

DOJ Announces Developments in Cartel Enforcement

Several important developments in the cartel enforcement policies of the Department of Justice (DOJ) Antitrust Division were announced last week by Bill Baer, Assistant Attorney General in charge of the Antitrust Division, during the 2013 Antitrust Spring Meeting of the American Bar Association (ABA). The developments include an important change to the DOJ's policy regarding "carving out" individual employees from a corporate plea agreement; a clarification regarding the cooperation credit available in certain circumstances to companies negotiating plea agreements with DOJ; and a change to the level of review within DOJ available to companies and individuals facing the possibility of criminal charges. All are important developments that provide key guidance to companies and their executives that are considering plea negotiations with the Antitrust Division.

Carve-out Policy

In perhaps the most significant of the recent developments, the DOJ has changed how it treats individuals in corporate plea agreements. In a typical Antitrust Division plea agreement, the corporation and its cooperating employees are provided immunity from further prosecution on the criminal antitrust offenses listed in the plea agreement. In other words, executives that come within the terms of the plea agreement will not be separately prosecuted.

The Antitrust Division, however, has long had a policy of explicitly excluding, or carving out, certain individuals from the immunity protections of the plea agreement. Carving someone out of the plea agreement preserves the option of later prosecuting that individual. Until now, DOJ has made clear that it carves out not just targets of the investigation, but also other individuals, including, for example, employees refusing to cooperate with the investigation, or employees who cannot be located. Under the old policy, the carved out individuals are publicly named in the corporation's plea agreement.

In a statement released by DOJ on April 12, 2013, and in remarks by Bill Baer, DOJ announced two important changes to its carve-out policy. First, the DOJ made clear that it "will no longer carve out employees for reasons unrelated to culpability." In other words, DOJ now will carve out individuals only when it has evidence the individual was involved in wrong doing. And in the second change to the policy, carved out individuals will no longer be named in the plea agreement itself. Instead, the individuals will be identified in an appendix to the plea agreement to be filed under seal.

Amnesty-Plus Program

At the same ABA conference, other DOJ officials shed some light on cooperation credit available to companies that plead guilty to one offense, while also reporting a second offense, previously unknown to DOJ. The Antitrust Division has a policy of providing complete immunity from prosecution for the first company to identify a cartel offense that is not already being investigated by the Division. This is known as the corporate amnesty program.

Companies that participated in an offense but are not the first to report cannot receive amnesty. Typically the DOJ requires such companies to plead guilty and pay a criminal fine if they wish to settle the matter before trial. However, if such a company can provide evidence of a second cartel offense that the DOJ was unaware of, the company can get amnesty for the second offense and qualify for a reduction in the criminal fine it otherwise would have paid in connection with the first offense.

The size of the criminal fine discount available to participants in the so-called “Amnesty-Plus” program has never been clear. During the ABA conference, however, the DOJ clarified that an amnesty-plus applicant can expect a reduction in the fine it receives for the first offense ranging from 5% to 25%. While that range may seem a little stingy, the overall discount applied may be larger based on other factors. For example, companies that cooperate with DOJ and agree to plead guilty can expect to receive a significant cooperation discount from the applicable fine, even in the absence of an amnesty plus application. An amnesty plus discount for exposing a second offense to DOJ should be applied in addition to the cooperation discount the company receives.

Charging Decisions

Finally, a DOJ official suggested at the recent ABA conference that there have been changes in the procedures by which corporations and individuals may challenge decisions by the line prosecutors to file criminal charges. In the past, DOJ has provided those facing criminal charges with an opportunity to present their views to senior Department officials before DOJ reaches a final decision. This often has included a meeting with Deputy Assistant Attorney General in charge of the Antitrust Division’s criminal program. The DOJ official speaking at the ABA conference suggested that, in the absence of unusual factual circumstances or unresolved policy questions, DOJ is no longer willing to routinely involve the Deputy Assistant Attorney General when a corporation or individual is facing criminal charges, particularly in investigations where others have already been charged.

Implications

These changes are the first criminal policy changes implemented by Assistant Attorney General Bill Baer since he was confirmed to his post. For the most part, the changes suggest a willingness to consider issues important to corporations that cooperate in DOJ investigations. The changes to the carve-out policy reflect a recognition of the importance of the privacy interests of employees of companies facing criminal charges. On the other hand, this change in policy might cause delays in finalizing corporate plea agreements as the DOJ may want to ensure that it has full knowledge of all of the company’s employees that were involved in the wrong-doing. The additional information provided about the Amnesty-Plus program gives companies more information about the possible benefits of cooperating with the DOJ by reporting unknown offenses. The apparent change to the procedures available to companies challenging charging recommendations is less welcome. The change may put more control over such decisions in the hands of the staff and their Section Chiefs rather than the senior management of the Antitrust Division, where ultimately, in the past, such decisions have been made.

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