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PLEA AGREEMENTS**The Policy Case For Eliminating The Public Identification
Of Carve-Outs In Antitrust Plea Agreements**

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I. Introduction

One aspect of corporate antitrust plea agreements that has remained consistent over the years is the U.S. Department of Justice Antitrust Division's (sometimes "Division") practice of listing by name the specific individuals who are excluded from the protections afforded by the plea agreement (called "carve-outs") in the publicly filed plea agreement.

The Antitrust Division's practice of publicly listing carve-outs is unique to the Division and conflicts with the policy followed by the Department's Criminal Division, as well as all 93 U.S. Attorney's offices, where "there is a longstanding prohibition on identifying publicly in charging, plea, or other documents individuals

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who have not been charged with any crime."¹ While the Division has successfully litigated this issue and proffered a number of reasons why its practice of publicly identifying carve-outs does not conflict with Department policy that would otherwise prohibit the practice, we believe that, as a matter of public policy, it is neither fair nor appropriate to publicly identify uncharged individuals who are subjects of a criminal investigation, absent a compelling law enforcement reason. In our view, the Division should end this practice and allow corporate antitrust defendants to enter into plea agreements with the names of carve-outs filed under seal.

**II. Background: The Antitrust Division's
Carve-Out Policy**

Prior to the plea agreements in the vitamins investigation with F. Hoffman-La Roche Ltd. and BASF AG in 1999, the Antitrust Division generally listed a single carve-out who "would be excluded from the cooperation and non-prosecution provisions of corporate plea agreements and was typically offered a no-jail deal."²

¹ Leslie R. Caldwell, *DOJ's Inconsistent Publicizing of Suspects (Not Accused)*, N.Y. L.J., Nov. 14, 2007.

² Scott D. Hammond, Deputy Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *Charting New Waters in International Cartel Prosecutions* 17 (Mar. 2, 2006), available at <http://www.justice.gov/atr/public/speeches/214861.pdf>.

However, in those two plea agreements, the Division listed the names of four carve-outs for each company.³ Since those agreements, the Antitrust Division “routinely excludes multiple individuals from the nonprosecution coverage of corporate plea agreements.”⁴

In 2006, Scott D. Hammond, the Deputy Assistant Attorney General for Criminal Enforcement at the Division, explained the carve-out policy in some detail.⁵ Specifically, he explained that carve-outs can include at least three categories of employees: “culpable employees, employees who refuse to cooperate with the Division’s investigation, and employees against whom the Division is still developing evidence.”⁶ In addition, Mr. Hammond noted that, if a company waits to come forward after other companies have cooperated, “the cooperation will be less valuable and a greater number of executives will face significant jail time.”⁷ In a separate speech, Mr. Hammond also noted that the Antitrust Division “will typically carve out only the highest-level culpable individuals as well as any employees who refuse to cooperate.”⁸

In the ongoing investigation into the automotive parts industry (as well as other investigations), the Antitrust Division has continued its practice of listing the names of carve-outs in publicly filed plea agreements. For example, Tokai Rika Co., Ltd. is the most recent corporate defendant to enter into a plea agreement with the Division.⁹ That agreement was filed on December 12, 2012 and includes the names of five Tokai Rika employees who will not receive its protections.¹⁰

Why does the Antitrust Division continue to publicly identify carve-outs? What policy reasons are offered for this practice, putting to one side that legal challenges to the practice have failed? Are these reasons compelling?

³ *Id.*; Plea Agreement at ¶ 14, *United States v. BASF AG*, No. 99-CR-200-R (N.D. Tex. May 20, 1999); Plea Agreement at ¶ 14, *United States v. F. Hoffman-La Roche Ltd.*, No. 3:99-CR-184-R (N.D. Tex. May 20, 1999).

⁴ Hammond, *supra* note 2, at 17.

⁵ *Id.* at 17-18.

⁶ *Id.* at 17. The Antitrust Division has been generally consistent in explaining the reasons an individual may be listed as a carve-out. See, e.g., Scott D. Hammond, Deputy Ass’t Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, The U.S. Model of Negotiated Plea Agreements: A Good Deal With Benefits For All 16 (Oct. 17, 2006), available at <http://www.justice.gov/atr/public/speeches/219332.pdf>. The Antitrust Division has also stated that it will not extend the benefits of a corporate plea agreement to individuals whom the Division has been unable to locate. See, e.g., United States’ Opp’n to Pl.’s Appl. for TRO & Prelim. Inj. to Enjoin Public Disclosure of Matters Occurring Before the Grand Jury at 7, *Doe v. Hammond*, 502 F.Supp.2d 94 (No. 07-1496) (D.D.C. 2007) [hereinafter, “*Doe Opp’n*”].

⁷ Hammond, *supra* note 2, at 17-18. For example, Mr. Hammond explained that in the Division’s DRAM investigation “Infineon had four individuals carved out of its plea agreement; Hynix had five carve outs; and Samsung had seven.” *Id.* at 18.

⁸ Scott D. Hammond, Deputy Ass’t Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Measuring the Value of Second-In Cooperation in Plea Negotiations 8 (Mar. 29, 2006), available at <http://www.justice.gov/atr/public/speeches/215514.pdf>.

⁹ Press Release, Department of Justice, Japanese Automobile Parts Manufacturer Agrees to Plead Guilty to Price Fixing and Obstruction of Justice (Oct. 30, 2012), available at http://www.justice.gov/atr/public/press_releases/2012/288353.pdf.

¹⁰ Plea Agreement at ¶ 14(a), *United States v. Tokai Rika Co. Ltd.*, No. 12-cr-20711 (E.D. Mich. Dec. 12, 2012), ECF No. 11.

We think not. Should the Division’s practice be changed? We think yes, it should.

III. Discussion

The Antitrust Division should end its practice of publicly identifying carve-outs in corporate plea agreements for two principal reasons: (1) the Division’s practice conflicts with Justice Department policy, as identification results in unfair and significant harm to carve-outs, and (2) the interests identified by the Division as being served by its practice do not outweigh the harms caused by the public disclosure of a carve-out’s identity.

A. The Antitrust Division’s Conflict With Department Of Justice Policy

The Antitrust Division’s practice of publicly disclosing the names of individual carve-outs conflicts with the Department of Justice’s general policy, which discourages the identification of third-parties in plea agreements. Attorney General Eric Holder has directed that “[a]ll plea agreements should be consistent with the Principles of Federal Prosecution.”¹¹ These Principles in the United States Attorneys’ Manual provide that:

In all public filings and proceedings, federal prosecutors should remain sensitive to the privacy and reputation interests of uncharged third-parties. In the context of public plea . . . proceedings, this means that, in the absence of some significant justification, it is not appropriate to identify . . . a third-party wrongdoer unless that party has been officially charged with the misconduct at issue.¹²

This fundamental Department policy is “rooted in basic notions of due process, the requirement of grand jury indictment, and the belief that those accused of a crime should have the opportunity to face their accusers and contest the charges in court.”¹³ Specifically, the Principles cite *In re Smith*, where the Fifth Circuit held that the public identification of an unindicted third party by the government in its recitation of the facts at a plea hearing was a violation of the due process protection afforded by the Fifth Amendment of the United States Constitution.¹⁴ The Fifth Circuit explained that “no legitimate governmental interest is served by an official public smear of an individual when that individual has not been provided a forum in which to vindicate his rights.”¹⁵

As noted above, the Antitrust Division has successfully litigated this issue in a series of cases related to corporate plea agreements in the Division’s air cargo investigation and in a case arising out of the investigation into the rubber chemicals industry.¹⁶ The Division’s position has been that the identification of an individual as a carve-out does not amount to an allegation that the identified individual engaged in misconduct or

¹¹ Memorandum from Eric H. Holder, Attorney General, to Federal Prosecutors, Department Policy on Charging and Sentencing (May 19, 2010).

¹² Department of Justice, United States Attorneys’ Manual (“USAM”) § 9-27.760 (emphasis added).

¹³ Caldwell, *supra* note 1.

¹⁴ *In re Smith*, 656 F.2d 1101, 1105-07 (5th Cir. 1981).

¹⁵ *Id.* at 1106.

¹⁶ See *In re Interested Party 1*, 530 F.Supp.2d 136 (D.D.C. 2008) (Bates, J.); *Doe v. Hammond*, 502 F.Supp.2d 94 (D.D.C. 2007) (Bates, J.); *United States v. Korean Air Lines*, 505 F.Supp.2d 91 (D.D.C. 2007) (Bates, J.); *United States v. Crompton Corp.*, 399 F.Supp.2d 1047, 1048 (N.D. Cal. 2005).

will ever be charged with a crime, so such identification publicly is okay.¹⁷

Despite the Antitrust Division's successes in court thus far, by publicly identifying an individual in the plea agreement as a carve-out, it is identifying the carve-out as an individual implicated in a criminal investigation—an action that clearly has negative connotations and causes harm to that individual's reputation, relationship with family, and his employment situation. Indicating culpability or being someone against whom the Division is still developing evidence effectively means that the Division is making a public statement that the named carve-outs are individuals who are either targets or subjects of a criminal investigation.¹⁸ Each of these designations is stigmatizing and inflicts serious reputational harm on the named individual, which is precisely why, absent good cause, the Justice Department does not make such public designations in any other context outside of the Antitrust Division. Moreover, the reality is that many, if not most, carve-outs are individuals who fall within the first category—individuals who are either charged with wrongdoing or viewed by the Division as unindicted co-conspirators. As a result, the public perception, even by family and friends, is that carve-outs are likely criminals and thus, regardless of its intent, the effect of the Antitrust Division's decision to name the carve-outs publicly is to inflict the stigma of that public assumption upon them.¹⁹

In addition, the impact on carve-outs' professional lives can be even more profound, as individuals identified as carve-outs often become *persona non grata*, adversely impacting the carve-outs' relationships with colleagues, with their companies, and with others in the industry.²⁰ The resulting reputational harm is not simply theoretical and can be particularly damaging where the carve-outs are active employees, with significant responsibilities. If publicly tarred as carve-outs, those individuals may not be able to continue in their current roles. Hence, a carved-out individual who may not have committed a crime will nevertheless be stigmatized and lose his reputation in general, and efficacy to perform his work with customers and others with whom he has a commercial relationship, thus rendering him unable to continue to perform his job.²¹

¹⁷ This article does not challenge the government's legal authority to include the names of carve-outs in plea agreements and recognizes that courts have held that in some circumstances the government has the legal right to do so. Rather, as a matter of public policy, the Antitrust Division should refrain from doing so in the future.

¹⁸ The United States Attorneys' Manual defines a target as "a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant" and a subject as "a person whose conduct is within the scope of the grand jury's investigation." USAM § 9-11.151.

¹⁹ See Andrew Wiessmann & Martha Boersch, *A Smear by Any Other Name*, Legal Times, Nov. 19, 2007, at 2 ("Membership in a limited group of individuals named in a federal plea agreement as unworthy of immunity—out of thousands of the individuals' fellow employees—has only one reasonable connotation: Beware of those individuals. They are, at the very least, under investigation and, at worst, government targets.")

²⁰ See *id.* at 1.

²¹ As discussed above, the Antitrust Division will also carve-out individuals who fail to cooperate with the Division's investigation. However, being identified as someone who is "uncooperative" is itself stigmatizing. Moreover, an individual's lack

B. The Antitrust Division's Reasons For Publicly Identifying Carve-Outs Are Not Compelling

In our view, the harms that result from publicly identifying carve-outs are not outweighed by any countervailing governmental interest. Indeed, as indicated above, the Justice Department recognizes that "there is ordinarily 'no legitimate governmental interest served' by the government's public allegation of wrongdoing by an uncharged party, and this is true '[r]egardless of what criminal charges may . . . b[e] contemplated by the Assistant United States Attorney against the [third-party] for the future.'" ²² In addition, the Department has recognized that "[i]n all but the unusual case," any legitimate governmental interest in referring to uncharged third-party wrongdoers can be advanced through other means.²³

In support of its practice to the contrary, the Antitrust Division has proposed three interests served by publicly identifying carve-outs in corporate plea agreements: (1) the public's First Amendment right of access to filed plea agreements; (2) the need for contractual clarity for all employees of the corporate defendant; and (3) the right of victims to access plea agreements, as conferred by the Crime Victims' Rights Act of 2004 ("CVRA").²⁴ We submit that, in contrast to the very real harm that would be inflicted upon publicly identified carve-outs, none of the interests identified are sufficiently compelling as a matter of public policy.

(i) The Public's First Amendment Right Of Access

The Division has argued that public disclosure of carve-outs is necessary in order to inform the public of the full contents of a plea agreement, and is required under the First Amendment.²⁵ A number of circuit courts have recognized that there is a qualified right of the public to have access to court proceedings under the First Amendment, including access to plea agreements.²⁶ However, each of those courts has made clear that the right of access to a plea agreement is a rebuttable presumption that can be overridden if sealing a portion of the plea agreement would serve a compelling interest. And, in practice, that presumption is not particularly difficult for the government to rebut—if it wants to do so.

The D.C. Circuit's decision in *Washington Post v. Robinson* is the lead circuit court case relied on by the

of cooperation does not justify the Division publicly damaging an individual's reputation.

²² USAM § 9-27.760 (quoting *In re Smith*, 656 F.2d 1101, 1106-07 (5th Cir. 1981)).

²³ USAM § 9-27.760; see also *id.* at § 9-11.130 ("Ordinarily, there is no need to name a person as an unindicted co-conspirator in an indictment in order to fulfill any legitimate prosecutorial interest or duty."); *id.* at § 9-16.500 ("In the absence of some significant justification, it is generally not appropriate for a [prosecutor] to identify (either by name or unnecessarily-specific description), or cause a defendant to identify, a third-party wrongdoer unless that party has been officially charged with the misconduct at issue.")

²⁴ 18 U.S.C. § 3771. See *Doe Opp'n*, *supra* note 6, at 12-16.

²⁵ *Doe Opp'n*, *supra* note 6, at 12-13.

²⁶ See, e.g., *Washington Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991); *Oregonian Pub. Co. v. U.S. Dist. Court*, 920 F.2d 1462, 1465 (9th Cir. 1990); *United States v. Haller*, 837 F.2d 84, 86 (2d Cir. 1988); *In re Washington Post*, 807 F.2d 383, 390 (4th Cir. 1986).

Division in support of its position that the First Amendment requires public disclosure of carve-outs.²⁷ In *Robinson*, the District Court sealed the entire plea agreement of an informant who was cooperating in the government's case against then-D.C. Mayor Marion Barry for cocaine possession.²⁸ The court sealed that plea agreement after the informant had already pled guilty in open court, and the justification for sealing the agreement was to keep the informant's cooperation confidential.²⁹ However, the informant's cooperation was already public knowledge, as the U.S. Attorney had previously held a press conference explaining the informant's decision to plead guilty and cooperate with the government.³⁰

Obviously, the facts of *Robinson* are vastly different from those presented by the issue of keeping confidential the names of uncharged individuals involved in a criminal investigation. Thus, while *Robinson* held that an entire plea agreement cannot be sealed for no reason, it recognized that sealing would be appropriate under the First Amendment, if there was a compelling interest at stake.³¹ Here, there is a compelling interest—the strong need to safeguard the privacy and reputational interests of uncharged third-parties, as discussed above.³²

Moreover, the idea that part of a plea agreement would be filed under seal is hardly a revolutionary development. To the contrary, Rule 11 of the Federal Rules of Criminal Procedure expressly allows plea agreements to be filed under seal.³³ And, consistent with that Rule, the Division already routinely files significant parts of plea agreements under seal, most notably the amnesty letters that are exhibits to plea agreements for companies that have received “Amnesty Plus.”³⁴

²⁷ See *Doe Opp'n*, *supra* note 6, at 12.

²⁸ 935 F.2d at 283.

²⁹ *Id.* at 285.

³⁰ *Id.* at 291-292.

³¹ Interestingly, U.S. District Judge John D. Bates, who upheld the Division's practice of disclosing carve-outs in the series of cases in the D.C. District Court and who cited *Robinson* in those decisions, was one of the Assistant U.S. Attorneys in *Robinson* who sought to file the informant's plea agreement under seal. See *id.* at 283.

³² Courts have explicitly recognized the interest of protecting the privacy and reputation of uncharged third parties. See, e.g., *United States v. Haller*, 837 F.2d 84, 88 (2d Cir. 1988) (recognizing the privacy interests of third-parties and the need to protect them from “public embarrassment”); *United States v. Smith*, 776 F.2d 1104, 1113-14 (3d Cir. 1985) (upholding the district court's decision to seal the portion of a bill of particulars which contained the names of the unindicted co-conspirators because unsealing it jeopardized the privacy and reputational interests of those named individuals); *United States v. Strevell*, No. 05-cr-477, 2009 BL 43765, at *5 (N.D.N.Y. Mar. 4, 2009) (listing interests that are routinely accepted as compelling, including “the privacy and reputation interests of the those involved in an investigation”).

³³ See Fed. R. Crim. P. 11(c)(2) (“The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.”) (emphasis added).

³⁴ See, e.g., Plea Agreement at ¶ 18, *United States v. Denso Corp.*, No. 12-cr-20063 (E.D. Mich. Mar. 5, 2012) (cooperation agreement filed under seal); Plea Agreement at ¶ 18, *United States v. Tokai Rika Co., Ltd.*, No. 12-cr-20711 (E.D. Mich. Dec. 12, 2012) (same).

In short, filing the names of carve-outs under seal with the sentencing court is a narrowly tailored approach that protects the privacy and reputation of the carve-outs and also protects the confidentiality of the government's continued investigation with respect to the carve-outs and other co-conspirators.

(ii) Contractual Clarity

The Antitrust Division has also argued that publicly listing the names of carve-outs in a plea agreement is necessary to provide contractual clarity and notice to all employees who are protected by a corporate plea agreement.³⁵ However, there are alternative means for achieving this goal that do not require public identification. Specifically, the Division can (i) send a separate letter to each carve-out notifying the carve-out of his or her carve-out status; (ii) include a provision in the publicly filed plea agreement stating that the plea agreement's protections extend to all the corporate defendant's personnel except those expressly identified in an exhibit to the plea agreement; and (iii) file that exhibit under seal. Moreover, it often will be the case that notification to individual carve-outs would be simple, as these individuals typically have retained separate counsel during the course of the investigation and the company's cooperation with the Division.

(iii) The Crime Victims' Rights Act

The Antitrust Division has also argued that public disclosure of carve-outs is required by the CVRA.³⁶ However, neither the CVRA itself nor the Attorney General Guidelines for Victim and Witness Assistance,³⁷ which implement the CVRA, contain any such requirement. Rather, the CVRA provides victims with the right to attend public court proceedings,³⁸ and “the right to be reasonably heard at any public proceeding . . . involving . . . plea [or] sentencing.”³⁹ Implicit in the limitation of these rights to public proceedings is the principle that there will be some matters conducted *in camera* or filed under seal and that victims will have no right of access to these. Moreover, nothing in the CVRA purports to alter pre-existing law regarding when *in camera* proceedings or sealing are appropriate.⁴⁰

IV. Conclusion

In sum, for the reasons detailed above, we urge that the Division change its practice of publicly identifying carve-outs. In order to implement the change, we suggest that the cooperation and non-prosecution provi-

³⁵ *Doe Opp'n*, *supra* note 6, at 15-16.

³⁶ *Id.* at 14-15.

³⁷ Department of Justice, *Attorney General Guidelines for Victim and Witness Assistance* (2011 ed., rev. May 2012), available at http://www.justice.gov/olp/pdf/ag_guidelines2012.pdf.

³⁸ 18 U.S.C. § 3771(a)(3).

³⁹ 18 U.S.C. § 3771(a)(4).

⁴⁰ See *In re Siler*, 571 F.3d 604, 609-10 (6th Cir. 2009) (holding, in context of appeal of motion for access to pre-sentence reports, that CVRA provides no independent right of access to documents). To date, only one court has explicitly held that redaction of a carve-out's name from a plea agreement would violate the CVRA. See *United States v. Crompton Corp.*, 399 F.Supp.2d 1047, 1051 (N.D. Cal. 2005). However, the *Crompton* court's CVRA holding contains little analysis, does not address the statutory language discussed above and is inconsistent with *In re Siler*.

sions of the model corporate plea agreement be modified as follows:⁴¹

DEFENDANT'S COOPERATION

14. The defendant [and its [LIST TYPES OF OTHER RELATED CORPORATE ENTITIES] [(collectively, "related entities")— only use if more than one type of related entity is listed]] will cooperate fully and truthfully with the United States in the prosecution of this case, the conduct of the current federal investigation of violations of federal antitrust and related criminal laws involving the [manufacture or sale] of [PRODUCT], any other federal investigation resulting therefrom, and any litigation or other proceedings arising or resulting from any such investigation to which the United States is a party ("Federal Proceeding"). The ongoing, full, and truthful cooperation of the defendant shall include, but not be limited to:

* * *

(b) Using its best efforts to secure the ongoing, full, and truthful cooperation, as defined in Paragraph 15 of this Plea Agreement, of the current [and former](35) directors, officers, and employees of the defendant [or any of its [related entities]][, in addition to those specified in subparagraph (b) above,] as may be requested by the United States, **[but excluding the [NUMBER] individuals (the "Carve-outs") who have been advised of this exclusion by letter dated [DATE] and who are identified in Exhibit [LETTER], which has been filed separately with the Court**

⁴¹ The Antitrust Division's current Model Corporate Plea Agreement which was last updated in July 2009 is available at http://www.justice.gov/atr/public/guidelines/corp_plea_agree.pdf.

under seal,] including making these persons available [in the United States and at other mutually agreed-upon locations], at the defendant's expense, for interviews and the provision of testimony in grand jury, trial, and other judicial proceedings in connection with any Federal Proceeding.

* * *

GOVERNMENT'S AGREEMENT

* * *

17. The United States agrees to the following:

(a) Upon the Court's acceptance of the guilty plea called for by this Plea Agreement and the imposition of the recommended sentence and subject to the exceptions noted in Paragraph 17(c), the United States will not bring criminal charges against any current [or former] director, officer, or employee of the defendant [or its [related entities]] for any act or offense committed before the date 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] ("Relevant Offense")[, **with the exception that the protections granted in this paragraph shall not apply to the Carve-outs**].

With this change to the Division's model corporate plea agreement, the only information that would now be exempt from public disclosure in a plea agreement is the names of the carved-out individuals. The public could still be informed of the fact that a certain number of employees are excluded from the protections of the plea agreement. This approach would strike an appropriate balance between informing the public of the contents of the plea agreement, while at the same time avoiding the stigmatizing effect of naming the carve-outs therein.