulatory Provisions for COFECE's Leniency and Immunity Program.

Please note that these views are being presented only on behalf of the Antitrust Law Section. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

If you have any questions after reviewing this report, I will be happy to provide further comments.

Sincerely,

Brian R. Henry
Chair, Antitrust Law Section Sincerely,

Attachment

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Moctezuma Bautista Karla

De: Sierra Aranda Fidel Gerardo
Enviado el: miércoles, 27 de noviembre de 2019 07:41 p. m.
Para: Moctezuma Bautista Karla
Asunto: RV: Comments - COFECE's Leniency and Immunity Program
Datos adjuntos: Cvr Ltr_SAL_COFECE Leniency and Immunity Program_11.22.2019.pdf; ATT00001.htm; Comments_SAL_COFECE Leniency and Immunity Program_11.22.2019.pdf; ATT00002.htm

De: Palacios Prieto Alejandra <apalacios@cofece.mx>
Enviado el: viernes, 22 de noviembre de 2019 03:36 p. m.
Para: Sierra Aranda Fidel Gerardo <fsierra@cofece.mx>; López Rodríguez Sergio <slopezr@cofece.mx>
Asunto: Fwd: Comments - COFECE's Leniency and Immunity Program

Aquí los comentarios del ABA a las disposiciones de inmunidad. En M que vamos con esto?

Enviado desde mi iPhone

Inicio del mensaje reenviado:

De: "Morgan, Deborah" <Deborah.Morgan@americanbar.org>
Fecha: 22 de noviembre de 2019, 15:00:33 GMT-6
Para: Palacios Prieto Alejandra <apalacios@cofece.mx>, López Rodríguez Sergio <slopezr@cofece.mx>, Lamb de Valdes David <dlamb@cofece.mx>, Valladares Huidobro Paulina <pvalladares@cofece.mx>, Sada Correa Heidi <hsada@cofece.mx>
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Asunto: Comments - COFECE's Leniency and Immunity Program

Dear Chairwoman Palacios:

On behalf of the American Bar Association Antitrust Law Section, I am pleased to submit the attached comments regarding the Proposed Draft Regulatory Provisions for COFECE's Leniency and Immunity Program.

We appreciate the opportunity to provide comments. If you have questions after reviewing them, please let us know.

Kind regards,

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