

CLIENT ALERT

DOJ Antitrust Division Announces Changes to Corporate Plea Agreement Policy

Apr. 15, 2013

Late last week, the Department of Justice Antitrust Division (the "Division") announced two changes to long-standing practices regarding individual "carve-outs" in corporate plea agreements for criminal antitrust violations. The changes are significant because they will impact corporate employees and executives who remain under investigation by the Division following a corporate plea, and could shift the dynamics of corporate plea negotiations in some cases.

Bill Baer, the Assistant Attorney General of the Antitrust Division, announced that the Division will abandon its practice of naming the individuals who are "carved out" of corporate plea agreements, recognizing that publicly identifying uncharged individuals was not "appropriate." Baer also commented that the Division will only carve out those individuals who it believes to be culpable and are thus potential targets of the investigation.

The Antitrust Division's plea agreements for criminal antitrust violations customarily include language that includes current and former corporate employees and executives in the non-prosecution and other provisions of corporate plea agreements. Typically, these agreements also "carve out" one or more individuals who are subject to individual prosecution for the conduct forming the basis of the plea agreement.

In the past, the Division carved out not only those employees it believed were culpable, but also individuals who did not cooperate with the investigation, could not be located, or whom the Division was still investigating. Going forward, an individual will no longer be carved out for any reason unrelated to culpability. Specifically, the Division will only carve out those employees it has "reason to believe were involved in criminal wrongdoing and who are potential targets of our investigation." Baer reinforced that carve-out decisions will be made on an individualized basis.

In another significant change, the names of the carve-outs will no longer be publicly identified in corporate plea agreements. Previously, these individuals were explicitly named in publicly-filed plea agreements, a practice that has generated a good deal of controversy and some litigation over the years. Starting today, the Division will identify such individuals only in an appendix to the plea agreement that will be filed under seal. In his statement announcing the policy change, Baer recognized that "[a]bsent some significant justification, it is ordinarily not appropriate to publicly identify uncharged third-party wrongdoers."

The policy change comes in the midst of one of the Division's most active periods of criminal antitrust enforcement. In 2012, total criminal antitrust fines topped \$1.1 billion and the Division filed 67 cases. The Division is currently conducting a wide-ranging investigation into price fixing and bid rigging in the automotive parts industry, which, according to former Acting Assistant Attorney General Sharis A. Pozen, is the "largest criminal investigation the Antitrust Division has ever pursued, both in terms of its scope and the potential volume of commerce affected by the alleged illegal conduct."

[Click here](#) to read the full statement of Assistant Attorney General Bill Baer.

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