

DOJ Antitrust Corporate Dispositions May Protect Some Culpable Employees

IN SHORT

The Situation: Corporate plea agreements can eventually resolve liability for most companies under investigation by the U.S. Department of Justice's Antitrust Division, but the potential prosecutions of current or former employees remain a concern.

The Result: Companies facing these investigations must negotiate leniency agreements or plea deals protecting employees from individual prosecutions.

Looking Ahead: Companies can take steps to secure nonprosecution protection for employees as part of a corporate disposition, avoiding lengthy and possibly embarrassing employee prosecutions.

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Most companies under criminal investigation by the U.S. Department of Justice's Antitrust Division ("DOJ") resolve their liability without going to trial, either by entering into a leniency agreement or by pleading guilty to criminal antitrust charges under a corporate plea agreement. Corporate counsel seek to negotiate agreements ensuring the company will pay little or no criminal fines but also seek to maximize the number of employees covered by the antitrust corporate disposition.

The stakes are enormous for a company trying to obtain nonprosecution or immunity protection for the broadest number of its employees involved in antitrust "cartel" conduct. Even if a company can resolve its own criminal liability, it cannot put the investigation behind it when some current employees remain under investigation. For those employees taking their chances at trial, the government will parade cooperating witnesses before the jury and highlight inflammatory company documents, publicly demonstrating the scope of the company's wrongdoing. But certain steps can secure nonprosecution protection for the company's employees.



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DOJ's Goal of "Individual Accountability"

As part of any corporate disposition, DOJ does not provide blanket nonprosecution protection for all "culpable" employees—employees who engaged in cartel behavior on behalf of their company. The government has a longstanding commitment to the notion of "individual accountability" and considers the punishment of culpable employees a way to deter companies from future cartel activity.

DOJ's "Carve-Out" Policy

DOJ routinely "carves out" certain culpable company employees from corporate dispositions to ensure those individuals can be prosecuted for their cartel conduct. Current employees receive nonprosecution protection as a group in DOJ corporate dispositions unless they are specifically carved out of the company agreement. Former employees do not receive that blanket protection and must be individually "carved in" to receive nonprosecution protection.

Leniency Agreements

Companies applying for leniency do so under either Type A or Type B of DOJ's Corporate Leniency Program. Type A leniency can be obtained when DOJ is unaware of the cartel conduct at the time the application; Type B leniency can be obtained even when the government already has received some information about the cartel conduct.

In Type A situations, all current employees who are willing to cooperate will be included in the company's leniency agreement automatically.

In Type B situations, DOJ may carve out from the leniency agreement any current employees, especially those highly culpable, but it generally does not do so since cooperation is usually needed from current employees to fulfill the company's leniency obligation to cooperate fully in DOJ's cartel investigation.

For both situations, DOJ will consider carving certain former employees into the leniency agreement if those individuals offer substantial, noncumulative cooperation against remaining potential targets.

Plea Agreements

In corporate plea agreements, DOJ similarly provides blanket nonprosecution protection to current cooperating employees, except for those specifically "carved out." DOJ does not extend blanket coverage to former employees but may "carve in" former employees who can significantly advance the government's investigation.

While determining which current culpable employees to carve out of corporate plea agreements, DOJ considers the nature and length of the individual's participation in the cartel activity. Culpable senior executives are likely carve-outs, especially if they used their authority to direct criminal activity or failed to exercise authority to stop it. An employee's potential cooperation could overcome DOJ's initial inclination to carve out that individual, particularly if the employee was not among the company's most culpable or senior participants.

Strategies for Obtaining Broader Employee Coverage

How corporate counsel (or even individual "spin-off" counsel) proffers information on behalf of an employee can determine that employee's chances of being covered under corporate dispositions. The way an employee's potential cooperation is framed will be critical to DOJ's carve-out decision.

Corporate counsel must provide DOJ with a detailed summary of what type of incriminating information the employee can offer against the remaining potential targets. The proffer should highlight that part of the employee's cooperation that could be deemed "substantial" by DOJ prosecutors, such as the ability to offer firsthand accounts of remaining potential targets' cartel activities or to explain the substance of emails incriminating those potential targets. An employee's ability to be an effective witness at trial also should be highlighted.

For counsel representing multiple employees, providing DOJ with an individualized assessment of each employee's potential cooperation is essential. Corporate counsel must adopt a strategy to obtain nonprosecution protections for the greatest number of employees. Persuading DOJ that those employees can provide the type of noncumulative, substantial cooperation against remaining potential targets that merits their inclusion in any antitrust corporate disposition is critical.

TWO KEY TAKEAWAYS

1. Companies negotiating corporate leniency or plea agreements should offer information on behalf of their employees that will improve their chances of being covered under the corporate disposition.
2. Explaining to DOJ how employees' cooperation could provide substantial information against remaining potential targets increases the likelihood that a current employee will not be "carved out" of, and that a former employee will be "carved in" to, the company disposition.

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