

## Competition - USA

### Antitrust Division ends public naming practice

Contributed by [Hogan Lovells US LLP](#)

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On April 12 2013 William J Baer, assistant attorney general in charge of the US Department of Justice's Antitrust Division, released a statement announcing that the division will change its practice and no longer publicly list the names of individuals excluded (or 'carved out') from the protections afforded by corporate plea agreements. In the statement, the division also announced that in the future it will limit its use of carve-outs to individuals whom it suspects may be guilty of a crime.<sup>(1)</sup> Historically, the division had also carved out individuals about whom it had not yet made a prosecution decision and those who refused to cooperate with its investigation. The changes effectively harmonise the division's policy with the US Attorneys' Manual, which governs prosecutorial conduct for the Department of Justice's Criminal Division and the 93 US Attorney's Offices, and generally requires that prosecutors not publicly identify potential wrongdoers unless and until they are charged.<sup>(2)</sup>

According to the announcement, the division will no longer include the names of carved-out individuals in the plea agreement itself, but will instead list them in an appendix that the division will ask the court to file under seal. Baer noted that "[a]bsent some significant justification, it is ordinarily not appropriate to publicly identify uncharged third-party wrongdoers".<sup>(3)</sup>

The announcement also narrows the categories of employee whom the division will carve out of company pleas. Historically, carve-outs have included three categories of employee: "culpable employees, employees who refuse to cooperate with the Division's investigation, and employees against whom the Division is still developing evidence."<sup>(4)</sup> But now, although "[t]he 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", it "will no longer carve out employees for reasons unrelated to culpability".<sup>(5)</sup>

The consequences of the announcement should be felt immediately in ongoing cartel investigations, and should also have important ramifications for future investigations. Executives at companies under investigation will no longer have to fear being carved out and named publicly for their failure to cooperate with the division's investigation. Of course, significant incentives to cooperate remain, including obtaining more lenient treatment from the division and avoiding obstruction of justice charges. However, the effects of the division's new policy may be felt most strongly by non-US employees willing to forego travel to countries that place them at risk of extradition. Such employees may no longer need to be concerned about being publicly named by the division if they refuse to cooperate, unless they are ultimately indicted.

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### Endnotes

(1) See Press Release, Antitrust Division, US Department of Justice, Statement of Assistant Atty Gen Bill Baer on Changes to Antitrust Division's Carve-Out Practice Regarding Corporate Plea Agreements (April 12 2013), available at [www.justice.gov/opa/pr/2013/April/13-at-422.html](http://www.justice.gov/opa/pr/2013/April/13-at-422.html).

(2) See US Attorneys' Manual, 927.760, Limitation on Identifying Uncharged Third-Parties Publicly:

*"In all public filings and proceedings, federal prosecutors should remain sensitive to the privacy and reputation interests of uncharged thirdparties.. [I]n*

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*the absence of some significant justification, it is not appropriate to identify... a thirdparty wrongdoer unless that party has been officially charged with the misconduct at issue."*

(3) Department of Justice statement.

(4) Scott D Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, US Department of Justice, Charting New Waters in International Cartel Prosecutions (March 2 2006), available at [www.usdoj.gov/atr/public/speeches/214861.htm](http://www.usdoj.gov/atr/public/speeches/214861.htm).

(5) Department of Justice statement.

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