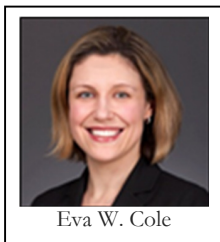
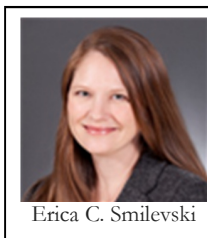


# The Antitrust Division's New Model Corporate Plea Agreement

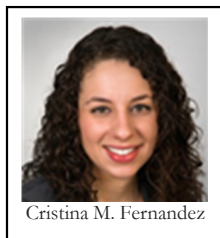
by Eva W. Cole, Erica C. Smilevski, and Cristina M. Fernandez<sup>195</sup>



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In April 2013, the Department of Justice Antitrust Division announced a notable shift in its policy regarding employees carved out of corporate plea agreements. This first significant change announced since AAG William Baer assumed his post in January 2013 received substantial media attention. However, Baer explained that this change was only one “part of a thorough review of the Division’s approach to corporate dispositions.”<sup>196</sup> On December 20, 2013, without any public announcement, the Division published a new corporate model plea agreement, which underwent a more extensive transformation, along with a parallel model plea agreement for individual defendants.<sup>197</sup> The revisions follow in the wake of prominent cartel decisions—in particular *United States v. VandeBrake*, 679 F.3d 1030 (8th Cir. 2012), *cert. denied* 133 S. Ct. 1457 (2013), and one of the *Air Cargo*

cases, *United States v. Florida West*, 853 F. Supp. 2d 1209 (S.D. Fla. 2012)—and reflect the Division’s desire to clarify arguably ambiguous language from the previous model plea agreement that was at issue in those cases. In addition,

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<sup>196</sup> Press Release, Statement of Assistant Attorney General Bill Baer on Changes to Antitrust Division’s Carve-Out Practice Regarding Corporate Plea Agreements (Apr. 12, 2013) available at <http://www.justice.gov/opa/pr/2013/April/13-at-422.html>.

<sup>197</sup> Justice Department, Antitrust Division, Model Annotated Corporate Plea Agreement, last updated Dec. 20, 2013, available at <http://www.justice.gov/atr/public/criminal/302601.pdf> [hereinafter “New Model Plea”]. In addition to the changes described in this article and minor, non-substantive edits, the New Model Plea includes a new paragraph 5 entitled Elements of the Offense which lists the elements of the charged antitrust offense for any case involving interstate commerce as follows:

- “(a) the conspiracy described in the Information existed at or about the time alleged;
- (b) the defendant knowingly became a member of the conspiracy; and
- (c) the conspiracy described in the Information either substantially affected interstate commerce in goods or services or occurred within the flow of interstate commerce in goods and services.”

*Id.* ¶ 5.

several modifications suggest a growing concern by the Division about obstructive conduct by corporations entering into plea agreements. These changes signal to defendant corporations in cartel investigations that the Division is interested in protecting its right to prosecute obstructive conduct, even after a plea agreement is signed for the underlying antitrust offense.

### Parties' Ability to Support an Outside-the-Guidelines Sentence

Whereas the previous model plea agreement provided that the “parties agree not to seek or support any sentence outside the Guidelines range,”<sup>198</sup> the New Model Plea removes “or support” and adds “at the sentencing hearing” to read as follows: “The parties agree not to seek at the sentencing hearing any sentence outside of the Guidelines range nor any Guidelines adjustment for any reason that is not set forth in this Plea Agreement.”<sup>199</sup> Thus, the New Model Plea makes clear that although a party may not seek a different sentence *at the sentencing hearing*, it may later participate in an appeal in which it advocates a sentence outside of the Guidelines range. While the Government has always taken the position that it may participate in an appeal concerning a plea agreement unless the agreement expressly bars the Government from doing so, the defendant in *VandeBrake* argued that the language in the previous model plea did in fact preclude the Government from defending a sentence outside the Guidelines range on appeal.<sup>200</sup> The New Model Plea attempts to crystalize the Government’s rights in this regard.

### United States v. VandeBrake

In May 2010, Steven VandeBrake pled guilty to two counts of price fixing and one count of bid rigging in the ready-mix concrete industry.<sup>201</sup> The plea agreement recommended a \$100,000 fine and a sentence of 19 months of imprisonment.<sup>202</sup> The district court subsequently imposed a fine of \$829,715.85 and sentenced VandeBrake to a record 48 months of imprisonment followed by three years of supervised release.<sup>203</sup>

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<sup>198</sup> Justice Department, Antitrust Division, Model Annotated Corporate Plea Agreement ¶ 8, last updated July 13, 2009, *available at* 2 MATERIALS ON ANTITRUST COMPLIANCE § 22:9 (2014) [hereinafter “2009 Model Plea”].

<sup>199</sup> New Model Plea ¶ 9.

<sup>200</sup> While *VandeBrake* involved an individual defendant rather than a corporate defendant, the New Model Plea clearly reflects this concern in the corporate arena as well. The Division simultaneously updated the model plea agreement for individual defendants with the same language: “The parties agree not to seek at the sentencing hearing any sentence outside of the Guidelines range nor any Guidelines adjustment for any reason that is not set forth in this Plea Agreement.” Justice Department, Antitrust Division, Model Annotated Individual Plea Agreement ¶ 9, last updated Dec. 20, 2013, *available at* <http://www.justice.gov/atr/public/criminal/302600.pdf>.

<sup>201</sup> *United States v. VandeBrake*, 771 F. Supp. 2d 961, 967 (N.D. Iowa 2011).

<sup>202</sup> Plea Agreement ¶ 9, *United States v. VandeBrake*, No. 5:10-cr-04025 (N.D. Iowa May 27, 2010), *available at* <http://www.justice.gov/atr/cases/f260100/260124.htm> [hereinafter “VandeBrake Plea Agreement”].

<sup>203</sup> *VandeBrake*, 771 F. Supp. 2d at 1018-19. The variance was largely based on the district court’s belief that the antitrust sentencing Guidelines are too lenient and that VandeBrake lacked remorse. *Id.* at 1001-03, 1007-08.

VandeBrake appealed the sentence to the Eighth Circuit on a number of grounds, including that the district court abused its discretion when it varied upward from the Guidelines range.<sup>204</sup> In connection with this argument, in a footnote of his opening brief, VandeBrake asserted that “[t]he [G]overnment cannot, without breaching this [plea] agreement, defend the district court’s above-Guidelines sentence in this appeal.”<sup>205</sup> In making this argument, VandeBrake relied on the language in the plea agreement that the Government had agreed “not to seek or support any sentence outside of the Guidelines range.”<sup>206</sup>

In its opposition to VandeBrake’s appeal, the Government argued that nothing in the plea agreement precluded it from defending the higher sentence on appeal and that the restriction on seeking or supporting any sentence outside of the Guidelines range applied only to the sentencing phase.<sup>207</sup> Among other things, the Government argued that the only provisions in the plea agreement discussing appeals related to the conditions under which *the defendant* could appeal, and did not apply to the Government.<sup>208</sup> Without an express limitation, the agreement could not be read to implicitly prohibit the Government from contesting VandeBrake’s appeal.<sup>209</sup> The Government also contended that when the parties amended the plea agreement prior to the sentencing hearing, they did not agree to any limitation on the Government’s ability to participate in an appeal of the sentence.<sup>210</sup> In addition, according to the Government, the language at issue should be read in the context of the agreement as a whole, which also provided that the sentence would be determined by the court in its discretion and that the court was not bound to impose a sentence within the Guidelines range.<sup>211</sup> Accordingly, the agreement expressly permitted the Government to argue on appeal that the district court did not abuse its discretion in imposing an above-Guidelines sentence.

In an interesting procedural move, instead of addressing the Government’s arguments in his appellate reply brief, VandeBrake concurrently filed a motion to enforce the plea agreement (Motion to Enforce), in which he asserted that the Government’s “support for the district court’s sentence on appeal breach[ed] its promise in the Plea Agreement

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<sup>204</sup> Br. for Appellant Keith VandeBrake, *United States v. VandeBrake*, No. 11-1390, 2011 WL 2003117, at \*23-24 (8th Cir. May 13, 2011).

<sup>205</sup> *Id.* at \*23 n.7.

<sup>206</sup> *Id.* (citing VandeBrake Plea Agreement ¶ 9).

<sup>207</sup> Corrected Br. for Appellee United States of America at 29-32, *United States v. VandeBrake*, No. 11-1390 (8th Cir. July 8, 2011), available at <http://www.justice.gov/atr/cases/f273200/273299.pdf>.

<sup>208</sup> *Id.* at 30 (citing *United States v. Winters*, 411 F.3d 967, 975 (8th Cir. 2005)).

<sup>209</sup> *Id.* at 30-31 (citing *United States v. Howard*, 894 F.2d 1085, 1091 (9th Cir. 1990)).

<sup>210</sup> VandeBrake had originally entered guilty pleas pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), under which the district court could either accept or reject the pleas but not impose a sentence higher than the recommended sentence and that VandeBrake could withdraw his pleas if the court did not accept the recommendation. When the district court indicated it would likely reject the agreement because the recommended sentence was too lenient, however, VandeBrake voluntarily converted his plea agreement to an agreement under Rule 11(c)(1)(B), so the recommended sentence was no longer binding on the district court, and VandeBrake was no longer free to withdraw his pleas if the court imposed a higher sentence. *VandeBrake*, 679 F.3d at 1033.

<sup>211</sup> *Id.* at 32.

not to ‘support’ an above-Guidelines sentence.”<sup>212</sup> To remedy this alleged breach, VandeBrake asked the Eighth Circuit to strike the portions of the Government’s appellate brief in which it sought to defend the district court’s sentence.<sup>213</sup> The Government opposed VandeBrake’s motion, reasserting the arguments it had previously made.<sup>214</sup>

The Eighth Circuit affirmed the district court’s sentence, but did not explicitly address VandeBrake’s breach argument.<sup>215</sup> Rather, the Court denied VandeBrake’s Motion to Enforce in a short footnote in its decision on the appeal.<sup>216</sup>

Despite the fact that the Eighth Circuit did not address whether the parties’ agreement “not to seek or support any sentence outside the Guidelines range” impacted the Government’s rights on appeal, the language was hotly contested by the parties in *VandeBrake*. Thus, the purpose of the revision in the New Model Plea is to clarify that the restriction on supporting alternate sentences is not intended to limit the positions the Government can take in connection with an appeal of a sentence.<sup>217</sup> However, the revised language may in fact introduce a new uncertainty—the New Model Plea arguably permits the parties to seek a different sentence not only on appeal, but also at any juncture other than during the sentencing hearing. For example, the New Model Plea could be read to permit either party to seek a different sentence just before the sentencing hearing. Of course, it remains to be seen whether the Government or a defendant would ever make this argument under the New Model Plea language.

### **New Definition of “Related Entities” Protected by a Corporate Plea Agreement**

Apparently prompted by the Government’s experience in one of the *Air Cargo* cases, the New Model Plea also clarifies the definition of “subsidiaries” that can receive the benefit of nonprosecution protection in exchange for providing ongoing cooperation pursuant to a parent company’s plea agreement.<sup>218</sup> Under the 2009 Model Plea, parties could use the term “subsidiaries” to identify the type of entities covered by a parent company’s plea agreement without specifically identifying the companies at issue or defining the term “subsidiary.”<sup>219</sup> The New Model Plea provides two methods for specifying which subsidiaries are covered by the agreement. The agreement may either specifically name all covered subsidiaries, or, if they are too numerous to name, the agreement must define covered subsidiaries as “entities that the defendant had greater than 50% ownership interest in as of the date of signature of

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<sup>212</sup> Mot. to Enforce the Plea Agreement at 2, *United States v. VandeBrake*, No. 11-1390 (8th Cir. July 22, 2011).

<sup>213</sup> *Id.*

<sup>214</sup> Opp’n to Mot. to Enforce the Plea Agreement at 2-7, *United States v. VandeBrake*, No. 11-1390 (8th Cir. Aug. 1, 2011).

<sup>215</sup> However, the Eighth Circuit did note in passing that it agreed with the Government on other issues. *VandeBrake*, 679 F.3d at 1037-38.

<sup>216</sup> *Id.* at 1036 n.5.

<sup>217</sup> See New Model Plea, *supra* note 3, ¶ 9.

<sup>218</sup> *Id.* ¶ 13 n.22; 2009 Model Plea, *supra* note 5, ¶ 14 n.27.

<sup>219</sup> 2009 Model Plea ¶ 14. The 2009 Model Plea explains that previous Division plea agreements included “affiliates” in the definition of related entities, but that the Division’s practice at that time was to require any covered affiliates to be specifically named rather than including such a broad term in the plea agreement. *Id.* at n.28.

this Plea Agreement.”<sup>220</sup> In addition, all other types of related entities, such as corporate parents of the defendant, must be specifically named if they are to be included in the protections offered by the company’s plea agreement.<sup>221</sup>

*Only “entities that the defendant had greater than 50% ownership interest in” as of the date of the plea agreement, or those that are specifically named are protected from prosecution under the New Model Plea.*

### United States v. Florida West Int’l Airways

The Division confronted the issue of which entities are properly considered covered “subsidiaries” under 2009 Model Plea language in the recent *Florida West* case. In 2010, the Government indicted Florida West International Airways, Inc. (Florida West) and its Vice President, Hernan Hidalgo, for conspiring to fix certain air cargo rates.<sup>222</sup> Florida West and Hidalgo moved to dismiss the indictment, arguing that they were immunized under a 2009 plea agreement executed by LAN Cargo, S.A., which covered LAN Cargo and its subsidiaries.<sup>223</sup> As the Court noted, the LAN Cargo Plea Agreement left the term “subsidiary” undefined.<sup>224</sup> Florida West and Hidalgo asserted that because LAN Cargo owned 25% of Florida West and exerted control over it, Florida West was a covered subsidiary under the LAN Cargo plea, and it and Hidalgo were thus immunized by the plea.<sup>225</sup> The Government contended that a majority ownership was a prerequisite to qualifying as a covered subsidiary.<sup>226</sup>

The Court ultimately found that the plea agreement’s use of “subsidiary” was unambiguous, notwithstanding the fact that the term was undefined.<sup>227</sup> It held that the Government offered the only reasonable interpretation of the definition of a subsidiary as “a corporation in which a parent corporation owns a controlling share.”<sup>228</sup> The language of the New Model Plea now tracks the Government’s position, and the Court’s holding, in *Florida West* by defining subsidiaries as entities that are majority owned by the defendant as of the signing of the agreement.<sup>229</sup>

### New Provisions Relating to Obstructive Conduct

The Division also significantly revised the language of the New Model Plea relating to obstruction. Under the 2009 Model Plea, the Government agreed that it would “not bring further criminal charges against the defendant . . . for any act or offense committed before the date of [the] Plea Agreement that was undertaken in furtherance of [the

<sup>220</sup> New Model Plea ¶ 13.

<sup>221</sup> *Id.*

<sup>222</sup> Indictment, *United States v. Florida West*, No. 1:10-cr-20864-RNS (S.D. Fla. Dec. 2, 2010), available at <http://www.justice.gov/atr/cases/f265300/265329.htm>.

<sup>223</sup> *United States v. Florida West*, 853 F. Supp. 2d 1209, 1214-16 (S.D. Fla. 2012).

<sup>224</sup> *Id.* at 1215.

<sup>225</sup> *Id.* at 1215-16.

<sup>226</sup> *Id.* at 1216.

<sup>227</sup> *Id.* at 1233.

<sup>228</sup> *Id.* at 1235.

<sup>229</sup> New Model Plea, *supra* note 3, ¶ 13.

underlying] antitrust conspiracy.”<sup>230</sup> The only limitations on the nonprosecution provisions were with respect to civil matters, violations of tax or securities law, and crimes of violence.<sup>231</sup>

*Counsel representing companies in cartel investigations should be aware that nonprosecution protections in the New Model Plea Agreement do not cover obstructive conduct unless that conduct is specifically described in the agreement.*

The New Model Plea expands the limitations to also exclude from the nonprosecution protection “any acts of subornation of perjury (18 U.S.C. § 1622), making a false statement (18 U.S.C. § 1001), obstruction of justice (18 U.S.C. § 1503, *et seq.*), contempt (18 U.S.C. §§ 401-02), or conspiracy to commit such offenses” unless such conduct is specifically described in a new optional insert.<sup>232</sup>

The Division’s modifications should serve as a signal to companies and employees involved in cartel investigations that the Division has taken a greater interest in overtly exposing obstructive conduct, and that the Division is adverse to any even implicit limitations on its ability to later prosecute companies or individuals for obstruction-related offenses.

### Comparison of Plea Agreements in the Auto Parts Investigation

Although the Division has long applied sentencing enhancements for obstructive conduct, it previously did so without denying nonprosecution protection for such conduct or identifying the conduct in the public plea agreement when there was no separate count for obstruction. In March 2012, DENSO Corporation (Denso) pled guilty to two counts of bid rigging and price fixing relating to two different automotive parts.<sup>233</sup> Denso’s plea agreement, which was based on the 2009 Model Plea, did not contain a separate count for obstruction and, in fact, made no explicit mention of any obstructive conduct. The transcript of Denso’s sentencing hearing, however, makes clear that Denso received an upward adjustment to its culpability score “for the fact that there was behavior on behalf of the corporation to obstruct or impede justice, including the destruction of some documents.”<sup>234</sup>

The nonprosecution provision of Denso’s plea agreement included the standard language from the 2009 Model Plea which immunized Denso from any further criminal charges for conduct in furtherance of the underlying antitrust conspiracies to which it pled, which could include obstructive conduct. The provision also included language pursuant to which the Government agreed not to prosecute Denso for any acts “undertaken in connection with any

<sup>230</sup> 2009 Model Plea, *supra* note 5, ¶ 16.

<sup>231</sup> *Id.*

<sup>232</sup> New Model Plea ¶ 15. The New Model Plea includes language similarly limiting the nonprosecution provisions for employees who are covered by the corporate plea agreement. *Id.* ¶ 16(f) (also including perjury).

<sup>233</sup> Plea Agreement, *United States v. DENSO Corp.*, No. 2:12-cr-20063 (E.D. Mich. Mar. 5, 2012), *available at* <http://www.justice.gov/atr/cases/f280800/280837.pdf> [hereinafter “Denso Plea Agreement”].

<sup>234</sup> Hr’g Tr. 24:11-14, *United States v. DENSO Corp.*, No. 2:12-cr-20063 (E.D. Mich. Mar. 5, 2012). Indeed, the DOJ announced on February 20, 2014 that a former Denso executive agreed to plead guilty to obstruction of justice charges in connection with the Division’s investigation. Press Release, Former Denso Corp. Executive Agrees to Plead Guilty to Obstructing Automotive Parts Investigation (Feb. 20, 2014), *available at* <http://www.justice.gov/opa/pr/2014/February/14-at-177.html>.

investigation” of the underlying conspiracies.<sup>235</sup> It did not, however, list any obstruction-related exceptions to the nonprosecution protections, nor did it explicitly describe the obstructive conduct in which Denso had engaged.

In contrast, Hitachi Automotive Systems, Ltd. and Mitsubishi Electric Corporation, which also received sentencing enhancements for obstruction but had no separate obstruction counts, subsequently entered into plea agreements based on the New Model Plea. Each of those agreements contains the new optional insert detailing the companies’ respective obstructive conduct.<sup>236</sup> These companies’ plea agreements provide no protection from prosecution for any obstructive conduct beyond that specifically described in their plea agreements. The New Model Plea leaves no room for defendants to argue that they are immunized for obstructive conduct if such conduct is not specifically described in the plea.

### **The New Obstruction Provisions Provide Less Certainty for Defendants Entering Plea Agreements**

Given the number of companies involved in the auto parts investigation that have pled guilty to obstruction or received sentencing enhancements for obstructive conduct, it is not surprising that the Division is increasingly concerned with the issue. From the Division’s perspective, it does not want to foreclose the possibility of pursuing obstructive conduct that may not be discovered by the time a plea agreement is negotiated and entered. However, explicitly excluding obstruction related offenses from nonprosecution protection diminishes the certainty and finality of plea agreements. While perhaps only a theoretical concern, under the New Model Plea, if the Division declined to include a separate count or sentencing enhancement for obstruction in a company’s plea agreement, it could later bring obstruction charges for pre-plea conduct based in part on information the Division knew at the time that the plea agreement was executed. In order to address this concern, the Division could instead finalize obstruction investigations prior to entering into plea agreements and give formal assurances to defendants that they will not be prosecuted for the conduct that was the subject of the Division’s obstruction investigation. Alternatively, the Division could amend the language of the New Model Plea’s limitation on nonprosecution for obstructive conduct to relate only to any acts which occur *after* the date that the plea agreement is signed. Either solution would achieve the Division’s goals of publicizing and punishing obstruction offenses, while providing defendants with the certainty that ought to correspond to a finalized plea agreement.

### **A New and Improved Model Plea Agreement?**

The changes to the New Model Plea show that the Division is concerned both with clarifying ambiguous language and preserving its right to continue to investigate and prosecute obstructive conduct. While the addition of “at the sentencing hearing” that followed from the *VandeBrake* case may actually give rise to some new uncertainties, the more specific definition of “subsidiaries” from *Florida West* does clarify the model plea agreement. The new limitation

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<sup>235</sup> *Denso* Plea Agreement ¶ 13.

<sup>236</sup> Plea Agreement ¶ 4(e), *United States v. Hitachi Automotive Sys., Ltd.*, No. 2:13-cr-20707 (E.D. Mich. Nov. 6, 2013), available at <http://www.justice.gov/atr/cases/f301600/301614.pdf>; Plea Agreement ¶ 4(e), *United States v. Mitsubishi Electric Corp.*, No. 2:13-cr-20710 (E.D. Mich. Nov. 6, 2013) available at <http://www.justice.gov/atr/cases/f301600/301629.pdf>.

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on the nonprosecution protection for obstructive conduct that is not expressly detailed in the agreement is arguably the most significant change which could have real repercussions and could give corporate defendants greater pause before agreeing to enter into a plea agreement which arguably does not dispose of all related offenses.