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Will 'Yates memo' affect Antitust Division plea policy?

By Peter Huston

When a corporation agrees to plead guilty to an antitrust crime the Department of Justice's Antitrust Division's long-standing practice has been to enter into a plea agreement that protects all but a handful of the corporation's executives and employees from prosecution. This practice appears to conflict with the department-wide policy announced this fall in the so-called "Yates memo" on "Individual Accountability for Corporate Wrongdoing."

On closer inspection, though, the apparent tensions can be reconciled and the Antitrust Division is not likely to change its corporate plea practice.

The Yates memo sets forth six principles to guide DOJ enforcement components in their approach to individuals involved in corporate wrongdoing. According to the fourth principle, "absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation." While the Yates memo specifically exempts the Antitrust Division's corporate leniency policy which provides complete amnesty to the first corporation to confess and cooperate (including amnesty for all directors, officers and employees), it is silent with respect to plea agreements entered into by corporations that come forward later and do not qualify for leniency.

The Antitrust Division's practice of releasing all of the corporation's directors, officers and employees except for a few of the most culpable individuals who are excluded or "carved out" of this non-prosecution protection is embodied in the Antitrust Division's model corporate plea agreement, which it publishes on its website. The model plea agreement says:

"Upon the Court's acceptance of the guilty plea called for by this Plea Agreement ... the United States agrees that it will not bring criminal charges against any current [or former] director, officer, or employee of the defendant [or its [related entitites]] for any act or offense committed before the date of signature of this Plea Agreement and while that person was acting as a director, officer, or employee of the defendant [or its [related entities]] that was undertaken in furtherance of an antitrust conspiracy involving the [manufacture or sale] of [PRODUCT] ... [except that the protections granted in this paragraph do not apply to [[**insert names of all carve outs who have been publicly charged** ... and [the [**insert the remaining number of carve outs**][additional] individuals listed in Attachment A filed under seal]]."

On closer inspection, though, the apparent tensions can be reconciled and the Antitrust Division is not likely to change its corporate plea practice.

The protections provided in the model plea agreement to a corporation's employees can be significant. Price-fixing conspiracies can go on for many years and can involve many individuals at various levels of the organization, from salespeople to middle managers to upper-level executives. Thus, while some individuals are typically "carved out" of the plea agreement's protections and thus face potential prosecution when a corporation decides to plead guilty, large swaths of employees who may have been involved in the wrongdoing get a pass.

For example, in the Antitrust Division's price fixing investigation of the air cargo industry the average number of executives carved out of corporate plea agreements was 4.5 (ranging from a low of one to a high of 15). In the LCD investigation, the average number of individuals carved out was 3.8 (ranging from a low of two to a high of seven). In each of these cases there were no doubt many other individuals at each pleading corporation who had a role in helping to carry out the conspiracies. They received non-prosecution protection under the corporations' plea deals.

The Antitrust Division's rationale for providing non-prosecution protection to these employees is compelling. Antitrust crimes, especially international cartels with overseas evidence, are particularly difficult to investigate and prosecute. While the employees that receive non-prosecution protection under the corporate plea agreements may have had some involvement in the illegal conduct, they are often lower-level employees that a jury would be unlikely to convict if they were indicted. These individuals can be very helpful in corporate internal investigations and can supply important information against those more heavily involved. The immunity acts as an adjunct to the Antitrust Division's corporate leniency policy; an added incentive to get companies to reduce their exposure by coming forward and cooperating.

The Antitrust Division's criminal program has consistently focused on individual accountability (i.e., jail time) as the most effective deterrent. The Antitrust Division's "divide and conquer" strategy of immunizing and securing the cooperation of conspiracy insiders to use against others has been successful both in bringing additional corporations and individuals to the table to negotiate plea agreements and in supplying witnesses for court cases. It has not only collected $8 billion in corporate fines since 2004, it has also charged over 600 individuals.

If the Yates memo was a reaction (or some would say overreaction) to an unsatisfying level of individual prosecutions following the financial meltdown, these statistics suggest it should not be directed at the Antitrust Division.

The Antitrust Division is not likely to change its plea agreement practices anytime soon, regardless of the Yates memo. It did not change the model corporate plea agreement on its website following the Yates memo, and has not announced that a revision is in the works. Renata Hesse, deputy assistant attorney general of the Antitrust Division, told a competition law conference audience shortly after the memo came out, "in terms of the policies that those of you who do cartel work with us have come to be familiar with and to use, those are not changed by the memorandum at all." The Antitrust Division appears to be relying on the caveat supplied by the Yates memo. As noted, the memo's policy of not releasing individuals from criminal liability had an exception for "approved departmental policy."

While there is no formal DOJ document listing the Antitrust Division's corporate plea practice as an approved departmental policy, the practice received a comprehensive review by the DOJ in 2013. The aspect of that review that received the most press was the practice of publicly naming executives who had been carved out in the corporate plea agreements. Defense counsel often complained about that practice because those executives were often not ultimately prosecuted, and it seemed unfair to publicly associate them with the companies' felonious conduct where they had no avenue to clear their name. As a result of the review, the Antitrust Division changed its policy. Now, instead of naming carved-out executives in the publicly filed plea agreement, it names them in a separate document that is filed with the court under seal.

The DOJ's review of the Antitrust Division's corporate plea policy in 2013, according to the Antitrust Division's statement at the time, was "thorough." It is safe to assume that it included not just the naming of carve-outs in plea agreements, but the very notion that all other employees would be protected from prosecution. By landing where they did after this thorough review, the current system, which has served the Antitrust Division and the DOJ well, took on the mantle of "approved departmental policy."

In pursuing its criminal program, the Antitrust Division has for many years stressed the importance of pursuing individuals in addition to the corporations that employ them. The policy has been backed up by action and results. When it comes to plea agreements for corporations, it appears that the Department of Justice will allow the Antitrust Division to continue with the basic formula it has been using for many years.

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