DOJ's Catch-22: Corporate Criminal Antitrust Targets Walk A Blurry Line with Culpable Employees

Craig P. Seebald and Brian D. Schnapp

In September 2014, Assistant Attorney General Bill Baer, then-head of the U.S. Department of Justice's Antitrust Division, highlighted a "tension" that exists where companies continue to employ culpable executives while simultaneously arguing that they are compliance-oriented organizations:

> Guilty companies sometimes want to continue to employ culpable senior executives who do not accept responsibility and are carved out of the corporate plea agreement, while at the same time arguing that their compliance programs are effective and their remediation efforts laudable. That creates an obvious tension.[1]

Recent DOJ policy, including the September 9, 2015 Memorandum from Deputy Attorney General Sally Yates regarding "Individual Accountability for Corporate Wrongdoing" (commonly known as the Yates Memo)[2] and speeches delivered by Antitrust Division leadership create another related dilemma for companies under scrutiny. This tension exists between the Division's desire for companies to fire or demote individuals who potentially engaged in wrongdoing and the DOJ's demand that, "in order for a company to receive *any* consideration for cooperation . . . the company must completely disclose to the Department all relevant facts about individual misconduct."[3]

Though the Antitrust Division has stressed that "*[i]ndividuals* commit the crimes for which corporate offenders pay,"[4] the complete cooperation called for by the Yates Memo can only be successfully achieved by companies and company counsel having good relationships with those very same individuals from whom companies learn the key facts. Companies performing internal investigations must grapple with the reality that employees are less likely to be truthful if they know that by revealing their own culpability the government will require their termination or demotion. In other words, there is an inherent tension between the DOJ policy to, on the one hand, demand all relevant facts about individual misconduct, but, on the other hand, require that culpable individuals—who can provide these facts—be punished for a company to demonstrate its commitment to compliance. This tension, along with DOJ's policy of identifying and prosecuting culpable individuals

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[1] Bill Baer, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Prosecuting Antitrust Crimes, Remarks as Prepared for the Georgetown University Law Center Global Antitrust Enforcement Symposium 8 (Sept. 10, 2014), https://www.justice.gov/atr/file/517741/download.

[2] Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015) [hereinafter Yates Memo], https://www.justice.gov/dag/file/769036/download.

[3] *Id.* at 3.

[4] Brent Snyder, Deputy Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Individual Accountability for Antitrust Crimes, Remarks as Prepared for the Yale School of Management Global Antitrust Enforcement Conference 2 (Feb. 19, 2016), https://www.justice.gov/opa/file/826721/download.

as early as possible in an investigation, complicates the task of conducting a thorough internal investigation.

In light of these policies, companies must now consider two threshold questions. If employees engaged in potential wrongdoing are fired or demoted, how will all the relevant facts be gathered to enable the company to qualify for cooperation credit? And conversely, if employees are not fired or demoted, will a company be deemed to be anti-compliance, jeopardizing its ability to obtain significant fine discounts and risking appointment of a compliance monitor or a term of probation? Several additional issues, such as who are the "culpable" employees who should be punished, when should this punishment take place, and at what cost to collateral civil cases and cultural norms, are but a few of the unanswered questions raised by these policies. These tensions and questions lie at the intersection of DOJ's current focus on individual accountability, compliance, and cooperation.

If employees engaged in potential wrongdoing are fired or demoted, how will all the relevant facts be gathered to enable the company to qualify for cooperation credit?

This article focuses on a typical corporate criminal antitrust investigation from the standpoint of a company that is considering cooperating with the government. A typical corporate antitrust investigation arises when a co-conspirator company cooperating with the government seeks to avail itself of the Antitrust Division's Corporate Leniency Policy, which grants amnesty to companies that are first to report unlawful anticompetitive conduct. In this situation, company counsel often will have discussions with the DOJ Antitrust Division office handling the investigation, during which the DOJ will identify the names of company employees allegedly involved in the conduct, potentially including details on when they met with their competitors, what they discussed, and the anticompetitive agreements they struck.

After evaluating its path forward, analyzing whether it has any defenses to potential charges, and assessing the pros and cons of deciding whether to cooperate with the DOJ and eventually entering plea negotiations with the goal of reducing the company's exposure, a company is faced with many competing considerations. As part of the company's decision, it will want to analyze the deal it could likely reach as a result of plea negotiations as compared to the outcomes it faces by going to trial. There are many relevant factors that go into the calculation of a company's penalty in a negotiated plea context—including potentially narrowing the scope of the conspiracy and the volume of affected commerce that would otherwise be charged by DOJ in a litigated context. In this article we primarily focus on one aspect of this calculation: "cooperation credit."

U.S. Sentencing Guidelines Calculation and the Value of Cooperation

Fines negotiated with the Antitrust Division are calculated under several provisions of the U.S. Sentencing Guidelines. The main factors are: (1) the volume of commerce (VOC)—a measure of the sales of goods or services affected by the conspiracy; (2) the culpability score—determined by assessing various criteria, such as the size of an organization, its prior history, its acceptance of responsibility, and other criteria; and (3) cooperation credit. Factors (1) and (2) are applied to generate a Sentencing Guidelines fine range, and factor (3) is used to apply a discount to that range. Cooperation credit can have staggering effects on a corporation's fine, in some cases decreasing a fine by hundreds of millions of dollars.

The sentencing of Yazaki Corporation, one of the first defendants to be sanctioned in the recent automotive parts industry investigation, provides a good illustration of how cooperation credit can impact fines. Yazaki was charged with price fixing as to a number of automotive parts, with a combined VOC of $2.11 billion.[5] As set forth in the Sentencing Guidelines, the base fine is

[5] Sentencing Mem. at 2, United States v. Yazaki Corp., No. 12-CR-20064 (E.D. Mich. Apr. 13, 2015).

20 percent of VOC, or $422.6 million in the case of Yazaki.[6] The base culpability score of 5, as set forth in the Guidelines, was increased by 5 points, given that Yazaki had more than 5,000 employees, and was reduced 2 points under U.S.S.G. § 8C2.5(g)(2), given Yazaki's acceptance of responsibility and cooperation.[7] The final culpability score of 8 yielded a fine range of $676.1 million to $1.35 billion (based on a formula set forth in the Guidelines).[8] Yazaki's fine was further reduced 30 percent below this Guidelines range, to $470 million, given Yazaki's "substantial assistance in the United States's investigation of price fixing in the auto parts industry."[9]

The 30 percent reduction referred to as the "Cooperation Discount" understates the value of cooperation credit given to Yazaki. The 2-point reduction in culpability score in fact reflects additional credit. Companies that agree to plead guilty may be given a 1-, 2-, or 5-point reduction in culpability score, depending on when the company decides to cooperate and the extent of the cooperation. To receive a 1-point reduction in culpability score, a company must have "clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct."[10] Companies typically receive this by virtue of entering into a plea agreement with the government. The only additional specified requirement to receiving a 2-point reduction—which Yazaki received—is to "fully cooperate[] in the investigation."[11] In other words, cooperation is a factor in the culpability score determination as well as providing an independent basis for a discount.

Had Yazaki not received this additional reduction—from 1-point to 2-points—it would have faced a fine in the range of $760.7 million to $1.52 billion. Therefore, the ultimate fine of $470 million reflects roughly a 38 percent reduction off the bottom of the *potential* Guidelines range, based on the extent of cooperation. Put differently, had Yazaki not earned the extra 1-point reduction in its culpability score but received the same 30 percent cooperation credit discount, its fine would have been $532.5 million, or $62.5 million higher than the fine it did receive. Earning cooperation credit—whether in the form of a reduction in culpability score or as a "discount" as applied to the Guidelines range—is extremely significant in reducing a company's fine. And, given the potential value of cooperation credit as a percentage of potential fine, it can be extremely important for a cooperating company to maximize the cooperation credit it receives.

2014 and Beyond: Compliance, Culpable Individuals, and the Yates Memo

The DOJ and its Antitrust Division have become increasingly focused on individual accountability in corporate investigations, beginning with an uptick in late 2014, continuing through the September 2015 Yates Memo, and reiterated in a February 2016 speech by Antitrust Division Deputy Assistant Attorney General for Criminal Enforcement Brent Snyder.[12] As recently as March 11, 2016, another Antitrust Division official, Deputy Assistant Attorney General for Litigation David Gelfand, stated that the Division is even increasing the focus on individuals in the context of civil cases.[13] As DAAG Snyder stated in February, "This emphasis on individual accountability is fundamental to Antitrust Division prosecutors."[14]

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[6] *Id.* at 3.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] U.S. Sentencing Guidelines Manual U.S.S.G. § 8C2.5(g)(3) (2015).

[11] *Id.* § 8C2.5(g)(2).

[12] Snyder, Individual Accountability for Antitrust Crimes, *supra* note 4, at 2.

[13] Daniel Wilson, *DOJ Official Says Yates Memo Ups Civil Antitrust Scrutiny*, Law360 (Mar. 11, 2016).

[14] Snyder, Individual Accountability for Antitrust Crimes *supra* note 4, at 3.

Recent DOJ policy creates heightened thresholds that companies must meet to be eligible for any cooperation credit. As Deputy Attorney General Yates noted in a speech last year:

> In the past, cooperation credit was a sliding scale of sorts and companies could still receive at least some credit for cooperation, even if they failed to fully disclose all facts about individuals. That's changed now. As the policy makes clear, providing complete information about individuals' involvement in wrongdoing is a threshold hurdle that must be crossed before we'll consider any cooperation credit.[15]

At the same time the DOJ has focused on complete accounting of individual wrongdoing, it has likewise focused on individual accountability in the context of assessing an organization's compliance policies and culture. Confirming that organizations have robust compliance programs has now become inextricably linked to a company's corporate resolution with the Antitrust Division. In connection with this emphasis on compliance, recent Antitrust Division policy has highlighted that retaining potentially culpable individuals in key positions will be looked on unfavorably by the Division, in assessing the compliance policies of an organization.

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The Yates Memo: Focus on Individual Accountability. The Yates Memo specifies that:

> In order for a company to receive *any* consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the Department all relevant facts about individual misconduct. . . . That is, to be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct.[16]

The requirement to disclose "all relevant facts about individual misconduct" necessarily requires having access to many of the key individuals who were involved in the wrongdoing, as they are the ones who will have the most knowledge of the facts. In conducting an internal investigation, there is a wide variety of evidence that can be accessed by company counsel in order to learn many of an investigation's key facts—emails, notebooks, hardcopy files, phone and text message records, calendars, and business card collections are just a small set of the materials available. While these materials are critical, often it is only through interviewing the key witnesses with knowledge of the relevant facts that the full story—or "all relevant facts"—can be known. This is especially true regarding long-term or old activity.

The need and desire to interview key individuals is universally recognized as an important aspect of conducting a thorough internal investigation. Thus, the Yates Memo's implication that such interviews should take place is not especially noteworthy. However, it is the combination of needing to supply the DOJ with "all relevant facts" with the Antitrust Division's policy requiring the removal of culpable individuals from key positions that makes achieving the goal of discovering "all relevant facts" so difficult.

Antitrust Division Policy: Significance of Compliance Programs. An increased focus on individuals has developed, not only with respect to an accounting of all facts related to their wrongdoing, but also to a forward-looking analysis of their continued role in company life. Since 2014,

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[15] Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, Remarks at Am. Banking Ass'n and Am. Bar Ass'n Money Laundering Enforcement Conf. (Nov. 16, 2015), https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-american-banking-0.

[16] Yates Memo, *supra* note 2, at 3.

the Antitrust Division has increasingly focused on companies' compliance programs, and the continued role of culpable individuals in company life is a key issue on the DOJ's radar.

DOJ scrutiny of an organization's compliance program can lead to positive or negative consequences for a company. Demonstrating that a company has a robust and effective compliance program can yield additional reductions in fines, whereas DOJ concern about the effectiveness of a company's compliance program can lead to probation, independent compliance monitors, or both.

Last year the DOJ outlined, in the most detail to date, how a company can avoid onerous plea terms such as a compliance monitor and probation, and receive a reduction in its fine by implementing a strong compliance program. In its case against Kayaba Industry Co., Ltd., the Antitrust Division's motion for a downward departure credited not only the substantial assistance Kayaba provided, but also Kayaba's compliance program.[17] Though it is unknown how much of the downward departure credit can be attributed to the compliance program, the combination of the cooperation Kayaba provided and the evaluation of its compliance program netted Kayaba a 40 percent reduction below the minimum Guidelines fine.[18]

On the negative side, the Antitrust Division has been clear that ineffective compliance programs can result in probation and even compliance monitors. As Snyder cautioned in September 2014: "[A]ctive refusal to accept responsibility, including resisting effective compliance, will result in probation and independent monitors. The Division will take a similarly hard line with companies that do not take their compliance programs seriously."[19] Thus, companies have a strong incentive to demonstrate the efficacy of their compliance programs in any negotiation with the Antitrust Division.

Compliance Programs: Focus on Individuals. The strength of a compliance program closely tracks the factors enumerated in Section 8B2.1 of the Sentencing Guidelines. The factors include such things as establishing standards and procedures to prevent and detect criminal conduct, designating individuals at different levels of the organization to have specific compliance and ethics responsibilities, training employees, and promoting compliance and ethics standards.[20] Many of these activities can be categorized under the broad goal of promoting "an organizational culture that encourages ethical conduct and a commitment to compliance with the law."[21]

A significant part of the Antitrust Division's focus on compliance programs has involved an assessment of how companies treat culpable employees. Then-AAG Baer highlighted the attitude of the Antitrust Division on this issue in a major speech in September 2014, remarking that "[i]t is hard to imagine how companies can foster a corporate culture of compliance if they still employ individuals in positions with senior management and pricing responsibilities who have refused to accept responsibility for their crimes and who the companies know to be culpable."[22] Though the Antitrust Division has stated that it "has been departmental policy not to insert itself into the per-

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[17] Mem. & Mot. for Downward Departure at 11, United States v. Kayaba Indus. Co., Ltd., No. 15-CR-00098 (S.D. Ohio Oct. 5, 2015).

[18] *Id.* at 8, 11.

[19] Brent Snyder, Deputy Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Compliance Is a Culture, Not Just a Policy, Remarks as Prepared for the International Chamber of Commerce/United States Council of International Business Joint Antitrust Compliance Workshop 11 (Sept. 9, 2014), https://www.justice.gov/atr/file/517796/download.

[20] U.S. SENTENCING GUIDELINES MANUAL, *supra* note 10, § 8B2.1.

[21] *Id.* § 8B2.1(a)(2).

[22] Baer, *supra* note 1, at 8.

sonnel matters of companies by requiring the termination of culpable employees, and that has not changed,"[23] the Division is quick to point out that while this may not be a requirement, personnel action is expected. For instance, the day after Snyder stated that termination of culpable employees is not required, Baer outlined the following policy:

> If any company continues to employ [culpable] individuals in positions of substantial authority; or in positions where they can continue to engage directly or indirectly in collusive conduct; or in positions where they supervise the company's compliance and remediation programs; or in positions where they supervise individuals who would be witnesses against them, we will have serious doubts about that company's commitment to implementing a new compliance program or invigorating an existing one.[24]

While this policy does not require culpable employees to be terminated, it requires that, to allay DOJ's doubts about a company's commitment to compliance, culpable employees be removed from positions of "substantial authority" among others—a policy that invites some degree of ambiguity. Baer added that the Antitrust Division's interpretation of the Sentencing Guidelines suggests that companies that do not remove employees from these positions "cannot be said to have an 'effective' compliance program."[25] He noted that the Antitrust Division reserves the right to insist on probation, including using independent compliance monitors, to ensure the effectiveness of compliance programs—a prospect that carries a host of negative consequences for companies, not the least of which is financial burden.

Who is a culpable employee? Thus far, there is no definitive guidance from the DOJ, and it is not an easy question to answer.

Unanswered Questions

The new policy of encouraging the termination or requiring the reassignment of culpable employees may seem straightforward, but in reality the policy raises many difficult questions for companies in the middle of an investigation. Some of the key unanswered questions include:

Who Is a Culpable Employee? Thus far, there is no definitive guidance from the DOJ, and it is not an easy question to answer. The April 2013 changes to the Antitrust Division's carve-out policy stated that individuals who are carved out, or excluded from, the non-prosecution protections of a plea agreement are those individuals believed to be "culpable" (whereas previously an individual could have been carved out for other reasons).[26] But, is this carve-out determination conclusive on the question of which employees are to be punished?

Take, for instance, the example of an employee who has individual counsel, was carved out of a plea agreement, but never prosecuted. Is this a culpable person who has to be terminated or demoted? On one hand, the DOJ identified this individual as someone involved in the conduct when it decided that the employee needed separate counsel and needed to be excluded from the corporate plea agreement. But, on the other hand, the DOJ ultimately decided not to prosecute the employee, presumably because the DOJ believed it lacked sufficient evidence to win a conviction.

Baer's comments focus on punishing "culpable senior executives who do not accept responsibility and are carved out of the corporate plea agreement."[27] At the same time, however, his and

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[23] Snyder, Compliance Is a Culture, Not Just a Policy, *supra* note 9, at 6–7.

[24] Baer, *supra* note 1, at 8.

[25] *Id.*

[26] Statement of Ass't Att'y Gen. Bill Baer on Changes to Antitrust Division's Carve-Out Practice Regarding Corporate Plea Agreements, U.S. Dep't of Justice (Apr. 12, 2013), https://www.justice.gov/opa/pr/statement-assistant-attorney-general-bill-baer-changes-antitrust-division-s-carve-out.

[27] Baer, *supra* note 1, at 8.

Snyder's comments recognize that a carve-out decision reflects who is potentially culpable[28] or believed to be culpable.[29] Thus, is the implication that someone who is carved out, but not prosecuted, should still be punished by his or her employer? That situation raises serious process issues for a company that would be required to terminate, transfer, or demote an employee just because he or she was carved out and yet maintained his or her innocence.

Likewise, as Snyder points out, the DOJ has adopted new internal procedures to identify all "potentially culpable individuals as early in the investigative process as feasible."[30] Presumably, this means that at an early stage in the investigation, an employee can be unilaterally determined to be "potentially culpable," but then by the resolution stage can be carved out and thus his or her status elevated to even-more-potentially culpable? Or carved in and thus no longer considered culpable? This leads to the next logical consideration: timing.

At What Time Do You Punish "Culpable Employees"? Carve out decisions are made very late in the plea process and are the subject of serious negotiation. At some point the company is supposed to take "responsible action" against those employees who may ultimately be carved out, even though an employee's status is not known until late in the process. So waiting until a carve-out decision is made would seem too late in the process to satisfy the DOJ under the new policy, as this could signal a lack of commitment to compliance. Given the comments by Snyder that his offices will now make decisions early in an investigation about culpable employees, companies will seemingly have to make early decisions regarding how to punish employees.

But just because a company is under investigation does not necessarily mean the company or its employees are actually guilty of a crime. The new policy should have some flexibility to allow companies time to thoroughly investigate the underlying conduct and make rational decisions regarding the company's fate and the fate of its employees. Companies should not be incentivized to make early and potentially rash decisions regarding the fate of employees. Conversely, companies should not be penalized for taking time to fairly and accurately investigate potential criminal conduct.

How Can Companies Persuade Culpable Employees to Go to Prison Under This New Policy? DOJ officials have talked about their commitment to ensuring that foreign nationals serve prison sentences.[31] The new policy creates a Catch-22 situation for companies: is it better (a) to follow the new policy and terminate or otherwise punish employees, thereby losing all leverage to encourage the culpable employee to come to prison in the United States or (b) ignore the new policy and use leverage (including the promises of continued employment, financial support of families, and cash incentives) to encourage the employee to come to the United States? The Antitrust Division's new policies may have the unintended consequence of causing fewer culpable employees residing overseas to serve time in prison, as companies will lack any meaningful leverage to force them to come to the United States. Alternatively, the policies may put companies in a situation where they are rewarding culpable employees and their families with support—a practical outcome that seems at odds with the DOJ's compliance focus.

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[28] Snyder, Individual Accountability for Antitrust Crimes, *supra* note 4, at 13. ("Those potentially culpable individuals are, as a matter of long-standing Antitrust Division practice, excluded from—or 'carved out' of—the nonprosecution protections of a corporate plea agreement.").

[29] Baer, *supra* note 26.

[30] Snyder, Individual Accountability for Antitrust Crimes, *supra* note 4, at 4.

[31] *Id.* at 8; Scott D. Hammond, Deputy Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, The Evolution of Criminal Antitrust Enforcement over the Last Two Decades, Remarks as Prepared for the 24th Annual National Institute on White Collar Crime 8 (Feb. 25, 2010), https://www.justice.gov/atr/file/518241/download.

What Are the Sensitivities to Foreign Labor Laws and Cultural Issues? Many of the prosecutions in recent cases involve employees located in South Korea and Japan, where employment for life is considered extremely important and labor laws are much more favorable to employees than in the United States. In the statements from the DOJ thus far, there seems to be no recognition that there are cultural and legal barriers in foreign countries that may make it more difficult for companies to implement the new policy.

Should Companies Continue to Pay for Counsel for Punished, Culpable Employees? There is an assumption built into modern cartel enforcement that companies should pay for individual counsel for employees who are the subject of cartel investigations. This situation greatly benefits the DOJ, as it can communicate with sophisticated defense attorneys in the United States to try to convince counsel that the culpable employee should cooperate with the government.

The Antitrust Division's new policies may seriously undercut this dynamic. Companies have been generally willing to pay for separate counsel for individuals the DOJ unilaterally identifies as potentially culpable, either because they had a contractual obligation to do so or because they think that having individual counsel will bring some benefit, through providing information to the company or otherwise coordinating with the company. If a company has to punish these employees because they are now considered "culpable," then the company and the employee will be in an adversarial position. Since fired employees will no longer be concerned about their relationships with their former employer, companies may see little advantage in paying for individual counsel. Also, contractual rights to pay for individual counsel may be much different for current employees as compared to former employees. In other words, the new policy may have the unintended consequence of causing companies to reconsider paying for counsel for their employees.

What Is the Impact of Punishing Culpable Employees on Other Investigations and Civil Law Suits? In international cartel cases, DOJ fines can be small relative to fines in other jurisdictions and compared to civil liabilities. Defense counsel cannot consider the DOJ's policies in a vacuum—those policies need to be considered in the overall context of investigations by other government authorities and civil exposure. By terminating or demoting culpable employees, a company may be making it harder to reduce fines in other jurisdictions and to defend future civil lawsuits because it will not have the same access to witnesses who could provide cooperation to foreign enforcement entities or potentially minimize civil claims.

Alternatively, from the regulators' perspective, the policy might have the unintended consequence of actually helping the corporate defendant avoid civil liabilities. If a company fires culpable employees, especially those in foreign jurisdictions, the company no longer has control over those employees and can no longer be compelled to produce the employees as witnesses in civil cases. These terminated employees would now be third parties in civil litigation, and it will be extremely difficult, if not impossible, for plaintiffs to get needed testimony from these witnesses who reside in foreign countries.

Do You Get More Credit for Firing a Culpable Employee than for Reassigning the Employee? The guidance thus far from the DOJ does not make this distinction. It appears that a company can make the choice to reassign an employee or terminate the employee and still receive the same credit.

A Difficult Choice

The fact that firing or moving employees can create a roadblock to obtaining all the relevant facts in an investigation is recognized even by the Principles of Federal Prosecution of Business Organizations, the DOJ policy directive codified in the U.S. Attorneys' Manual (USAM) that sets

forth, among other topics, the factors by which all federal prosecutors are to assess the extent of cooperation credit ("e.g., the timeliness of the cooperation, the diligence, thoroughness and speed of the internal investigation, and the proactive nature of the cooperation").[32] As the "Comment" to Section 9-28.700 of the USAM notes, one of the reasons a corporation's cooperation may be critical in identifying relevant facts is the difficulties prosecutors may face given the realities of corporate life. The USAM notes:

> [A] prosecutor may encounter several obstacles resulting from the nature of the corporation itself. It may be difficult to determine which individual took which action on behalf of the corporation . . . . Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable personnel may have been promoted, transferred, or fired, or they may have quit or retired.[33]

Despite this recognition that firing or transferring employees can impede fact-finding, companies are being asked to do just that.

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What Should a Company Do?

Until the DOJ revisits or begins to indicate a recognition of the competing incentives its policies create, companies must carefully weigh these issues when navigating an investigation and pursuing a resolution with the government. There are several factors that companies should bear in mind:

- *Timing:* Companies need to move quickly in an investigation to learn as many facts as possible before the government identifies culpable employees. Companies need to consider carefully when is the best time to make personnel decisions in the context of the overall investigation. Companies need to make such decisions after learning as much as possible from the culpable employees but before making a compliance presentation to the DOJ.
- *Protecting the Company:* Companies should consult local labor and employment counsel as part of the investigation. Companies must try to minimize exposure for wrongful termination cases and other issues that can come up in an international context.
- *Individual Counsel Issues:* If the DOJ does identify potentially culpable employees early in an investigation, it likely will be harder for the company to get information from those individuals after that because the DOJ will likely request individual counsel for such employees. As a result, companies may need to take a more aggressive position when the DOJ requests that the company obtain individual counsel for individuals. Companies should demand to know the basis of why the government thinks individual counsel is necessary and be prepared to push back if the explanation is lacking.
- *Consider Enhanced Warnings:* Since employees who are identified as potentially culpable are at risk of being terminated or demoted under the DOJ policy, counsel needs to carefully consider providing enhanced *Upjohn* warnings when interviewing these employees.[34]
- *Have a Dialogue with the DOJ:* Many of these issues can be raised with the DOJ at various stages of the investigation and negotiation. Doing so with the right approach can have a major impact on the outcome.

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[32] U.S. Dep't Of Justice, United States Attorneys' Manual 9-28.700 (2015), https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations.

[33] *Id.*

[34] *See* Upjohn Co. v. United States, 449 U.S. 383 (1981). *Upjohn* warnings, or "corporate *Miranda*" warnings are notices given by corporate counsel to individual employees to inform them that counsel represents the company and not the individual, and that though communications with counsel are privileged, that privilege belongs to the company, not the individual, and can be waived by the company alone.

Conclusion

Given the financial significance, it is extremely important for companies engaged in plea negotiations with the Antitrust Division to make all efforts to secure cooperation credit. At the same time, being deemed non-compliant can have serious effects on the outcome of a company's investigation, such as the imposition of a compliance monitor, periods of probation, and the loss of opportunity for a fine reduction.

With the competing DOJ policies in the Antitrust Division policy speeches and the Yates Memo in place, figuring out the best way to handle potentially culpable employees can be very difficult. Therefore, company counsel should recognize the impact of these competing policies on internal investigations and develop clear response plans to be in the best position to handle these issues throughout the course of an investigation and when the time comes to negotiate with the DOJ. ●