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The DOJ's Antitrust Division Cuts Back on Its Carve-out Policy for Corporate Officers in Plea Agreements

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Last Friday, Bill Baer, Assistant Attorney General for the Department of Justice's Antitrust Division, announced that the Division will no longer publicly name the executives excluded from immunity granted in corporate cartel plea agreements, nor will it carve out individuals for reasons unrelated to culpability. Going forward, the Division will ask the court to seal the names of carved-out individuals in an appendix that will generally not be publicly available. These changes infuse much needed principles of fairness and justice into cartel plea agreements.

What's Notable

- Carve-out policy only applies to culpable executives who participated in illegal cartel behavior and not merely uncooperative individuals.
- Publicly-filed corporate plea agreements will no longer include names of carved-out employees, but these names will be filed under seal as an appendix to the corporate plea agreement.
- Carved-out employees are now given greater constitutional protections, such as upholding the secrecy of grand jury indictments.
- Policy change better aligns the Antitrust Division with the overall policy of the DOJ's Criminal Division and possibly signals a more even-handed approach under new Assistant Attorney General Bill Baer's stewardship of the Antitrust Division.

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A Recap of the Antitrust Division's Announcement

On April 12, Assistant AG Baer issued an official statement about the Division's carve-out practice regarding corporate plea agreements. AAG Baer began his statement by noting the Division's long efforts and success at investigating and prosecuting illegal cartel conduct. His introductory comment likely references the fact that in recent years there has been an increase in (1) the number of corporate plea agreements filed; (2) the amount of fines imposed on companies; and (3) the number of years executives are serving in US prisons as a result of cartel behavior. It is within this context of success that Baer noted that the Division will be making some changes to its overall approach to corporate plea agreements, specifically "[a]s part of a thorough review of the Division's approach to corporate dispositions, [it] [has] decided to implement two changes."

First, the "Division will continue to carve out employees who [it] [has] reason to believe were involved in criminal wrongdoing and who are potential targets of [its] investigation. However, [the Division] will no longer carve out employees for reasons unrelated to culpability." *Second*, the Division's new carve-out policy "will not include the names of carved-out employees in the plea agreement itself. Those names will instead be listed in an appendix, and [the Division] will ask the court for leave to file the appendix under seal." AAG Baer concluded his statement by noting that the Division "will continue to make these decisions on an employee by employee basis consistent with the evidence and the Principles of Federal Prosecution."

Why It Matters

The Division's Leniency Program facilitates cooperation in cartel investigations and corporate plea agreements are frequently the means used by DOJ to resolve investigations against defendant corporations that do not qualify for amnesty but otherwise cooperate in exchange for more lenient treatment. As such, corporate plea agreements play a critical role in the Division's Leniency Program. Prior to this policy change, the Division listed the names of specific individuals who were excluded from the protections afforded by the plea agreement in the publicly-filed document. Previously, the Division had explained that its carve-out policy applied to three categories of employees: (1) culpable employees, (2) employees who refuse to cooperate with the Division's investigation, and (3) employees against whom the Division was still developing evidence. Thus, the policy unfairly lumped together the culpable with the uncooperative and even employees that were merely "persons of interests." In lumping all carved-out individuals together, the Division was seen to be implicitly suggesting that all those named were equally culpable. Previously, the Division also had let it be known that its practice was to carve out only the highest level culpable individuals as well as any employees who refused to cooperate. Accordingly, if a corporate executive's name was included in the list of carved-out employees, there was often a perception of criminal activity (and a stigma of guilt) that carried harmful repercussions, which could include irreparable damage to the business

reputations of both the corporation and the executives named in the plea agreement.

Nevertheless, in support of its practice, the Antitrust Division claimed that three interests were served by publicly identifying carve outs in corporate plea agreements: (1) the public's First Amendment right of access to filed plea agreements; (2) the need for contractual clarity for all employees of the corporate defendant; and (3) the right of victims to access plea agreements, as conferred by the Crime Victims' Rights Act of 2004. For some time, the antitrust defense bar, however, has been questioning the practice of publicly naming executives who are under criminal investigation as (1) contrary to principles of grand jury secrecy and (2) in direct conflict with the policy followed by the DOJ's Criminal Division, as well as 93 US Attorneys' offices. Practitioners have long argued the Antitrust Division's policy infringed the privacy and reputational interests of uncharged third parties. This announcement suggests that the Antitrust Division has recognized the importance of protecting uncharged individuals from unwarranted public stigmatization as well as minimizing the disruption to the legitimate business operations of cooperating corporations.

Going Forward

This is the first major policy change announced by Bill Baer, the new assistant attorney general for the Antitrust Division. With this change in the Antitrust Division's carve-out policy, the Division has taken a long overdue move to safeguard certain rights of corporations and their executives and it appears that they will now be afforded the same rights due to individuals under criminal investigation in non-antitrust prosecutions.

¹ See recent Bloomberg Law article entitled "The Policy Case for Eliminating the Public Identification of Carve Outs in Antitrust Plea Agreements (available here) that was originally published on March 15, 2013 in the Antitrust & Trade Regulation Report.