409 Antitrust Compliance Training

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After clerking for the Honorable Pierre N. Leval, United States District Judge for the Southern District of New York, Donna Costa spent eight years as a litigator at the New York offices of Cleary Gottlieb Steen & Hamilton.

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Prior to joining the antitrust division, Ms. Sharp was branch chief for the office of the general counsel, U.S. Department of Health and Human Services, in Dallas.

Ms. Sharp has also contributed to the ABA's most recent edition of the Criminal Antitrust Litigation Handbook and has spoken to various groups about criminal antitrust enforcement.

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DEPARTMENT OF JUSTICE

Antitrust Compliance Programs: The Government Perspective

Address by

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Before the

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Good morning. I want to thank Joe Murphy, Herb Zinn, and the Practicing Law Institute for giving me this opportunity to share with you the Antitrust Division's perspective on the critical importance antitrust compliance programs play in deterring antitrust crimes. I worked on my first internal investigation 25 years ago for a company based here in San Francisco, so it's a particular joy to be back here again talking about this important subject today.

The need for effective corporate compliance programs has never been more evident. It seems that almost every day we read of another case of flagrant disregard of the law by the top executives of yet another large and previously well respected company. These nearly daily disclosures of widespread accounting fraud, self-dealing, and just plain greed threaten to undermine confidence in our financial markets and jeopardize our economic recovery. Given my responsibilities for our relations with other antitrust authorities worldwide, I also fear that these disclosures will undermine our credibility abroad, weakening our ability to serve as a model for the rest of the world, and providing ammunition for those who do not share our commitment to free markets and economic democracy.

During the time I've been at the Antitrust Division, as I've visited our field offices which do the bulk of our criminal enforcement, one consistent theme I've heard is that the companies we investigate rarely have effective antitrust compliance programs. Our staffs tell me they have been surprised at how sloppy many large, publicly traded companies have become about antitrust compliance. It appears that as companies have down-sized their legal and auditing staffs, and turned their attention more and more to deal-making, one of the first places they cut is antitrust (and, I suspect, other) compliance. And we've all now seen the results. It's time for in-house counsel to return to practicing preventive law.

My task today is to talk about how to design a compliance program to prevent and detect antitrust crimes. David and Phil will discuss the role compliance programs can play in preventing environmental crimes and fraud. But in focusing only on criminal misconduct, I do not want us to lose sight of the equally important role compliance programs can play in preventing civil antitrust offenses. As all of you know, violations of the antitrust laws, be they civil or criminal, can expose your companies and clients to hundreds of millions, if not billions, of dollars in treble damage liability. A well-designed compliance program can reduce the risk of this civil exposure as well.

I want to begin by telling you a little bit about our criminal antitrust enforcement program and the important role our leniency program plays in it. Second, I want to share with you some of the common characteristics of the cartels we've prosecuted. Third, I will describe the essential elements of an effective antitrust compliance program. Finally, I will identify some of the common red flags you should be looking for as you counsel your clients and conduct antitrust audits.

I. The Antitrust Division's Criminal Enforcement Program

As I've said in other speeches,[2] investigating and prosecuting hard core cartels has always been, and remains, our number one enforcement priority. Cartels — whether in the form of price fixing, output restrictions, bid rigging, or market division — raise prices and restrict supply, enriching producers at consumers' expense and acting as a drag on the entire economy. In our view, these are crimes, pure and simple, and those who perpetrate them are criminals who belong in jail.

As commerce has become more global, so too have cartels. Over the last five years, we have successfully prosecuted sixteen major multinational cartels in industries as diverse as animal feed additives, vitamins, graphite electrodes for steel mills, and fine arts auction houses. These cartels affected over $55 billion in commerce worldwide and resulted in mark-ups as high as 100 percent in some cases. We have collected nearly $2 billion in fines and sentenced some 20 senior corporate executives to jail terms of more than one year, the maximum sentence being ten years. In the last few years, the European Union has joined our battle against cartels with a vengeance. Last year alone, the European Commission imposed fines in the aggregate of 1.9 billion Euros on some 40 companies for engaging in illegal multinational cartels.

Our expanded corporate leniency program has been the key to our uncovering and successfully prosecuting these cartels.[3] This program offers any company that comes forward and blows the whistle on a cartel in which it has been participating, and which then cooperates fully with our investigation, complete amnesty from prosecution, so long as it meets the conditions set forth in the program.[4] Amnesty is automatic if the company comes forward before we have opened an investigation, but may still be available if the company is the first to agree to cooperate in an ongoing investigation. A grant of amnesty protects not only the company, but also all of its directors, officers, and employees who also agree to cooperate.

Since the current version of this program was put in place in 1993, it has been instrumental in most of the major cartel cases we have prosecuted. In the last several years, we have received an average of one amnesty application per month. So successful has our program been that many other jurisdictions around the world, including the European Union, are now copying it.

It should be obvious that our amnesty program substantially increases the importance of having an effective antitrust compliance program that is designed to prevent antitrust violations and to detect them quickly when they occur. The existence of the amnesty program dramatically increases the likelihood that the cartel will be detected and punished. Only a company with an effective antitrust compliance program can hope to be in a position to be the first company in the door.

II. Common Characteristics of Multinational Cartels

Designing an effective antitrust compliance program requires knowing what it is you are trying to prevent. What I want to talk about next, therefore, are the common characteristics of the multinational cartels we've prosecuted. I'm hopeful that this will assist you in counseling your clients about what conduct to avoid and in designing an effective program for assuring they do not engage in unlawful cartel activity.

A. Brazen Nature of Cartels

The most startling characteristic of the multinational cartels we have prosecuted is how cold blooded and bold they are. The members of those cartels showed utter contempt for antitrust enforcement. The cartels invariably involved hardcore cartel activity -- price fixing, bid-rigging, and market- and customer-allocation agreements. Without exception, the conspirators were fully aware they were violating the law in the United States and elsewhere, and their only concern was avoiding detection. The conspirators openly discussed, and even joked about, the criminal nature of their agreements; they discussed the need to avoid detection by antitrust enforcers in the United States and abroad; and they went to great lengths to cover-up their actions -- such as using code names with one another, meeting in secret venues around the world,

creating false "covers" -- *i.e*. facially legal justifications -- for their meetings, using home phone numbers to contact one another, and giving explicit instructions to destroy any evidence of the conspiracy. In one cartel, the members were reminded at every meeting -- "No notes leave the room."

B. Involvement of Senior Executives

The second most startling characteristic of these cartels is that they typically involve the most senior executives at the firms involved -- executives who have received extensive antitrust compliance counseling, and who often have significant responsibilities in the firm's antitrust compliance programs. For example, the vitamin cartel was led by the top management at some of the world's largest corporations, including one company -- F. Hoffmann-La Roche -- which continued to engage in the vitamin conspiracy even as it was pleading guilty and paying a fine for its participation in the citric acid conspiracy.

These executives are not only disdainful of their customers and of the law, but also show equal contempt for their own company's rules -- rules adopted to protect the company and them from criminal conduct. They will, therefore, go to great lengths to make sure that you, as inside or as outside counsel, don't find out about their criminal activity.

A good example is the extent to which one executive of a corporation we recently prosecuted went to frustrate the efforts of the company's general counsel to enforce the company's antitrust compliance program. This general counsel had instituted a comprehensive antitrust compliance program, and had made sure that the senior executives were well schooled on the antitrust laws. He had laid out specific rules to follow and adopted stiff penalties for failure to follow those rules. When a top executive at his firm arranged a meeting with his chief foreign competitor to discuss exchanging technological information, the executive, as required by the policy, notified the general counsel's office of the meeting. The general counsel (perhaps suspecting the worst) insisted on accompanying the executive to the meeting and remaining at his side throughout the meeting -- never letting him out of his sight even when the executive went to the bathroom. He was certain that this way there could be no chance conversation between the company executive and his competitor, and the general counsel would be a witness to everything said. Surely no antitrust problems could arise in such a setting. And the general counsel must have taken some comfort when he, the executive, and the executive from the competitor firm greeted one another at the start of the meeting and the two executives introduced themselves to each other, exchanged business cards, and engaged in small talk about their careers and families that indicated that the two had never met each other before. Imagine how that general counsel must have felt when he learned, during the course of our investigation, that the introduction between the two executives had been completely staged for his benefit -- to keep him in the dark. In fact, the two executives had been meeting, dining, socializing, playing golf, and participating together and with others in a massive worldwide price-fixing conspiracy for years. Furthermore, other employees at the company knew of this relationship and were instructed to keep the general counsel in the dark by referring to the competitor executive by a code name when he called the office and the general counsel was around.

C. Fear Of Detection By U.S. Enforcers

While cartel members know full well that their conduct is illegal under the antitrust laws of many countries, they have a particular fear of U.S. antitrust authorities. For that reason, international cartels try to minimize their contacts in the United States by conducting their

meetings abroad. This has been particulary true since 1995, when the lysine investigation became public. In fact, cooperating defendants in several recent cases have revealed that the cartels changed their practices and began avoiding contacts in the United States at all costs once the Division began cracking and prosecuting international cartels. Some cartel members go so far as to try to keep their cartel activity secret from all U.S.-based employees, even those responsible for carrying out their instructions as to the firm's output and prices. However, the cartel members continue to target their agreements at U.S. businesses and consumers; the only thing that has changed is that they conduct nearly all of their meetings overseas.

D. Using Trade Associations As Cover

International cartels frequently use trade associations as a means of providing "cover" for their cartel activities. In order to avoid arousing suspicion about the meetings they attended, the lysine conspirators actually created an amino acid working group or subcommittee of the European Feed Additives Association, a legitimate trade group. The sole purpose of the new subcommittee was to provide a false, but facially legitimate, explanation as to why they were meeting. Similarly, the citric acid cartel used a legitimate industry trade association to act as a cover for the unlawful meetings of the cartel. The cartel's so-called "masters," *i.e.*, the senior decision-makers for the cartel members, held a series of secret, conspiratorial, "unofficial" meetings in conjunction with the official meetings of ECAMA, a legitimate industry trade association based in Brussels. At these unofficial meetings, the cartel members agreed to fix the prices of citric acid and set market share quotas worldwide. A former ADM executive testified that the official ECAMA meetings provided a "combination of cover and convenience" for the citric acid cartel. As he explained it, ECAMA provided "cover" because it gave the citric acid conspirators "good cause" to be together at the particular location for the official meetings -- which were held in Belgium, Austria, Israel, Ireland, England, and Switzerland. Since the cartel members were all attending those meetings anyway, it was convenient to meet secretly, in an "unofficial capacity" for illegal purposes, during the time period set aside for the industry association gathering.

E. Fixing Prices Globally

Another common characteristic of an international cartel is its power to control prices on a worldwide basis effective almost immediately. Prosecutors got an unprecedented view of the incredible power of an international cartel to manipulate global pricing in the lysine videotapes. Executives from around the world can be seen gathering in a hotel room and agreeing on the delivered price, to the penny per pound, for lysine sold in the United States, and to the equivalent currency and weight measures in other countries throughout the world, all effective the very next day. Our experience with the vitamin, citric acid, and graphite electrode cartels, to name a few, shows that such pricing power is typical of international cartels and that they similarly victimize consumers around the globe. Cartel members often meet on a quarterly basis to fix prices. In some cases the price is fixed on a worldwide basis, in other cases on a region-by-region basis, in still others on a country-by-country basis. The fixed prices may set a range, may establish a floor, or may be a specific price, fixed down to the penny or the equivalent. In every case, customer victims in the United States and around the world pay more because of the artificially inflated prices created by the cartel.

F. Worldwide Volume-Allocation Agreements

The members of most cartels recognize that price-fixing schemes are more effective if the cartel also allocates sales volume among the firms. For example, the lysine, vitamin, graphite electrode, and citric acid cartels prosecuted by the Division all utilized volume-allocation agreements in conjunction with their price-fixing agreements. Cartel members typically meet to determine how much each producer has sold during the preceding year and to calculate the total market size. Next, the cartel members estimate the market growth for the upcoming year and allocate that growth among themselves. The volume-allocation agreement then becomes the basis for (1) an annual "budget" for the cartel, (2) a reporting and auditing function, and (3) a compensation scheme -- three more common characteristics of international cartels.

G. Audits And The Use Of Scoresheets

Most cartels develop a "scoresheet" to monitor compliance with and enforce their volume-allocation agreement. Each firm reports its monthly sales to a co-conspirator in one of the cartel firms -- the "auditor." The auditor then prepares and distributes an elaborate spread sheet or scoresheet showing each firm's monthly sales, year-to-date sales, and annual "budget" or allocated volume. This information may be reported on a worldwide, regional, and/or country-by-country basis and is used to monitor the progress of the volume-allocation scheme. Using the information provided on the scoresheet, each company will adjust its sales if its volume or resulting market share is out of line.

H. Compensation Schemes

Another common feature of international cartels is the use of a compensation scheme to discourage cheating. The compensation scheme used by the lysine cartel is typical and worked as follows. Any firm that had sold more than its allocated or budgeted share of the market at the end of the calendar year would compensate the firm or firms that were under budget by purchasing that quantity of lysine from any under-budget firms. This compensation agreement reduced the incentive to cheat on the sales volume-allocation agreement by selling additional product, which, of course, also reduced the incentive to cheat on the price-fixing agreement by lowering the price on the volume allocated to each conspirator firm.

I. Budget Meetings

Cartels nearly always have budget meetings. Like division managers getting together to work on a budget for a corporation, here senior executives of would-be competitors meet to work on a budget for the cartel. Budget meetings typically occur among several levels of executives at the firms participating in the cartel; their frequency depends on the level of executives involved. The purpose of the budget meetings is to effectuate the volume-allocation agreement -- first, by agreeing on the volume each of the cartel members will sell, and then periodically comparing actual sales to agreed-upon quotas. Cartel members often use the term "over budget" and "under budget" in comparing sales and allocations. Sales are reported by member firms on a worldwide, regional, and/or country-by-country basis. In our experience, the executives become very proficient at exchanging numbers, making adjustments, and, when necessary, arranging for "compensation."

J. Retaliation Threats -- Policing The Agreement

As is often said, there is no honor among thieves. Thus, cartel members have to devise ways -- or even make threats -- to keep their co-conspirators honest, at least with respect to maintaining their conspiratorial agreements. It is common for cartel members to try to keep their

co-conspirators in line by retaliating through temporary price cuts or increases in sales volumes to take business away from or financially harm a cheating co-conspirator. Excess capacity in the hands of leading firms can be a particularly effective tool for punishing cheating and thereby enforcing collusive agreements. In lysine, ADM, which had substantial excess capacity, repeatedly threatened to flood the market with lysine if the other producers refused to agree to a volume allocation agreement proposed by ADM. In another case where competitors bought from one another, the cartel member with the extra capacity threatened to not sell to a competitor who was undercutting the cartel.

K. The Structure of Cartels

We have found that cartels can involve a surprisingly large number of firms. The number of participants in several of the cartels we prosecuted were surprisingly high. Five or six members were not uncommon and occasionally we have uncovered cartels with 10 or more members. This appears to be due in part at least to fringe players in the market feeling they will profit more by going along with the cartel than by trying to take share away from the larger firms by undercutting their prices. Nevertheless, industry concentration does matter. As economic theory predicts, the industries in which we have detected cartels are usually highly concentrated with the largest firms acting as ringleaders and the fringe players following along. In one case, there was evidence that the industry had attempted unsuccessfully to coordinate prices for several years before the cartel finally got off the ground after the industry consolidated down to approximately six players.

We have also found that a single cartel will often involve multiple forms of agreement. Just as George Stigler observed,[5] cartels can take many forms, with the choice of form being determined in part at least by balancing the comparative cost of reaching and enforcing the collusive agreement against the risk of detection. The vitamin cartel, for example, included price-fixing, bid-rigging, customer and territorial allocations, and coordinated total sales.

These cartels also tended to be more durable than is sometimes thought. After the ADM plea, the Wall Street Journal stated "If colluders push prices too high, defectors and new entrants will set things right." Our experience has shown that this is not the case. Several of the cartels we prosecuted had been in existence for over ten years, including one (sorbates) that lasted 17 years, from 1979 to 1996.

We also found that while product homogeneity and high entry barriers may facilitate cartel behavior, they are not essential to it. While the products in our cartel cases tend to be fungible, there are sometimes exceptions. One case we prosecuted involved bid rigging on school bus bodies. School bus bodies have many options, but the conspirators were able to work out a formula that incorporated the options and trade-in value to determine a price at or below which the designated winning bidder was supposed to bid. Similarly, while most of our cartel cases involve industries in which entry tends to be difficult, there are notable exceptions, such as in the Division's many bid-rigging cases in the road building industry. The road building industry, at least at the time of the conspiracies, was not difficult to enter, yet the Division turned up numerous cartels.

L. Large, sophisticated buyers can still be victims.

In merger analysis, some assume that large purchasers in the market will provide sufficient discipline to prevent cartels. Our experience shows to the contrary that many successful cartels sell to large, sophisticated buyers. In the lysine cartel, the buyers included Tysons Foods and Con Agra; in citric acid, the buyers included Coca-Cola and Procter & Gamble; and in graphite

electrodes, the victims included every major steel producer in the world. It is particularly ironic that one of the largest victims of the vitamins cartel had itself been one of the perpetrators of the citric acid cartel.

M. Cartel members include large, publicly traded companies

Our cases have turned up hard-core cartel activity top management at some of the world's largest corporations and most respected corporations including Christies/Sotheby's, ADM, Hoffmann-La Roche, BASF, ABB, and a host of others. We have repeatedly found that even the largest companies have become sloppy about their antitrust compliance programs and that they are not doing all they should to educate managers about the risks at which they put themselves and their companies by engaging in cartel activity.

N. Cartel participants tend to be recidivists

Finally, we have found that cartel participants tend to be recidivists. The most notorious example is Hoffmann-La Roche, which continued its participation in the vitamin conspiracy even as it was entering into a plea agreement for its participation in the citric acid cartel. Another example was a domestic building materials industry, where one generation of executives engaged in cartel activity during the mid-1980s and their sons did likewise after they took over the reins of the businesses in the 1990s.

III. Designing an Effective Compliance Program

Now that you know what an illegal cartel looks like, let's talk about how to design an antitrust compliance program that can deter cartel activity by your company's executives.

A. The goals of a successful compliance program

A sound antitrust compliance program should have two principal objectives: prevention and detection. From our perspective, the true benefit of compliance programs is to prevent the commission of antitrust crimes, not to enable organizations that commit such violations to escape punishment for them. This should be true for the company as well. A corporate compliance program generally will not protect the company from prosecution and certainly will not protect it from potentially devastating treble damage liability. Therefore, every company's first objective in its compliance program should be to prevent wrongdoing.

A second important objective of a compliance program is to detect wrongdoing as early as possible, while the damages are still small. Early detection of antitrust crimes will give a company a head start in the race for amnesty. But, equally important, it will enable it to nip the wrongdoing in the bud before the damages from the cartel become so large that they would be material to the company's bottom-line.

A well-designed compliance program may also, in some circumstances, help your company qualify for sentence mitigation under the sentencing guidelines. I want to emphasize that once a violation occurs, a compliance program can do little, if anything, to persuade the Division not to prosecute. Organizational liability, both civil and criminal, is grounded on the theory of *respondeat superior*. We have rarely, if ever, seen a case where an employee who committed an antitrust violation was acting solely for his own benefit and not the company's. A strong corporate compliance program can, however, help at the sentencing stage, so long as the employees who committed the violation were not "high-level personnel" of the organization. Again, however, it is important to emphasize that in our experience most antitrust crimes are

committed by just such high-ranking officials, which would disqualify the company from receiving any sentence mitigation, no matter how good its corporate compliance program. This again shows why it is so important if a company learns of a violation that it report it promptly and seek to qualify for our amnesty program. Finally, a strong compliance program may help your company avoid suspension and debarment, so long as the company takes aggressive steps to discipline the wrongdoers, make the victims whole, and assure that future violations do not occur.

B. Minimum requirements for an effective compliance program

The sentencing guidelines set forth seven minimum requirements that a compliance program must satisfy in order to qualify for sentence mitigation.[6] These are:

- Clearly established compliance standards;
- Assigning overall responsibility to oversee compliance to high-level executives within the company;
- Exercising due care not to delegate responsibility to employees who have a propensity to engage in illegal conduct;
- Taking reasonable steps to communicate standards and procedures effectively to all employees;
- Taking reasonable steps to achieve compliance with standards;
- Consistent enforcement of standards through appropriate disciplinary mechanisms; and
- Taking reasonable steps when an offense occurs to respond and to present future violations.

It's important to stress that these are minimum requirements. To be truly effective, a compliance program must be customized to fit the firm's business, organization, personnel, and culture. The first three requirements are reasonably self-explanatory. I want, therefore, to focus my attention on the last four requirements.

a. *Effective communication*. Every compliance program should include a clear statement of the company's commitment to comply with the antitrust laws, accompanied by a set of practical do's and don'ts written in plain English so that every employee can understand them. A policy statement is, however, only the beginning. The company should have an active training program that includes in-person instruction by knowledgeable counsel. The in-person training sessions can be supplemented by video and Internet training tools, but these are no replacement for some personal instruction. The instruction should be as practical as possible, including case studies drawn from the company's actual experiences. The instruction should also include education as to the consequences of antitrust violations, both for the company and the individual employee. You could, for example, tell your employees that in the last several years, the Division has sentenced more than 20 senior executives to serve one year or more of jail time for antitrust crimes. One of these executives, who compounded his antitrust offenses with bribery and money laundering, is now serving a ten-year sentence. And, as Alfred Taubman recently learned, an executive's stature in the community and record of community service will not save him or her from prison. You might also tell your employees about the magnitude of the criminal fines and treble damage violators have had to pay. Hoffman LaRoche alone has paid more than $1 billion in fines and damages for its involvement in the vitamins price-fixing conspiracy.

b. *Steps to achieve compliance*. While training is important, it is not sufficient to assure compliance with the antitrust laws. To achieve that goal, a company must have a proactive

law department that is dedicated to practicing preventive law. It is critical that the company's lawyers regularly attend management meetings and regularly visit the company's facilities so that employees know whom to call if they have a question or a problem. It is also critical that the lawyers win the respect of their clients by responding quickly to questions with sound legal advice that takes full account of the practical business issues the client faces. A company also needs to have in place and to publicize a reporting system so that employees know to whom to report possible misconduct. Many companies establish ombudsmen and hot lines for this purpose, while others require their employees to report possible wrongdoing to the law department. Whatever system is in place should assure employees seeking to report misconduct confidentiality and protection from retaliation. Finally, a company should conduct regular antitrust audits, preferably unannounced, to monitor compliance. These audits can be kept informal, but should include a review of both the paper and computer files (especially e-mails) of employees with competitive decision-making authority or sales and marketing responsibilities. It is important also to interview employees about their business and their contacts with competitors.

c. Enforcement of standards through appropriate discipline. It is absolutely critical that the company establish a record of consistently disciplining employees who disregard the company's antitrust compliance policy or who fail to report misconduct by others. In so doing, it is equally critical that the company discipline the chiefs, not just the Indians. The company should discipline senior managers who failed adequately to supervise or who created a climate of disrespect for antitrust principles in their organizations, even if they did not have actual knowledge of the particular wrongdoing.

d. Reasonable steps to respond to violations. When the worst happens and you discover that your company has committed a possible antitrust crime, it is also critical that the company respond promptly and energetically. This includes initiating an immediate investigation and reporting promptly to the agency. Remember: qualifying for amnesty can sometimes become a race with the first company in the door receiving the most lenient treatment. In addition to disciplining the employees responsible, the company should also take steps to make restitution to its customers, either through settling the inevitable treble damage actions or through commercial arrangements directly with the customers. The company should also re-examine its compliance program in order to learn from its mistakes and should make whatever modifications are necessary to assure that future violations do not occur.

As important these steps are, nothing is more important than senior management commitment and leadership. A culture of competition must begin at the very top of the company. Respect for the law is a necessary, but not sufficient, condition. Senior management must value competition and must be vocal in making that commitment known to employees. In the cases we prosecute, we find almost invariably that in companies that violate the antitrust laws, the tone of disrespect for the law and for competition permeated the entire company, usually starting at the very top. Look at some of the people we have prosecuted: Alfred Taubman, the chairman and principal shareholder of Sotheby's; Mick Andreas, son of the long-time chairman and CEO, Dwayne Andreas, who was himself being groomed to take over the reins. In fact, ADM is a particularly good illustration of the kind of corporate culture that breeds antitrust crimes. It was a culture that believed, as one senior executive put it, that, "Our competitors are our friends. Our customers are the enemy." Both in representing defendants in criminal investigations in private practice and now as a prosecutor, this is exactly the attitude I've found in almost every company

that commits antitrust crimes. And it's an attitude that can be changed only if the company's senior officers and directors all believe in the value of competition and communicate to their employees.

In addition to strong, positive leadership, it is important also that a company have sound incentive structures in place. There should be strong negative incentives against violating the antitrust laws and strong positive incentives for reporting and deterring violations. But companies should also have incentives that reward tough competition, not collusion. You want your sale force, for example, to have an incentive to sell more, not less at a higher price.

IV. Important Red Flags

In counseling your clients and in conducting antitrust audits, there are any number of common red flags to look for. Here are five.

Trade association activity. Look to see whether the positions of attendees at trade association meetings match the ostensible purpose of the meeting. Look for a pattern of meetings outside the United States. Look at whether the association is gathering detailed industry data, especially specific transaction data or forward-looking pricing and output data. Look to see whether meetings are attended by counsel and whether there is an agenda for the meetings and a record of what was discussed.

Sales transactions between your company and its competitors, particularly around the end of the year. While there are many legitimate reasons for competitors to buy from one another, such transactions can be used to "true up" a market allocation scheme.

Data on market shares. Look at your company's market shares to see if they are more stable than you would expect in a competitive market. Market shares that are stable over a long period of time are a strong indicator of collusion.[7]

Executives receiving calls at home or from callers giving fictitious names or refusing to identify themselves. When conducting audits, therefore, talk not only to the executives, but to their assistants.

Sudden, unexplained price increases and copies of competitor price announcements in your company's files. If you find any, look at the fax footprints or the cover e-mail to see where they came from.

V. Conclusion

The stakes have never been higher. An effective antitrust compliance program can literally mean the difference between survival and possible extinction to a corporation whose responsible officers or employees are tempted to engage in -- or are engaging in -- an antitrust conspiracy. In today's enforcement environment, a multinational firm, and its executives, engaged in cartel activity face enormous exposure: criminal convictions in the United States; massive fines for the firm and substantial jail sentences for the individuals; proceedings by other, increasingly active antitrust enforcement agencies around the world where fines may be, individually or cumulatively, as great as or greater than in the United States; private treble damage actions in the United States; damage actions in other countries; and debarment. Given this exposure, it would be difficult to overstate the value of a compliance program that prevented the violation in the first place. And if a violation does occur, it again would be difficult to overstate the value of a compliance program in detecting the offense early because amnesty is available to only one firm, the first to successfully apply in each cartel investigation. I hope my remarks today will serve their intended

purpose of persuading you when you get back to your companies to make it your first priority to assure that your compliance program is up to the task.

1. Deputy Assistant Attorney General for International Enforcement. The material in this paper draws heavily from materials developed and prepared by James M. Griffin, the Deputy Assistant Attorney General for Criminal Antitrust Enforcement, who in turn drew on materials prepared by his predecessor, Gary R. Spratling. I particularly want to thank Rebecca Meiklejohn of our New York Field Office for being the first to alert me to the neglect of corporate compliance the Division has found in several of its investigations and Donna Peel of our Chicago Field Office for contributing several of the common characteristics of multinational cartels. The views expressed in this article reflect those of the author and not necessarily those of the Division and the author accepts full responsibility for any errors.

2. *See, e.g., U.S. and EU Competition Policy: Cartels, Mergers, and Beyond*, An Address Before the Council for the United States and Italy Bi-Annual Conference, New York, N.Y., January 25, 2002, at http://www.usdoj.gov/atr/public/speeches/9848.htm.

3. U.S. Department of Justice, Antitrust Division, Corporate Leniency Policy, at http://www.usdoj.gov/atr/public/guidelines/lencorp.htm.

4. The six conditions for obtaining automatic leniency are: (1) At the time the corporation comes forward, the Division has not received information about the illegal activity from any other source; (2) The corporation, upon its discovery of the illegal activity, takes prompt and effective actions to terminate its part in the activity; (3) The corporation reports the wrongdoing with candor and completeness and provides full cooperation to the division throughout the investigation; (4) The confession of wrongdoing is truly a corporate act; (5) Where possible, the corporation makes restitution to the injured parties; and (6) The corporation did not coerce another party to participate in the illegal activity and was not the leader or originator of the activity. If condition one is not met, but the others are, the company may still qualify if (1) it is the first corporation to come forward, and (2) the Division at that point does not yet have evidence likely to result in a sustainable conviction against the firm.

5. *See* Stigler, George J., "A Theory of Oligopoly," *Journal of Political Economy*, Vol. 72, pp. 44-61 (1964).

6. U.S. Sentencing Guidelines, Chapter 8 (effective Nov. 1, 1991).

7. *See, e.g.,* U.S. International Trade Commission, *Report to the President on Global Steel Trade: Structural Problems and Future Solutions* 65-84 (July 2000)(citing stable market shares in Japanese steel industry as evidence that the industry is cartelized).

ANTITRUST POLICY

INTRODUCTION

The purpose of the antitrust laws is to preserve a competitive economy in which free enterprise can flourish. The Company's insistence upon full compliance with the antitrust laws is based on both our desire to stay within the bounds of the law, and our conviction that the preservation of a free competitive economy is essential.

Broadly stated, the antitrust laws prohibit the restraint of free competition by means of collusion, coercion or abuse of economic power. Certain conduct is unlawful "*per se*," meaning that it is prohibited absolutely, regardless of any claimed justification and without proof of any actual effect on competition. Other conduct is judged under the so-called "rule of reason," under which a restraint of trade is determined to be "reasonable" if, overall, it enhances competition to the ultimate benefit of consumers. Antitrust is a complex area of law, and no policy, no matter how comprehensive, can answer every question. All questions arising in the antitrust field should be referred to Company Counsel.

The antitrust laws are enforced in the United States by the Department of Justice, the Federal Trade Commission, State Attorneys General and private parties. The federal government can impose severe penalties for violations of the antitrust laws. In recent years, numerous corporate officers and employees have been convicted as felons and sentenced to imprisonment. In addition, fines of tens or even hundreds of millions of dollars may be imposed on a corporation for a criminal offense, and very substantial fines may be imposed on any individual who participates in an offense. Finally, any private party directly injured in their business or property by an antitrust violation may recover in a civil action up to three times the amount of damages actually suffered.

While the standards of conduct contained in this Policy are discussed in the context of compliance with UNITED STATES antitrust laws, the standards should be followed by all Company employees, both inside and outside the United States. Company employees should obtain Company Counsel review of any planned foreign activity that raises questions under this Policy or appears contrary to it. Company employees who become aware of questionable conduct by Company affiliates outside the United States should bring such conduct to the attention of Company Counsel.

IT IS COMPANY POLICY TO ENFORCE STRICT COMPLIANCE WITH AND TO AVOID ACTIVITIES THAT MAY RESULT IN LIABILITY UNDER THE ANTITRUST LAWS. THE COMPANY HOLDS EACH AND EVERY EMPLOYEE STRICTLY ACCOUNTABLE FOR TAKING MEASURES NECESSARY TO MAINTAIN STRICT COMPLIANCE WITH THIS POLICY. EMPLOYEES ARE REQUIRED TO REPORT PROMPTLY TO COMPANY COUNSEL OR A MEMBER OF MANAGEMENT ANY MISCONDUCT WITH ANTITRUST IMPLICATIONS OF WHICH THEY BECOME AWARE. ANYONE WHO INTENTIONALLY VIOLATES THIS POLICY WILL BE SUBJECT TO SEVERE DISCIPLINARY ACTION.

RELATIONS WITH COMPETITORS

The most frequent antitrust violations involve relations between competitors. The antitrust laws prohibit agreements between competitors that could have an anti-competitive effect in the United States. For purposes of the antitrust laws, the meaning of "agreement" is a broad one. It extends to all forms of agreements, including written agreements, verbal agreements and even tacit understandings that are reached through a course of conduct or other form of communication. The existence of an agreement may be inferred from a minimal amount of circumstantial evidence, such as a casual discussion between employees of competitors or a few carelessly written words. It is critical that you always keep in mind that your communications with competitors may risk misinterpretation.

The most commonly prosecuted offenses are based on agreements providing for (1) horizontal price-fixing, (2) market allocation, or (3) boycotts.

Horizontal Price-Fixing

"Horizontal price-fixing" is the process of competitors agreeing among themselves, directly or indirectly, about the prices they will charge. The most serious antitrust penalties are reserved for this kind of conduct, including lengthy terms of imprisonment, large monetary fines for the Company and individuals, and large monetary damage awards in private cases.

Price-fixing covers a broader range of conduct than agreements to charge a final price to customers. It includes any agreement with a competitor that affects prices, including agreements about components of price, agreements about the process by which prices are set, and agreements not to bid against someone else for business.

Market Allocation

Allocation of product markets, product lines, business opportunities, territories or customers among competitors is always unlawful, regardless of competitive effect or alleged justifications. For example, competitors may not agree upon geographic areas in which each will or will not sell, or agree on particular customers or classes of customers that each will or will not serve. Violations in this area are prosecuted vigorously and can result in private liability.

Boycotts

A company, acting alone, generally has the right to select the persons with whom it will do business. However, when two or more companies agree not to do business with another, that agreement may violate the antitrust laws.

THERE MUST NEVER BE ANY AGREEMENT, EXPRESS OR IMPLIED, WITH A COMPETITOR CONCERNING ANY SUBJECT, WITHOUT REVIEW BY COMPANY COUNSEL. THIS INCLUDES TACIT UNDERSTANDINGS AND "OFF THE RECORD" CONVERSATIONS. IT IS AGAINST COMPANY POLICY TO COMMUNICATE WITH A COMPETITOR CONCERNING PRESENT OR FUTURE PRICING, BIDS, DISCOUNTS, REBATES, PROMOTIONS, OR ANY OTHER TERMS OR CONDITIONS OF SALE. IT IS AGAINST COMPANY POLICY TO COMMUNICATE WITH A COMPETITOR CONCERNING PRODUCTION, ALLOCATING SALES ACCORDING TO CUSTOMERS, TERRITORIES OR PRODUCTS, OR BOYCOTTING CUSTOMERS OR SUPPLIERS.

Legitimate Communications with Competitors

Although any contact or communication with competitors may give the appearance of collusion between the Company and one of its competitors, communication with a competitor in connection with the following activities may be permissible, provided it serves a legitimate purpose and need:

- Trade Associations and Professional Societies.
- Standardization Activities.
- Joint Activities to Influence Government Action.
- Acquisitions and Joint Ventures.
- Teaming Arrangements and Joint Research and Development.

Employees who communicate with competitors in the context of any of these activities should work with Company Counsel to ensure that business contacts and communications are limited to proper subjects and that appropriate procedures are followed to record the nature and scope of these activities.

MONOPOLIZATION

The antitrust laws encourage vigorous competition. Having a monopoly position as a consequence of a superior product, business acumen, or historic accident is not unlawful. However, UNITED STATES law prohibits predatory or exclusionary conduct intended to obtain or preserve a monopoly share of a market. A "monopoly share" can be far less than 100% of a market; it may be as low as 50% of a market.

RELATIONS WITH CUSTOMERS

Restraints on Customers

Another basis for antitrust violations is relations with customers. While, as a general rule, the Company is free to select its own customers and to impose certain restraints on those customers, the antitrust laws restrict restraints that have an anti-competitive effect in the United States.

Vertical Price-Fixing

Antitrust law restricts "vertical price-fixing" – agreements between a manufacturer and a distributor concerning the minimum or maximum price at which a product will be resold. While it is lawful for the Company to suggest resale prices to customers, it is against Company policy to have an agreement with a customer concerning resale prices. Further, it is against Company policy to condition our business with a customer on the customer's adherence to our pricing suggestions.

Non-Price Restraints

It is generally permissible to place non-price restraints on customers who sell Company products, such as restricting the customer's sales to a particular territory, or requiring the customer to carry only Company products. However, in order to impose such restrictions, two requirements must be met. First, there must be a legitimate business reason for the restriction, for example, to encourage distributors to engage in aggressive sales efforts. Second, the restriction must be the result of an independent decision of the Company; the restriction cannot be imposed as a result of an agreement with a competitor or other distributors. Never meet or communicate with two or more distributors at one time to discuss: (a) the selection, number or designation of distributors; (b) the territorial restrictions placed on distributors; (c) the pricing practices of any distributor; or (d) suggested distributor pricing policies. Such a meeting or communication may be interpreted as an agreement among a group of distributors and the Company.

Tying

Under certain circumstances, the antitrust laws prohibit tying the sale of one product to the sale of another, that is, allowing a customer to purchase one product (the "tying product") only if the customer purchases a second product (the "tied product"). In these cases, the concern of the antitrust laws is that the seller will use "leverage" from selling a very desirable product (the tying product) in order to force a less desirable product (the tied product) on the customer. Not only may the customer be disadvantaged, but competitors who sell the tied product may be harmed as well. This prohibition applies only if: (1) there are actually two separate products; and (2) the seller has a substantial market share in one of the products and, therefore, has "leverage" to force the purchase of the second product. Products that are economically impractical to sell separately, such as items normally sold in the same package, are not subject to this prohibition. It is also permissible to offer promotions in which one product is offered at a discounted price in combination with another product, as long as the Company does not use the leverage of a substantial market share in the primary product to force the customer to purchase the second product.

Boycotts

While a company generally has the right to select the persons with whom it does business, when two or more companies agree not to do business with another, that agreement may violate the antitrust laws.

Reciprocity

It is illegal for the Company to condition its purchases from a customer on the customer making purchases from the Company. However, it is not illegal for the Company to independently decide to place purchase orders with a present or potential customer for the purpose of inducing that customer to make further purchases from the Company.

IT IS AGAINST COMPANY POLICY TO DICTATE OR CONTROL A CUSTOMER'S RESALE PRICES OR OTHERWISE RESTRICT A CUSTOMER'S RESALE ACTIVITIES WITHOUT CONSULTING COMPANY COUNSEL. IT IS AGAINST COMPANY POLICY TO REQUIRE A CUSTOMER TO PURCHASE ONE PRODUCT AS A CONDITION TO SELLING ANOTHER PRODUCT. IT IS AGAINST COMPANY POLICY TO CONDITION COMPANY PURCHASES FROM A CUSTOMER ON RECIPROCAL PURCHASES FROM THAT CUSTOMER. IT IS AGAINST COMPANY POLICY TO AGREE WITH A CUSTOMER TO REFUSE TO DEAL WITH A THIRD PARTY.

Customer Termination

The antitrust laws generally permit a person to decide not to do business with another person, and this generally includes the right to terminate an existing customer (including distributors, sales

representatives and end users). However, terminated customers frequently institute lawsuits against former suppliers seeking damages for alleged antitrust violations. Even when there is little basis for the suit, it can be difficult and expensive to defend. Therefore, prior to terminating a customer, you should work with Company Counsel to be sure there is a lawful basis for the termination and to minimize the risk of suit. If you have the authority to terminate a distributor, make sure that you document the reasons for the termination.

A customer termination resulting from an agreement with a competitor or another customer generally will constitute an antitrust violation. Because agreements can be inferred from circumstantial evidence, you should avoid communications with other parties concerning our relationships with our customers. Respond to complaints about a customer by indicating that it is Company policy to decide independently whether and upon what terms to do business with each of our customers.

IT IS AGAINST COMPANY POLICY TO ALLOW ONE CUSTOMER TO INFLUENCE THE COMPANY'S DEALINGS WITH ANOTHER CUSTOMER. DO NOT TERMINATE OR REFUSE TO SELL TO AN EXISTING CUSTOMER WITHOUT CONSULTING COMPANY COUNSEL.

Price Discrimination That Lessens Competition

The Robinson-Patman Act prohibits discrimination in price between different purchasers of commodities of like grade and quality sold for use, consumption or resale in the United States, where the effect of the discrimination may be to lessen competition or to tend to create a monopoly in any line of commerce. Price differences may be permissible, however, if the two customers do not compete with one another; or if it is necessary to lower the price to one customer in order to meet competition. In establishing that a price is lowered to "meet competition," the employee responsible for setting prices should ensure that (a) the lower price "meets", and does not beat the price charged by a competitor; (b) the lower price is limited to customers to whom the competitor made the lower price available; (c) the lower price is set in good faith, that is, in an honest effort to meet competition, based on facts known to the employees responsible for setting prices; and (d) the lower price is offered only so long as it is necessary in order to meet competition. The employee responsible for setting prices should document as fully as possible, the basis for offering the lower price.

COMPANY EMPLOYEES AND AGENTS ARE PROHIBITED FROM OFFERING A CUSTOMER PRICES OR TERMS MORE FAVORABLE THAN THOSE OFFERED TO COMPETING CUSTOMERS WITHOUT FIRST CONSULTING WITH COMPANY COUNSEL TO ENSURE THAT SUCH DISCRIMINATORY PRICING IS LEGAL.

COMMUNICATION

Careful language will not avoid antitrust liability when the conduct involved is illegal. But careful language can avoid the situation where perfectly lawful conduct becomes suspect because of a poor choice of words. Careless and inappropriate language in Company communications can have an extremely adverse effect on the Company's position in an antitrust investigation or lawsuit. It is not enough for the Company's public statements to be true; they cannot be misleading or readily susceptible to misinterpretation.

If the Company is investigated by a governmental agency or sued by a third party, no Company document is absolutely exempt from disclosure. To minimize the risk of damage to the Company as a result of poor communication or misinterpretation, always use common sense, always think before you speak or commit something to paper, and try to adhere to the following guidelines:

- Do not use words that suggest "guilt" ("Destroy after reading").
- Be careful of the exaggerated use of powerful words ("This sales program will DESTROY the competition").
- Do not speculate as to the legality or legal consequences of conduct or attempt to paraphrase legal advice.
- Use particular care when discussing competition and prices. Avoid giving the false impression that the Company is not competing vigorously, that its prices are based on anything other than its own business judgment, or that its public statements are "signals" to competitors.
- When discussing the prices or plans of competitors, clearly identify the source of your information so that there will be no implication that the information was obtained under a collusive arrangement with a competitor.
- Do not disparage the products of competitors.
- Keep in mind that our distributors are independent and that their obligations to us are limited to those set out in our distribution and sales representative agreements.
- Avoid any misimpression that special treatment is being accorded to a particular customer or class of customers.

CONCLUSION

This Policy contains general guidelines for employee conduct, not an exhaustive analysis of the law. It is not possible to anticipate all of the questions that may arise under the antitrust laws, or to address the issues that may arise in each aspect of the Company's businesses. Each employee is encouraged to seek the advice of Company Counsel as the need arises.

Antitrust: Compliance in a Global Economy

What Is Antitrust?

- U.S. antitrust laws protect competition.
- U.S. antitrust laws apply to activities inside the U.S.
- U.S. antitrust laws apply to activities outside the U.S. that have an effect on U.S. commerce.
- The EU and other countries in which we do business all have antitrust laws.

What Is The Cost Of Non-Compliance?

- Criminal fines of up to twice the loss suffered by the victims or twice the benefit gained by the company.
- Civil damages of up to three-times the actual damages caused to the victims, plus attorneys fees.
- Criminal investigations outside the U.S.
- Outside counsel fees!

What Is The Cost Of Non-Compliance?

- Time and resources diverted from business to respond to litigation and government investigations.
- Relationships with the public, customers and vendors.
- Prison! Most antitrust violations prosecuted are felonies. Individuals found guilty of felony violations go to prison.

Does DOJ Care About Our Company?

YES! DOJ is an equal opportunity prosecutor of antitrust violations.

Why Antitrust Training?

- Compliance is a matter of good business conduct and ethics.
- Compliance is a matter of good business.
- Compliance will keep you out of jail.
- Compliance will keep government out of your business.

What Is At Risk?

Everything!

Agreements With Competitors

Illegal agreements with competitors are felonies, regardless of the circumstances.

- The only defense is innocence.
- Guilt does not depend on the success of the agreement.
- Guilt does not depend on there being actual damage to competition.
- Guilt does not require a written agreement.
- Guilt does not require antitrust activity within the U.S.

Agreements With Competitors

Illegal agreements with competitors include agreements to:

- Fix Prices
- Rig Bids
- Allocate Markets

Price Fixing

- Competitors must determine their prices and other sales terms independently.
- Any agreement with a competitor affecting prices or other terms of sale is illegal.
- A price fixing agreement is a criminal offense even if the agreement is not implemented.
- A price fixing agreement does not have to be written, or even spoken, to be illegal.
- Individuals convicted of price fixing go to jail!

Bid Rigging

- Bid rigging is an understanding among competitors relating to a bid or any method for determining how prices or bids are set.
- Bid rigging is illegal regardless of the circumstances.
- Bid rigging is a criminal offense even if it has no effect on the market.
- An agreement to rig bids may be inferred from the circumstances.
- Individuals convicted of bid rigging go to jail!

Market Allocation

- Market allocation agreements occur where competitors agree not to sell in the same geographic market, in the same product market or to the same customers.
- Market allocation is illegal even if it has no proven effect on the market.
- A market allocation arrangement does not have to be written, or even spoken, to be illegal.
- Individuals convicted of market allocation go to jail!

Company Amateur Theater Presents:

"Call My Lawyer!"

Rules for Dealing with Competitors

- Don't discuss bids, prices, pricing methods, or other sales terms.
- Don't discuss costs, production levels, inventories, marketing plans, or other competition-sensitive information.
- Don't divide customers, markets or territories.
- Remember there are no geographic boundaries for antitrust violations that affect U.S. commerce.

When Competitors Are Also Customers

- Don't discuss bids, prices, pricing methods, or other sales terms, *except as necessary*.
- Don't discuss costs, production levels, inventories, marketing plans, or other competition-sensitive information, *except as necessary*.
- Don't divide customers, markets or territories.
- Where appropriate, create a "Chinese Wall."

Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For

An Antitrust Primer

This primer briefly describes the most common antitrust violations and outlines those conditions and events that indicate anticompetitive collusion.

Introduction

American consumers have the right to expect the benefits of free and open competition — the best goods and services at the lowest prices. Public and private organizations often rely on a competitive bidding process to achieve that end. The competitive process only works, however, when competitors set prices honestly and independently. When competitors collude, prices are inflated and the customer is cheated. Price fixing, bid rigging, and other forms of collusion are illegal and are subject to criminal prosecution by the Antitrust Division of the United States Department of Justice.

In recent years, the Antitrust Division has successfully prosecuted regional, national, and international conspiracies affecting construction, agricultural products, manufacturing, service industries, consumer products, and many other sectors of our economy. Many of these prosecutions resulted from information uncovered by members of the general public who reported the information to the Antitrust Division. Working together, we can continue the effort to protect and promote free and open competition in the marketplaces of America.

This primer contains an overview of the federal antitrust laws and the penalties that may be imposed for their violation. It briefly describes the most common antitrust violations and outlines those conditions and events that indicate anticompetitive collusion so that you might better identify and report suspicious activity.

Federal Antitrust Enforcement

Enacted in 1890, the Sherman Act is among our country's most important and enduring pieces of economic legislation. The Sherman Act prohibits any agreement among competitors to fix prices, rig bids, or engage in other anticompetitive activity. Criminal prosecution of Sherman Act violations is the responsibility of the Antitrust Division of the United States Department of Justice.

Violation of the Sherman Act is a felony punishable by a fine of up to $10 million for corporations, and a fine of up to $350,000 or 3 years imprisonment (or both) for individuals, if the offense was committed before June 22, 2004. If the offense was committed on or after June 22, 2004, the maximum Sherman Act fine is $100 million for corporations and $1 million for individuals, and the maximum Sherman Act jail sentence is 10 years. Under some circumstances, the maximum potential fine may be increased above the Sherman Act maximums to twice the gain or loss involved. In addition, collusion among competitors may constitute violations of the mail or wire fraud statute, the false statements statute, or other federal felony statutes, all of which the Antitrust Division prosecutes.

In addition to receiving a criminal sentence, a corporation or individual convicted of a Sherman Act violation may be ordered to make restitution to the victims for all overcharges. Victims of bid-rigging and price-fixing conspiracies also may seek civil recovery of up to three times the amount of damages suffered.

A corporation or individual convicted of a Sherman Act violation may be ordered to make restitution to the victims for all overcharges. Victims of bid-rigging and price-fixing conspiracies also may seek civil recovery of up to three times the amount of damages suffered.

Forms of Collusion

Most criminal antitrust prosecutions involve price fixing, bid rigging, or market division or allocation schemes. Each of these forms of collusion may be prosecuted criminally if they occurred, at least in part, within the past five years. Proving such a crime does not require us to show that the conspirators entered into a formal written or express agreement. Price fixing, bid rigging, and other collusive agreements can be established either by direct evidence, such as the testimony of a participant, or by circumstantial evidence, such as suspicious bid patterns, travel and expense reports, telephone records, and business diary entries.

Under the law, price-fixing and bid-rigging schemes are per se violations of the Sherman Act. This means that where such a collusive scheme has been established, it cannot be justified under the law by arguments or evidence that, for example, the agreed-upon prices were reasonable, the agreement was necessary to prevent or eliminate price cutting or ruinous competition, or the conspirators were merely trying to make sure that each got a fair share of the market.

Price Fixing

Price fixing is an agreement among competitors to raise, fix, or otherwise maintain the price at which their goods or services are sold. It is not necessary that the competitors agree to charge exactly the same price, or that every competitor in a given industry join the conspiracy. Price fixing can take many forms, and any agreement that restricts price competition violates the law. Other examples of price-fixing agreements include those to:

- Establish or adhere to price discounts.
- Hold prices firm.
- Eliminate or reduce discounts.
- Adopt a standard formula for computing prices.
- Maintain certain price differentials between different types, sizes, or quantities of products.
- Adhere to a minimum fee or price schedule.
- Fix credit terms.
- Not advertise prices.

In many cases, participants in a price-fixing conspiracy also establish some type of policing mechanism to make sure that everyone adheres to the agreement.

Bid Rigging

Bid rigging is the way that conspiring competitors effectively raise prices where purchasers — often federal, state, or local governments — acquire goods or services by soliciting competing bids.

Essentially, competitors agree in advance who will submit the winning bid on a contract being let through the competitive bidding process. As with price fixing, it is not necessary that all bidders participate in the conspiracy.

Bid rigging also takes many forms, but bid-rigging conspiracies usually fall into one or more of the following categories:

Bid Suppression: In bid suppression schemes, one or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning competitor's bid will be accepted.

Complementary Bidding: Complementary bidding (also known as "cover" or "courtesy" bidding) occurs when some competitors agree to submit bids that either are too high to be accepted or contain special terms that will not be acceptable to the buyer. Such bids are not intended to secure the buyer's acceptance, but are merely designed to give the appearance of genuine competitive bidding. Complementary bidding schemes are the most frequently occurring forms of bid rigging, and they defraud purchasers by creating the appearance of competition to conceal secretly inflated prices.

Bid Rotation: In bid rotation schemes, all conspirators submit bids but take turns being the low bidder. The terms of the rotation may vary; for example, competitors may take turns on contracts according to the size of the contract, allocating equal amounts to each conspirator or allocating volumes that correspond to the size of each conspirator company. A strict bid rotation pattern defies the law of chance and suggests collusion is taking place.

Subcontracting: Subcontracting arrangements are often part of a bid-rigging scheme. Competitors who agree not to bid or to submit a losing bid frequently receive subcontracts or supply contracts in exchange from the successful low bidder. In some schemes, a low bidder will agree to withdraw its bid in favor of the next low bidder in exchange for a lucrative subcontract that divides the illegally obtained higher price between them.

Almost all forms of bid-rigging schemes have one thing in common: an agreement among some or all of the bidders which predetermines the winning bidder and limits or eliminates competition among the conspiring vendors.

Market Division

Market division or allocation schemes are agreements in which competitors divide markets among themselves. In such schemes, competing firms allocate specific customers or types of customers, products, or territories among themselves. For example, one competitor will be allowed to sell to, or bid on contracts let by, certain customers or types of customers. In return, he or she will not sell to, or bid on contracts let by, customers allocated to the other competitors. In other schemes, competitors agree to sell only to customers in certain geographic areas and refuse to sell to, or quote intentionally high prices to, customers in geographic areas allocated to conspirator companies.

Detecting Bid Rigging, Price Fixing, And Other Types Of Collusion

Bid rigging, price fixing, and other collusion can be very difficult to detect. Collusive agreements are usually reached in secret, with only the participants having knowledge of the scheme. However, suspicions may be aroused by unusual bidding or pricing patterns or something a vendor says or does.

Bid or Price Patterns

Certain patterns of bidding or pricing conduct seem at odds with a competitive market and suggest the possibility of collusion:

Bids

- The same company always wins a particular procurement. This may be more suspicious if one or more companies continually submit unsuccessful bids.
- The same suppliers submit bids and each company seems to take a turn being the successful bidder.
- Some bids are much higher than published price lists, previous bids by the same firms, or engineering cost estimates.
- Fewer than the normal number of competitors submit bids.
- A company appears to be bidding substantially higher on some bids than on

Collusion is more likely to occur if there are few sellers. The fewer the sellers, the easier it is for them to get together and agree on prices, bids, customers, or territories.

other bids, with no apparent cost differences to account for the disparity.

- Bid prices drop whenever a new or infrequent bidder submits a bid.
- A successful bidder subcontracts work to competitors that submitted unsuccessful bids on the same project.
- A company withdraws its successful bid and subsequently is subcontracted work by the new winning contractor.

Prices

- Identical prices may indicate a price-fixing conspiracy, especially when:
  - Prices stay identical for long periods of time.
  - Prices previously were different.
  - Price increases do not appear to be supported by increased costs.
- Discounts are eliminated, especially in a market where discounts historically were given.
- Vendors are charging higher prices to local customers than to distant customers. This may indicate local prices are fixed.

Suspicious Statements or Behavior

While vendors who collude try to keep their arrangements secret, occasional slips or carelessness may be a tip-off to collusion. In addition, certain patterns of conduct or statements by bidders or their employees suggest the possibility of collusion. Be alert for the following situations, each of which has triggered a successful criminal antitrust prosecution:

- The proposals or bid forms submitted by different vendors contain irregularities (such as identical calculations or spelling errors) or similar handwriting, typeface, or stationery. This may indicate that the designated low bidder may have prepared some or all of the losing vendor's bid.
- Bid or price documents contain white-outs or other physical alterations indicating last-minute price changes.
- A company requests a bid package for itself and a competitor or submits both its and another's bids.
- A company submits a bid when it is incapable of successfully performing the contract (likely a complementary bid).
- A company brings multiple bids to a bid opening and submits its bid only after determining (or trying to determine) who else is bidding.
- A bidder or salesperson makes:
  - Any reference to industry-wide or association price schedules.
  - Any statement indicating advance (non-public) knowledge of competitors' pricing.
  - Statements to the effect that a particular customer or contract "belongs" to a certain vendor.
  - Statements that a bid was a "courtesy," "complementary," "token," or "cover" bid.
  - Any statement indicating that vendors have discussed prices among themselves or have reached an understanding about prices.

A Caution About Indicators of Collusion

While these indicators may arouse suspicion of collusion, they are not proof of collusion. For example, bids that come in well above the estimate may indicate collusion or simply an incorrect estimate. Also, a bidder can lawfully submit an intentionally high bid that it does not think will be successful for its own independent business reasons, such as being too busy to handle the work but wanting to stay on the bidders' list. Only when a company submits an intentionally high bid because of an agreement with a competitor does an antitrust violation exist. Thus, indicators of collusion merely call for further investigation to determine whether collusion exists or whether there is an innocent explanation for the events in question.

Antitrust violations are serious crimes that can cost a company hundreds of millions of dollars in fines and can send an executive to jail for up to ten years.

These conspiracies are by their nature secret and difficult to detect.

The Antitrust Division needs your help in uncovering them and bringing them to our attention.

Conditions Favorable To Collusion

While collusion can occur in almost any industry, it is more likely to occur in some industries than in others. An indicator of collusion may be more meaningful when industry conditions are already favorable to collusion.

- Collusion is more likely to occur if there are few sellers. The fewer the number of sellers, the easier it is for them to get together and agree on prices, bids, customers, or territories. Collusion may also occur when the number of firms is fairly large, but there is a small group of major sellers and the rest are "fringe" sellers who control only a small fraction of the market.
- The probability of collusion increases if other products cannot easily be substituted for the product in question or if there are restrictive specifications for the product being procured.
- The more standardized a product is, the easier it is for competing firms to reach agreement on a common price structure. It is much harder to agree on other forms of competition, such as design, features, quality, or service.
- Repetitive purchases may increase the chance of collusion, as the vendors may become familiar with other bidders and future contracts provide the opportunity for competitors to share the work.
- Collusion is more likely if the competitors know each other well through social connections, trade associations, legitimate business contacts, or shifting employment from one company to another.
- Bidders who congregate in the same building or town to submit their bids have an easy opportunity for last-minute communications.

What You Can Do

Antitrust violations are serious crimes that can cost a company hundreds of millions of dollars in fines and can send an executive to jail for up to ten years. These conspiracies are by their nature secret and difficult to detect. The Antitrust Division needs your help in uncovering them and bringing them to our attention.

If you think you have a possible violation or just want more information about what we do, contact the Citizen Complaint Center of the Antitrust Division:

E-mail:
antitrust.complaints@usdoj.gov

Phone:
1-888-647-3258 (toll-free in the U.S. and Canada) or 1-202-307-2040

Address:
Citizen Complaint Center
Antitrust Division, U.S. Dept. of Justice
950 Pennsylvania Ave. NW, Suite 3322
Washington, DC 20530

Antitrust Scenarios

#1

Bill: Alex, it's good to see you again. How've you been?

Alex: Great. Life is treating me well and the Yankees are looking good. How about you?

Bill: The stock market's down, my golf score is up, and I'm having trouble meeting my targets for the quarter. Volume is okay, but prices are so low I'm practically giving the stuff away.

Alex: That's too bad. Business is a little slow for me too.

Bill: There's no reason for us to be suffering like this. If we started working like we're on the same team, we could both benefit. Jack and I over at M&M have been talking for the last two months and things are starting to improve.

Alex: You know I can't talk to you about our prices. And you shouldn't be talking to Jack about them either.

Bill: I know, I know. Jack and I don't talk about pricing. We talk about baseball. One of your favorite subjects. It works like this. When he's up at bat, I let him know what kind of pitch is coming. When I'm up at bat, he does the same for me. The pitcher doesn't know. The umpire doesn't know. It's just a little friendly cooperation to improve my batting average.

Alex: Are you saying that you and Jack are agreeing on pricing.

Bill: I'm not saying anything. Want to play?

 # 2

Jill: Hi Dick. I'm always happy to see my favorite supplier.

Dick: And I'm always happy to see my favorite customer.

Jill: I'm happy to hear you say that. I heard you picked up the KRC account. I'd like to be able to congratulate you, but I have to tell you, they're nothing but trouble. Did you hear the reason their last vendor dropped them?

Dick: No. What happened?

Jill: Well, let me just say that you'll live to regret it if you continue to sell to them.

Dick: Are you warning me or threatening me?

Jill: It's not a threat. It's just that I heard from our purchasing department that you may lose our account soon. But I'm good friends with the head of purchasing and I'm confident that I can convince him to stick with you. Our account is about 3 times the size of KRC's, isn't it?

Dick: Well, if you say KRC's former vendor had problems with KRC, then maybe we should turn down future orders from them.

Jill: That would be a good business decision. By the way, I heard you've got a box seats at the Stadium. Why don't you give me some playoff tickets, and I'll put in that good word for you with purchasing!

 # 3

Bob: I saw your numbers for the first quarter. I'm sorry. I think I might have some information that will help you.

Dan: I need all the help I can get.

Bob: I'm pretty friendly with one of our competitors in Europe. He has all the numbers on their U.S. sales as well. Last time we met, I asked him about their delivery terms, payment terms and discounts in the U.S. I didn't ask about prices, because I know that would be a violation of U.S. law. I also asked him about their production schedule for the coming year.

Dan: I don't know the guy. I wasn't at the meeting. The information came from an employee in Germany. I haven't asked for anything. You're not giving me prices. We're not going to agree to anything. Sure, I don't see any problem. Give me the information.

Antitrust Survey

1. A competitor proposes to limit sales of Product A to California if Company agrees not to sell to customers in that state. You can agree, provided
   a) Company does not currently have any Product A customers in California and Company is bound to lose business if the competitor expands its sales of Product A beyond California.
   b) Company has Product A market share of less than 5% and Company and the competitor have combined market share of less than 10%.
   c) Company maintains the right to sell to customers who intend to transport Product A to California themselves.
   d) the agreement only covers one type of product, and Company and the competitor will compete on all other products.
   e) the limitation is strictly territorial and does not place any limitation on sales to specific customers or in particular markets.
   f) you do not mind going to prison.

2. A competitor calls you and asks about Company's discount policy. You should respond that:
   a) you will talk only if the discussion is limited to discount schedules generally and not discounts offered to specific customers. (You hope he agrees to this limitation, because such a discussion would likely support Company's belief that volume discounts are standard in the industry, which would be useful from a Robinson-Patman perspective).
   b) you can only discuss published discount schedules that are routinely provided to customers.
   c) you cannot discuss discount policy, because Company and the competitor have a combined market share of less than 5%.
   d) you cannot discuss discount policy under any circumstances.
   e) you cannot provide Company's discount schedule, but he should feel free to contact Bob Jones, who works for a mutual customer and whom you know received a copy of the Company discount schedule yesterday.
   f) you need your manager's approval before discussing discount rates and policy with someone who is not a customer. You immediately call your manager for his approval.

3. Apollo, Inc., a competitor and customer, suggests that Company stop supplying product to Isis Corporation, another competitor and customer, because Isis has been lowering its prices and trying to steal customers from Company and Apollo. You should:
   a) agree, provided that Company's sales to Isis are small and do not compensate for the money lost due to Isis' sales tactics.
   b) agree, but be sure to avoid any discussion of pricing with Apollo.
   c) agree, but immediately report the discussion to your supervisor and the Legal Department.
   d) disagree, and continue to sell to Isis.
   e) disagree, and discuss with your supervisor and the Legal Department whether to stop sales to Isis.
   f) disagree, and stop selling to Isis.

4. You are annoyed by the tactics your customer uses to bargain down the price between you and one of your competitors. You mention to your competitor that it would be in both of your interests to show the customer some resistance. You say that you want your competitor to negotiate more fiercely. Your next step is to:
   a) come to an understanding with the competitor to negotiate harder with the customer, provided you don't discuss minimum prices.
   b) come to an understanding with the competitor to set minimum prices for the customer, provided the minimum price is no higher than the market price.
   c) come to an understanding with the competitor to set minimum prices for the customer, provided the minimum price is no higher than the lowest price at which you have sold to the customer this year.
   d) come to an understanding with the competitor to set minimum prices for the customer, provided the minimum price is no higher than the lowest price at which either you or your competitor have sold to the customer this year.
   e) say that you are only kidding, that you are not suggesting price fixing, and then change the subject.
   f) call the Legal Department (after all, Company pays Legal for services each year and we want to be sure you're getting your money's worth).

5. Customer East has complained that his company is forced to pay list price for product (FOB plant) while his competitor, Customer West, is charged less for the same product (also FOB plant). The difference in pricing is clearly justified if:
   a) West buys in larger quantities.
   b) West has been buying from Company for much longer.
   c) West has a long-term contract and East buys on a spot basis.
   d) West threatened to buy the product from one of Company's competitor for less than Company's list price.
   e) West is located on the east coast and East is located on the west coast.
   f) West and East have different customer bases.

6. One year has passed since question 5 and Customer East is once again complaining that his company is forced to pay list price for product while his competitor, Customer West, is charged less for the same product. You respond that you lowered the price to West in order to "meet comp." This is an adequate defense to price discrimination, provided:
   a) West disclosed the name of Company's competitor.
   b) West disclosed the price offered by Company's competitor, then Company offered West a price 5 cents lower than East's price.
   c) Company last confirmed the competitive offer less than three months ago.
   d) You promise East that if they provide Company with evidence of a competitive offer, Company will lower its price to East.
   e) Company spoke to its customer and confirmed that the competitive offer made to West was legitimate, documented this fact, and only then beat the offer by 5 cents.
   f) Company spoke to its customer and confirmed that the competitive offer was legitimate, documented this fact, and only then offered West the same price offered by Company's competitor.

7. You have decided to stop selling to one of your customers. Which of the following is a legal basis for discontinuing sales:
   a) Company has entered into an exclusive contract with another company for the products required by the customer.
   b) You think the customer has an attitude problem, and the volume of its business does not justify the heartburn you get every time you have to talk to the buyer.
   c) Company does not like the way the customer prices product for resale.
   d) Company believes the customer is about to go bankrupt.
   e) All of the above.
   f) None of the above.

8. At a trade show, you sit down at a table where three of Company's competitors are discussing the possibility of reducing production by 10%.

a) This discussion is permissible if lowering production is necessary to avoid below-cost dumping at a later date.
b) This discussion is permissible so long as the competitors agree not to raise prices as a result of lower supply.
c) This discussion is permissible so long as the competitors do not discuss pricing.
d) This discussion is permissible so long as no agreement is reached other than that each company will decide for themselves whether to reduce production.
e) This discussion is permissible so long as it is limited to short-term action, and does not involve reducing capacity.
f) In South Carolina, railroad companies may be held liable for scaring horses.

9. Company stops selling in Brazil. Company's Brazilian competitor decreases its sales into the US as a result. Company's action is:

a) illegal, because it reduces competition in the US.
b) illegal, because it was inevitable that the Brazilian competitor would decrease sales in the US if Company pulled out of Brazil.
c) legal, because US law doesn't govern Company's actions in Brazil.
d) legal, provided the parties did not agree in advance to this arrangement.
e) legal under US law, but requires an examination of Brazilian law.
f) None of the above.

10. You are at a customer meeting with a company that is also a competitor. You want to warn your customer representative that Company's prices are probably going to increase next quarter, because you want her to be able to plan her budget accordingly. You should

a) not say anything about the planned price increase, because it would be price signaling to a competitor.
b) not say anything about the planned price increase, because it may cause your customer to find another supplier.
c) not say anything about the planned price increase, because your customer may discuss your plans with your competitors.
d) not say anything about the planned price increase, because it is inappropriate to inform one customer before you inform your other customers.
e) not say anything about the planned price increase, because your supervisor may change his mind and keep prices at their current levels.
f) inform your customer, because she is responsible for purchasing and has no sales responsibility.

11. You are at a meeting with a prospective customer discussing a bid for a huge order. You know that at least two of your competitors have already bid for the business and that the customer is happy with at least one of the bids. You really want the business, because you think it could be the beginning of a very profitable long-term relationship. You plan to bid low to win the business. When the customer leaves the room to call you a cab, you notice that he has left the bids from two of your competitors on the table. There is a copy machine in the room. You should:

a) not look at the bids, because the customer may have planted fake bids on purpose to force you to bid lower than you otherwise would.
b) not look at the bids, because it is unethical to look at your customer's documents without the customer's knowledge and consent.
c) not look at the bids, because it is illegal to know the content of a competitor's bid, regardless of the means of discovery.
d) look at the bids, because your discovery of them was not intentional.
e) look at the bids, because they will enable Company to outbid the competition, possibly at a higher price than Company would otherwise bid.
f) look at the bids, but don't copy them, because at a later date the bids could be viewed as evidence that Company was engaged in bid rigging with its competitors.

Department of Justice

CORPORATE LENIENCY POLICY

The Division has a policy of according leniency to corporations reporting their illegal antitrust activity at an early stage, if they meet certain conditions. "Leniency" means not charging such a firm criminally for the activity being reported. (The policy also is known as the corporate amnesty or corporate immunity policy.)

A. **Leniency Before an Investigation Has Begun**

Leniency will be granted to a corporation reporting illegal activity before an investigation has begun, if the following six conditions are met:

1. At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;
2. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;
3. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation;
4. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;
5. Where possible, the corporation makes restitution to injured parties; and
6. The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

B. **Alternative Requirements for Leniency**

If a corporation comes forward to report illegal antitrust activity and does not meet all six of the conditions set out in Part A, above, the corporation, whether it comes forward before or after an investigation has begun, will be granted leniency if the following seven conditions are met:

1. The corporation is the first one to come forward and qualify for leniency with respect to the illegal activity being reported;
2. The Division, at the time the corporation comes in, does not yet have evidence against the company that is likely to result in a sustainable conviction;

3. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;

4. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation that advances the Division in its investigation;

5. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;

6. Where possible, the corporation makes restitution to injured parties; and

7. The Division determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward.

In applying condition 7, the primary considerations will be how early the corporation comes forward and whether the corporation coerced another party to participate in the illegal activity or clearly was the leader in, or originator of, the activity. The burden of satisfying condition 7 will be low if the corporation comes forward before the Division has begun an investigation into the illegal activity. That burden will increase the closer the Division comes to having evidence that is likely to result in a sustainable conviction.

C. **Leniency for Corporate Directors, Officers, and Employees**

If a corporation qualifies for leniency under Part A, above, all directors, officers, and employees of the corporation who admit their involvement in the illegal antitrust activity as part of the corporate confession will receive leniency, in the form of not being charged criminally for the illegal activity, if they admit their wrongdoing with candor and completeness and continue to assist the Division throughout the investigation.

If a corporation does not qualify for leniency under Part A, above, the directors, officers, and employees who come forward with the corporation will be considered for immunity from criminal prosecution on the same basis as if they had approached the Division individually.

D. **Leniency Procedure**

If the staff that receives the request for leniency believes the corporation qualifies for and should be accorded leniency, it should forward a favorable recommendation to the Office of Operations, setting forth the reasons why leniency should be granted. Staff should not delay making such a recommendation until a fact memo recommending prosecution of others is prepared. The Director of Operations will review the request and forward it to the Assistant Attorney General for final decision. If the staff recommends against leniency, corporate counsel may wish to seek an appointment with the Director of Operations to make their

views known. Counsel are not entitled to such a meeting as a matter of right, but the opportunity will generally be afforded.

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DEPARTMENT OF JUSTICE

"An Update of the Antitrust Division's Criminal Enforcement Program"

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Before the

ABA Section of Antitrust Law
Cartel Enforcement Roundtable

2005 Fall Forum

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An Update of the Antitrust Division's
Criminal Enforcement Program

The detection, prosecution, and deterrence of cartel offenses continue to be the highest priority of the Antitrust Division. The Division places a particular emphasis on combating international cartels that target U.S. markets because of the breadth and magnitude of the harm that they inflict on American businesses and consumers. This enforcement strategy has succeeded in cracking dozens of international cartels, securing convictions and jail sentences against culpable U.S. and foreign executives, and obtaining record-breaking corporate fines. For example:

- *Since May 1999*, more than 107 individuals have served, or are currently serving, prison sentences in cases prosecuted by the Antitrust Division. This total includes 20 foreign nationals from nine different countries who were sentenced to incarceration in U.S. prisons for violating U.S. antitrust laws.

- *In FY 2005*, 18 individual defendants prosecuted by the Antitrust Division were sentenced to a total of 13,157 days in jail; the highest number of jail days in the Division's history. The trend toward more frequently imposed and longer average prison terms for antitrust offenders has resulted in an average jail sentence over the past three years of approximately 19 months – more than two times the average jail sentence in the 1990's. The 11 longest jail sentences in the Division's history have all been imposed in the last five years.

- *Since FY 1997*, nearly $3 billion in criminal fines have been imposed in Division cases, well over 90 percent of this total were obtained in connection with the prosecution of international cartel activity.

- *FY 2005* was the third highest fine year in the Division's history, with over $338 million in criminal fines obtained against 13 corporations and 20 individuals. This total includes a $185 million criminal fine imposed against Hynix Semiconductor, Inc. – the fourth largest criminal antitrust fine ever – for its role in a conspiracy to fix the price of dynamic random access memory (DRAM) sold to computer manufacturers. FY 2006 started off strong on October 13, 2005, when Samsung Electronics Company, Ltd., a Korean manufacturer of DRAM and its U.S. subsidiary, Samsung Semiconductor Inc., were charged with participating in the DRAM price-fixing conspiracy and agreed to plead guilty and to pay a $300 million fine. Samsung's fine is the second largest criminal antitrust fine in U.S. history and the largest criminal fine since 1999.

- *In FY 2005*, three companies in addition to Hynix agreed to pay fines of $10 million or more. It is worth noting that the Supreme Court's decision in Blakely v. Washington, 124 S.Ct. 2531 (2004), has not limited the Division's ability to obtain heavy fines as nine corporate defendants have agreed to pay fines of $10 million or more since the Blakely decision.

As outlined further in the summary below, the stakes will continue to rise for companies and their executives who engage in antitrust offenses. In June 2004, the maximum penalties for Sherman Act violations were raised significantly by Congress. The new law, the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA), increased the maximum Sherman Act corporate fine to $100 million, the maximum individual fine to $1 million, and the maximum Sherman Act jail term to 10 years. The increased sentences will bring antitrust prison sentences in line with those for other white-collar crimes and ensure that corporate fines accurately reflect the enormous harm inflicted by cartels on our economy. The U.S. Sentencing Commission has promulgated a revised Antitrust Guideline which will provide for the imposition of sentences in accordance with the new statutory maximum. The revised Antitrust Guidelines will go into effect on November 1, 2005. ACPERA also enhances the incentive for corporations to self report illegal conduct by limiting the damages recoverable from an applicant to the Division's Corporate Leniency Program, that also cooperate with private plaintiffs in their damage actions against remaining cartel members, to the damages actually inflicted by the amnesty applicant's conduct.

INTERNATIONAL CARTEL ENFORCEMENT

Investigations. Currently, there are approximately 56 sitting grand juries investigating suspected international cartel activity. International cartel investigations account for almost half of the Division's grand jury investigations. The subjects and targets of the Division's international investigations are located on six continents and in roughly 25 different countries. However, the geographic scope of the criminal activity is even broader than these numbers reflect. Our investigations have uncovered meetings of international cartels in well over 100 cities in more than 35 countries, including most of the Far East and nearly every country in Western Europe.

Cartels Prosecuted. Since the beginning of FY 1997, the Division has prosecuted international cartels affecting well over *$10 billion* in U.S. commerce. The Division has prosecuted international cartels operating in a number of sectors including vitamins, textiles, construction, food and feed additives, food preservatives, chemicals, graphite electrodes (used in steel making), fine arts auctions, ocean tanker shipping, marine construction, marine transportation services, rubber chemicals, synthetic rubber and dynamic random access memory used in computers and servers. The cartel activity uncovered in these cases has cost U.S. businesses and consumers billions of dollars annually.

Fines Imposed. Of the nearly $3 billion in criminal fines imposed in Division cases since FY 1997, well over 90 percent were obtained in connection with the prosecution of international cartel activity. The Division has obtained fines of $10 million or more against U.S., Dutch, German, Japanese, Belgian, Swiss, British, Luxembourgian, Norwegian, Korean and Liechtenstein-based companies. In 42 of the 51 instances in which the Division has secured a corporate fine of $10 million or greater, the corporate defendants were foreign-based. These numbers reflect the fact that the typical international cartel likely consists of a U.S. company and three or four of its competitors that are market leaders in Europe, Asia, and throughout the world. (See Attached Chart of Sherman Act Violations Yielding a Corporate Fine of $10 Million or More.)

Foreign Corporate Defendants. Since the beginning of FY 1998, roughly 50 percent of corporate defendants in criminal cases brought by the Division were foreign-based. In FY 2001, the percentage of foreign-based firms charged by the Division rose to nearly 70 percent, and then returned to around 44 percent over the past four years.

PROSECUTION OF INDIVIDUALS

The Division has long supported the belief that the most effective way to deter and punish cartel activity is to hold the most culpable individuals accountable by seeking jail sentences. For reasons that cannot be explored in this summary, that view has taken hold.[1] Antitrust offenders are being sent to jail with increasing frequency and for longer periods of time.

Jail Sentences Reach an All-Time High. The average jail sentence in the 1990's was eight months but has more than doubled over the past five years, rising to an average of 18 months. The average jail sentence rose to 10 months in FY 2000, to 15 months in FY 2001, to 18 months in FY 2002, to 21 months in FY 2003, dipped back to 12 months in FY 2004 and rose to an all-time high of 24 months in FY 2005. In the last five years, over 100 years of imprisonment have been imposed on Antitrust Division offenders, with more than 40 defendants receiving jail sentences of one year or longer, including nine defendants in FY 2005.

Conviction Of Foreign Executives. The Division has prosecuted foreign executives from Austria, Belgium, Canada, France, Germany, Italy, Japan, Korea Mexico, Norway, the Netherlands, Sweden, Switzerland, and the United Kingdom for engaging in cartel activity, resulting in heavy fines and, in some cases, imprisonment. Since FY 2001, roughly one-fourth of the individual defendants in our cases have been foreign nationals. Foreign defendants from Canada, France, Germany, Sweden, Switzerland, the Netherlands, Norway, the United Kingdom, and Japan have served, or are currently serving, prison sentences in U.S. jails for violating U.S. antitrust laws.

Tracking Down International Fugitives. In 2001, the Division adopted a policy of placing indicted fugitives on a "Red Notice" list maintained by INTERPOL. A red notice watch is essentially an international "wanted" notice that, in many INTERPOL member nations, serves as a request that the subject be arrested, with a view toward extradition. Multiple fugitive

[1] For more information on Division policies and initiatives directed toward the prosecution of individual offenders, see, "Negotiating the Waters of International Cartel Prosecutions" speech by Gary R. Spratling, Deputy Assistant Attorney General, Antitrust Division, before Thirteenth Annual National Institute On White Collar Crime (March 4, 1999), available at http://www.usdoj.gov/atr/public/speeches/2275.htm; and "When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom?" speech by Scott D. Hammond, Director of Criminal Enforcement, Antitrust Division, before Fifteenth Annual National Institute On White Collar Crime (March 8, 2001), available at http://www.usdoj.gov/atr/public/speeches/7647.htm.

focusing solely on leniency programs. In November 2005, the seventh international cartel workshop will be held in Seoul, Korea and a day and a half will focus solely on issues related to the complex area of electronic evidence gathering. These workshops provide enforcers with the valuable opportunity to develop close working relationships, which then serve as the basis for future formal and informal cooperation. This informal cooperation among competition law enforcers is best evidenced by a number of recent investigations in which dawn raids, searches, service of grand jury subpoenas, and drop-in interviews were coordinated to occur simultaneously in multiple jurisdictions.

Assistance In Obtaining Foreign-Located Evidence. The improved cooperation with foreign law enforcement authorities already has provided us with increased access to foreign-located evidence and witnesses that has proven to be instrumental in the cracking of a number of international cartels. While there are constraints as to what can be revealed about the nature of this assistance, there is one example and one compelling statistic that demonstrate the breadth of this cooperation. The example – our investigation of bid-rigging on wastewater treatment plant construction contracts in Egypt, which were funded by USAID, was assisted by the execution of search warrants by foreign authorities on the Division's behalf to seize evidence abroad. In that investigation, over 100 German police officers assisted in the simultaneous execution of search warrants on multiple companies at several locations across Germany. The searches induced cooperation from subjects of the investigation, which previously had been lacking, and that was critical to the success of the cases we later brought. The statistic – in the past few years, foreign authorities from five different countries have executed search warrants at our request in more than a half-dozen of our international cartel investigations. This is a remarkable advancement in international cooperation.

Cooperation And Coordination Of Investigations. Our cooperation with foreign antitrust authorities has never been better or more effective. In February of 2003, four enforcement authorities, the Antitrust Division, the EC Directorate-General for Competition, the Canadian Competition Bureau, and the Japanese Fair Trade Commission, coordinated searches and drop-in interviews in an unprecedented level of cooperation. This represented the first time that an international cartel investigation had gone overt simultaneously in four jurisdictions. As noted in the EC's press release, inspectors from the EC and Member States searched 14 companies located in six Member States as a part of these parallel efforts. Overall, more than 250 investigators and agents were involved in the simultaneous launching of these investigations on three continents. Such coordination among multiple jurisdictions will occur more frequently and be a part of the next frontier of cartel investigations. Convergence in leniency programs has led to an increased number of simultaneous amnesty applications, which has resulted in more opportunities for multi-jurisdictional cooperation. It is no longer uncommon for international antitrust authorities to discuss investigative strategies and to coordinate searches, service of subpoenas, drop-in interviews, and the timing of charges in order to avoid the premature disclosure of an investigation and the possible destruction of evidence. Such cooperation will lead to more effective antitrust enforcement in the future and the detection, prosecution, and elimination of more cartels.

Adoption Of Legislation And Agreements To Foster Cooperation. Another example of governments' increased willingness to assist each other in the enforcement of anti-cartel laws can be seen in the May 2001 agreement between the U.K. and U.S. governments to remove a "side letter" to the U.K.-U.S. Mutual Legal Assistance Treaty ("MLAT"), which had excluded antitrust matters from the scope of the cooperation provisions of the MLAT. The types of assistance in antitrust matters that the U.K. can now provide to the Division include the use of the U.K. courts to take testimony from witnesses, obtain documents, and assist in the collection of criminal fines. In addition, the U.K. government recently adopted legislation that creates a new criminal offense for individuals who engage in hardcore cartel activity and provides for maximum jail sentences of up to five years for antitrust offenders. In addition, in the past few years, the Division has entered into antitrust cooperation agreements with four foreign governments -- Brazil, Israel, Japan, and Mexico. These new agreements complement agreements previously reached with Australia, Canada, the European Union, and Germany, and will foster cooperation between the U.S. and those governments with respect to the investigation and prosecution of international cartels and other aspects of antitrust enforcement. In November 1999, the Division's International Antitrust Enforcement Assistance Agreement with Australia became effective. This agreement is a comprehensive antitrust mutual legal assistance agreement, which allows the two countries to exchange evidence and assist each other's civil and criminal antitrust investigative efforts. The exchange of evidence between antitrust enforcement authorities certainly will increase in the years to come. In 1998 the OECD encouraged member countries to "co-operate with each other in enforcing their laws against [hard core] cartels" and the OECD's Competition Law and Policy Committee's Working Party 3 currently is considering a set of recommended practices to govern the formal exchange of evidence between competition law enforcement authorities. The adoption of recommended practices by the OECD will assist member countries to remove obstacles to effective co-operation in the enforcement of laws against hard-core cartels (including the adoption of national legislation and/or entering bilateral agreements) and will result in increased exchanges of evidence between competition law enforcement authorities.

Increased Foreign Enforcement. Of course, antitrust authorities in Asia, Europe, Australia and Canada and around the world are not merely assisting our investigations. They also have become increasingly aggressive in investigating and sanctioning cartels that victimize their consumers. Seemingly with each passing day, the antitrust community learns of a foreign government that has enacted a new antitrust law, created a new cartel investigative unit, obtained a record antitrust fine, or developed a new Corporate Leniency program. On February 2, 2005, the Australian Government announced that it will amend its competition law to introduce criminal penalties for serious cartel conduct. Australia's legislation is still pending. Effective September 5, 2005 the Australian Competition and Consumer Commission (ACCC) implemented a revised "First-In Immunity Policy for Cartel Conduct." The revised policy confers full amnesty from prosecution and penalty to the first eligible cartel participant to report its involvement in a cartel and cooperate with the ACCC's investigation and prosecution of other cartel members. In April 2005 major revisions to Japan's Antimonopoly Act were adopted, effective January 4, 2006. The amendments include a substantial increase in the administrative fine that the JFTC imposes on cartel participants, authority for JFTC to obtain compulsory search warrants in investigations on cartel conduct that is likely to be prosecuted criminally, and introduction of a leniency program that eliminates the administrative fine (and criminal prosecution) for the first company in the door prior to the commencement of a JFTC investigation, and reduction in the administrative fines imposed on the second and third leniency applicants. Also in April 2005, a number of measures were implemented that should strengthen the KFTC's anti-cartel program. The maximum administrative fine was doubled to 10% of sales. Furthermore, the KFTC revised its leniency program to provide that only the first two qualifying applicants will benefit from the leniency program, with the first applicant receiving a complete exemption from administrative fines and corrective measures and the second applicant receiving a 30% reduction in the administrative fine. The KFTC also added an amnesty plus program.

These examples of worldwide convergence in anti-cartel enforcement and commitment to investigating and severely sanctioning international cartels will certainly enhance the international deterrence and detection of cartel activity.

CRIMINAL FINES

Since the beginning of FY 1997, the Division has imposed nearly $3 billion in criminal fines. Sherman Act violations prosecuted by the Antitrust Division have yielded more than 50 corporate criminal fines of $10 million or more, including nine fines of $100 million or more, and one fine of $500 million – the largest criminal fine ever imposed in the United States under any criminal statute.

Corporate Fines Have Increased Dramatically. International cartels affect massive volumes of commerce. In some matters currently under investigation, the volume of commerce affected by the suspected conspiracy is over $1 billion per year and in roughly two-thirds of our international investigations, the volume of commerce affected is over $100 million over the term of the conspiracy. Because international cartels affect such a large volume of U.S. commerce and the U.S. Sentencing Guidelines fines are based in large part on the amount of commerce affected by the cartel, fines obtained by the Division have increased dramatically since FY 1997.

- Year-End Total Fines. In the 10 years prior to FY 1997, the Division obtained, on average, $29 million in criminal fines annually. In FY 1997, the Division collected $205 million in criminal fines – which was 500 percent higher than during any previous year in the Division's history. In FY 1999, the Division secured over $1.1 billion, which was more than the total fines the Antitrust Division had secured in the first 109 years of Sherman Act enforcement. In FYs 2000-2004, fines obtained exceeded $150 million, $280 million, $75 million, $107 million, and $350 million respectively. In FY 2005, the Division obtained more than $338 million in total fines, the third highest total in Division history, including:

    - In March 2005, Zeon Chemicals L.P. pled guilty and was sentenced to pay a $10.5 million criminal fine for participating in a conspiracy to fix prices of the synthetic rubber acrylonitrile-butadiene, also known as nitrile butadiene rubber

(NBR), which is used to manufacture a variety of products including automotive parts.

- Also in March 2005, in another rubber-related case, Dupont Dow Elastomers LLC, a company formed in 1996 by E.I. du Pont de Nemours & Company and The Dow Chemical Company, pled guilty and was sentenced to pay an $84 million criminal fine for participating in an international conspiracy to fix prices of polychloroprene rubber, also known as chloroprene rubber. Chloroprene rubber is a type of synthetic rubber which is used in a variety of products including tires, fabrics, furniture, and shoes. Both Zeon and DDE were part of a highly-successful line of cases in various rubber-related industries which yielded a total of more than $200 million in fines.

- Over the past year, the Division's high-profile investigation of the dynamic random access memory (DRAM) cartel has yielded total fines of more than $646 million. Three of the Division's five largest corporate fines resulted from this investigation. Most recently, on October 13, 2005, Samsung Electronics Company, Ltd., a Korean manufacturer of dynamic random access memory (DRAM) and its U.S. subsidiary, Samsung Semiconductor, Inc., were charged with participating in an international conspiracy to fix the price of DRAM sold to certain customers and agreed to plead guilty and to pay a $300 million fine. In May 2005, Korean DRAM manufacturer Hynix Semiconductor, Inc. pled guilty to participating in the same conspiracy and was sentenced to pay a $185 million criminal fine. In November 2004, German DRAM manufacturer Infineon Technologies also pled guilty to participating in the same conspiracy and was sentenced to pay a $160 million criminal fine. These fines were respectively the second, fourth and fifth largest criminal fines in Division history.

- FY 2005 was also a record year for domestic cartel enforcement. In June 2005, Irving Materials, Inc., an Indiana ready mixed concrete producer, pled guilty to fixing the price of ready mixed concrete in the Indianapolis area and was sentenced to pay a $29.2 million criminal fine. This fine was the largest ever in a domestic antitrust investigation.

- Higher Top-End Fines. Before 1994, the largest corporate fine ever imposed for a single Sherman Act count was $6 million. However, today Sherman Act violations have yielded fines of $10 million or more against more than 50 corporate defendants. The Division has obtained fines of $100 million or more in nine cases:

  - **$500 million** against F. Hoffmann-La Roche (vitamin cartel - May 1999), largest fine ever imposed in a U.S. criminal prosecution of any kind;

  - **$300 million** against Samsung (DRAM - October 2005);

  - **$225 million** against BASF AG (vitamin cartel - May 1999);

  - **$185 million** against Hynix Semiconductor (DRAM - September 2004);

  - **$160 million** against Infineon Technologies AG (DRAM - September 2004);

  - **$135 million** against SGL Carbon AG (graphite electrodes cartel - May 1999);

  - **$134 million** against Mitsubishi Corp. (graphite electrodes cartel - May 2001);

  - **$110 million** against UCAR International (graphite electrodes cartel - April 1998); and

  - **$100 million** against Archer Daniels Midland Company (lysine and citric acid cartels - October 1996).

CORPORATE LENIENCY PROGRAM

In August 1993, the Division revised its Corporate Leniency Program to make it easier and more attractive for companies to come forward and cooperate with the Division.[2] Three major revisions were made to the program: (1) amnesty is automatic if there is no pre-existing investigation; (2) amnesty may still be available even if cooperation begins after the investigation is underway; and (3) all officers, directors, and employees who cooperate are protected from criminal prosecution.[3] As a result of these changes, the Leniency Program is the Division's most

[2]Antitrust Division, U.S. Department Of Justice, Corporate Leniency Policy (1993), *available at* http://www.usdoj.gov/atr/public/guidelines/lencorp.htm

[3]For more information on the requirements and application of the Division's Amnesty Program, see, Antitrust Division, U.S. Department of Justice Corporate Leniency Policy (1993), *available at* http://www.usdoj.gov/atr/public/guidelines/0091.htm; "Cornerstones of an Effective Leniency Program" speech by Scott D. Hammond, before ICN Workshop on Leniency Programs (November 22 - 23, 2004), *available at* http://www.usdoj.gov/atr/public/speeches/206611.htm; "When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom?," speech by Scott D. Hammond, Fifteenth Annual National Institute On White Collar Crime (March 8, 2001), *available at* http://www.usdoj.gov/atr/public/speeches/7647.htm; "Detecting And Deterring Cartel Activity

effective generator of international cartel cases, and it is the Department's most successful leniency program. Moreover, it has served as a model for similar corporate leniency programs that have been adopted by antitrust authorities around the world.

Application Rate. The revised Corporate Leniency Program has resulted in a surge in amnesty applications. Under the old policy, the Division obtained roughly one amnesty application per year. Under the new policy, the application rate has jumped to roughly two per month. As a result of this increased interest, the Division frequently encounters situations where a company approaches the government within days, and in some cases less than one business day, after one of its co-conspirators has secured its position as first in line for amnesty. Of course, only the first company to qualify receives amnesty.

Case Generator. Since the Division revised its leniency program, cooperation from amnesty applications has resulted in scores of convictions and more than $2 billion in criminal fines. In fact, the majority of the Division's major international investigations have been advanced through the cooperation of an amnesty applicant.

Foreign Authorities Following The U.S. Model. The extraordinary success of the Division's leniency program has generated widespread interest around the world. We have advised a number of foreign governments in drafting and implementing effective leniency programs in their jurisdictions. As a result, countries such as Japan, Australia, Brazil, Canada, Germany, Ireland, Korea, and the United Kingdom have announced new or revised leniency programs, with still other countries in the process of following. Most significant was the European Union's adoption of a revised leniency program in February 2002. The new program establishes a far more transparent and predictable policy than its predecessor and brings the EC's program closely in line with the Division's Corporate Leniency Policy. In fact, in greatly reducing the amount of discretion involved in assessing amnesty applications and in creating the opportunity for companies to qualify for full immunity after an investigation has begun, the blockbuster revisions are similar to the ones made by the Division when we successfully expanded our program in August 1993. The convergence in leniency programs has made it much easier and far more attractive for companies to simultaneously seek and obtain leniency in the United States, Europe, Canada, and in other jurisdictions where the applicants have exposure.

Through An Effective Leniency Program," speech by Scott D. Hammond, before International Workshop on Cartels (November 21-22, 2000), *available at* http://www.usdoj.gov/atr/public/speeches/9928.htm; "Making Companies An Offer They Shouldn't Refuse," speech by Gary R. Spratling, before Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust (February 16, 1999), *available at* http://www.usdoj.gov/atr/public/speeches/2247.htm; "The Corporate Leniency Policy: Answers To Recurring Questions," speech by Gary R. Spratling, Deputy Assistant Attorney General, Antitrust Division, before ABA Antitrust Section 1998 Spring Meeting (April 1, 1998), *available at* http://www.usdoj.gov/atr/public/speeches/1626.htm.

Amnesty Rewards. The DRAM vitamin, graphite electrodes, fine arts auctions, USAID construction, and rubber chemicals investigations offer five prime examples of the stunning incentives and rewards to companies *and their executives* that take advantage of the Amnesty Program. In each of these matters, the amnesty applicant paid *zero* dollars in criminal fines, and its cooperating executives received nonprosecution protection.

- **DRAM.** In the DRAM, investigation, the amnesty applicant's cooperation allowed the Division to quickly crack this high-tech international cartel leading to plea agreements with Samsung, Hynix, Infineon and four Infineon executives. Total fines resulting from this investigation currently exceed $646 million. Four former Infineon executives, including three German nationals, plead guilty and served jail sentences ranging from four to six months. This investigation is ongoing.

- **Rubber Chemicals**. The amnesty applicant's cooperation resulted in the prosecution of Crompton Corporation and Bayer AG and fines totaling $116 million. In addition, two former Crompton executives and two former Bayer executives pled guilty to participating in the rubber chemicals conspiracy and are cooperating with the investigation. Two former top Bayer AG executives were indicted in August 2005 for their participation in the rubber chemicals conspiracy and remain international fugitives. This investigation is ongoing.

- **Vitamins**. In the vitamin investigation, the amnesty applicant's cooperation directly led to F. Hoffmann-La Roche's (HLR) and BASF AG's decision to plead guilty and pay fines of $500 million and $225 million, respectively. Six Swiss and German executives from HLR and BASF were convicted for their role in the reported conspiracy, and all served time in U.S. prisons.

- **Graphite Electrodes**. In the graphite electrodes investigation, the second company in the door after the amnesty applicant paid a $32.5 million fine, the third company in paid a $110 million fine, and a fourth company pled guilty and paid a $135 million fine. Mitsubishi was later convicted at trial for its role as an aider and abettor of the cartel and was sentenced to pay a $134 million fine. Two U.S. executives were sentenced to lengthy prison terms and paid over $2 million in fines, and a German executive was fined $10 million.

- **Fine Arts Auctions**. The amnesty applicant's cooperation directly resulted in Sotheby's decision to plead guilty and pay a $45 million fine. Sotheby's former Chairman, Alfred Taubman, was subsequently convicted at trial and sentenced to one year in jail and a $7.5 million fine.

- **USAID Construction.** The assistance of an amnesty applicant led to the conviction of four companies who engaged in a scheme to rig bids on water

treatment construction contracts funded abroad by the United States Agency for International Development (USAID). Fines totaling more than $140 million were imposed in addition to over $10 million in restitution to the U.S. government. A U.S. executive for one of the late pleading companies was convicted at trial and sentenced to three years imprisonment.

Amnesty Plus. Currently, there are roughly 56 sitting grand juries investigating suspected international cartel activity. Nearly half of these investigations were initiated by evidence obtained as a result of an investigation of a completely separate industry. For example, a new investigation results when a company approaches the Division to negotiate a plea agreement in a current investigation and then seeks to obtain more lenient treatment by offering to disclose the existence of a second, unrelated conspiracy. Under these circumstances, companies that choose to self-report and cooperate in a second matter can obtain what is referred to as "Amnesty Plus." In such a case, the company will receive amnesty, pay zero dollars in fines for its participation in the second offense, and none of its officers, directors, and employees who cooperate will be prosecuted criminally in connection with that offense. Additionally, the company will receive a substantial additional discount by the Division in calculating an appropriate fine for its participation in the first conspiracy.

Penalty Plus. Companies that elect not to take advantage of the Amnesty Plus opportunity risk potentially harsh consequences. If a company participated in a second antitrust offense and does not report it, and the conduct is later discovered and successfully prosecuted, where appropriate, the Division will urge the sentencing court to consider the company's and any culpable executives' failure to report the conduct voluntarily as an aggravating sentencing factor. We will request that the court impose a term and conditions of probation for the company pursuant to U.S.S.G. §8D1.1, and we will pursue a fine or jail sentence at or above the upper end of the Guidelines range. Moreover, where multiple convictions occur, a company's or individual's Guidelines calculations may be increased based on the prior criminal history. In one recent "penalty plus case," the Division asked the court to depart upward from the top of the guidelines range pursuant to U.S.S.G. § 5K2.0 due to the company's recidivism as an antitrust offender, and to impose a sentence that was almost 30% above the top of the guideline fine range. In that case, the VOC was $17 million and the company paid a fine of $12 million – 70% of the VOC. Furthermore, three of the executives were "carved out" of the plea agreement. If the company had reported the conduct when it had the chance in connection with the earlier prosecution, it would have paid zero fine and its executives, who now are subject to prosecution, would have been given full nonprosecution protection. For a company, the failure to self-report under the Amnesty Plus program could mean the difference between a potential fine as high as 80 percent or more of the volume of affected commerce versus no fine at all on the Amnesty Plus product. For the individual, it could mean the difference between a lengthy jail sentence and avoiding jail altogether.

Confidentiality Policy. The Division's policy is to treat as confidential the identity of amnesty applicants and any information obtained from the applicant. The Division will not disclose an amnesty applicant's identity, absent prior disclosure by or agreement with the applicant, unless authorized by court order. Further, in order to protect the integrity of the Amnesty Program, the Division has adopted a policy of not disclosing to foreign authorities, pursuant to cooperation agreements, information obtained from an amnesty applicant unless the amnesty applicant agrees first to the disclosure. Notwithstanding this policy, the Division frequently obtains waivers to share information with another jurisdiction in cases where the applicant has also sought and obtained leniency from that jurisdiction. Such waivers are helpful in ensuring that the Division is able to coordinate investigative steps with the other jurisdictions involved. In addition, amnesty applicants may issue press releases or, in the case of publicly traded companies, submit public filings announcing their conditional acceptance into the corporate amnesty program thereby obviating the need to maintain their anonymity.

RECENT LEGISLATIVE AMENDMENTS

On June 22, 2004, President Bush signed into law H.R. 1086, which includes the Antitrust Criminal Penalty Enhancement and Reform Act of 2004. The Act increases the maximum Sherman Act corporate fine to $100 million, the maximum individual fine to $1 million, and the maximum Sherman Act jail term to 10 years. The Act also enhances the incentive for corporations to self report illegal conduct by limiting the damages recoverable from a corporate amnesty applicant, that also cooperates with private plaintiffs in their damage actions against remaining cartel members, to the damages actually inflicted by the amnesty applicant's conduct.

The increase in criminal penalties will bring antitrust penalties in line with those for other white-collar crimes and will ensure the penalties more accurately reflect the enormous harm inflicted by cartels in today's marketplace. In addition, the detrebling provision of the Act removes a major disincentive for amnesty applications and hence, will lead to the exposure of more cartels, making the Division's Corporate Leniency Program even more effective in detecting and prosecuting cartels. The detrebling amendment applies to a corporation and its executives, who cooperate with the government investigation through the Antitrust Division's Corporate Leniency Policy. The amendment limits the liability of a successful leniency applicant and its executives to single damages without joint and several liability -- i.e., the applicant would only be liable for actual, compensatory damages attributable to the harm its own conduct caused. In return, the bill requires the applicant and its executives to provide full cooperation to the victims in their lawsuit against the other conspirators for treble damages. Because all other conspirator firms remain jointly and severally liable for treble damages caused by the conspiracy, the victims' potential total recovery is not reduced by this legislation. Furthermore, the amendment likely will (1) increase the number of criminal antitrust conspiracies that are exposed and prosecuted; (2) increase compensation to victims of criminal antitrust conspiracies through the required cooperation provided to the victims by the amnesty applicant; (3) further destabilize, and deter the formation of, criminal antitrust conspiracies by creating an additional major

incentive to self-report the violation; (4) reduce the costs of investigating and prosecuting criminal antitrust conspiracies; and (5) reduce the cost for victims to recover the damages they suffer from criminal antitrust conspiracies.

The U.S. Sentencing Commission promulgated a revised Antitrust Guideline which provides for the imposition of sentences in accordance with the new statutory maximums. The revised Antitrust Guideline, which increases the base offense level and the affected commerce table to align Guideline sentences more closely with the new statutory maximums, went into effect on November 1, 2005.

ANTITRUST DIVISION
Sherman Act Violations Yielding a Corporate Fine of $10 Million or More

Defendant (FY)	Product	Fine ($ Millions)	Geographic Scope	Country
F. Hoffmann-La Roche, Ltd. (1999)	Vitamins	$500	International	Switzerland
Samsung Electronics Company, Ltd. Samsung Semiconductor, Inc. (2006)	DRAM	$300	International	Korea
BASF AG (1999)	Vitamins	$225	International	Germany
Hynix Semiconductor Inc.(2005)	DRAM	$185	International	Korea
Infineon Technologies AG (2004)	DRAM	$160	International	Germany
SGL Carbon AG (1999)	Graphite Electrodes	$135	International	Germany
Mitsubishi Corp. (2001)	Graphite Electrodes	$134	International	Japan
UCAR International, Inc. (1998)	Graphite Electrodes	$110	International	U.S.
Archer Daniels Midland Co. (1996)	Lysine & Citric Acid	$100	International	U.S.
Elpida Memory, Inc. (2006)	DRAM	$84	International	Japan
Dupont Dow Elastomers L.L.C. (2005)	Chloroprene Rubber	$84	International	U.S.
Takeda Chemical Industries, Ltd. (1999)	Vitamins	$72	International	Japan
Bayer AG (2004)	Rubber Chemicals	$66	International	Germany
Bilhar International Establishment (2002)	Construction	$54	International	Liechtenstein
Daicel Chemical Industries, Ltd. (2000)	Sorbates	$53	International	Japan
ABB Middle East & Africa Participations AG (2001)	Construction	$53	International	Switzerland
Crompton (2004)	Rubber Chemicals	$50	International	U.S.
Haarmann & Reimer Corp. (1997)	Citric Acid	$50	International	German Parent
HeereMac v.o.f. (1998)	Marine Construction	$49	International	Netherlands
Sotheby's Holdings Inc. (2001)	Fine Arts Auctions	$45	International	U.S.

Ueno Fine Chemicals Industry, Ltd. (2001)	Sorbates	$11	International	Japan
Eastman Chemical Co. (1998)	Sorbates	$11	International	U.S.

ANTITRUST DIVISION
Sherman Act Violations Yielding a Corporate Fine of $10 Million or More

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Sherman Act Violations Yielding a Corporate Fine of $10 Million or More

TRADE ASSOCIATIONS

Company employees participate from time to time in trade association and professional activities. Because such activities provide an obvious opportunity for competitors to discuss matters that could be considered competitively sensitive, special care must be taken to avoid discussions that may result in allegations that an unlawful agreement has been reached or concerted action has taken place. Note, again, that mere presence, even if not active, at any meeting in which anticompetitive practices are discussed will make you and the Company suspect to be a party to the restrictive arrangements resulting from that meeting.

In order to remain above suspicion, the following procedures should be observed with respect to all meetings among industry members concerning subjects of common industry interest:

1. An agenda should be circulated well in advance of each meeting.

2. The agenda should be reviewed by Legal to determine if there are any sensitive subjects.

3. Meetings among industry members should be held either at the offices of the industry association or at the offices of one of the industry members.

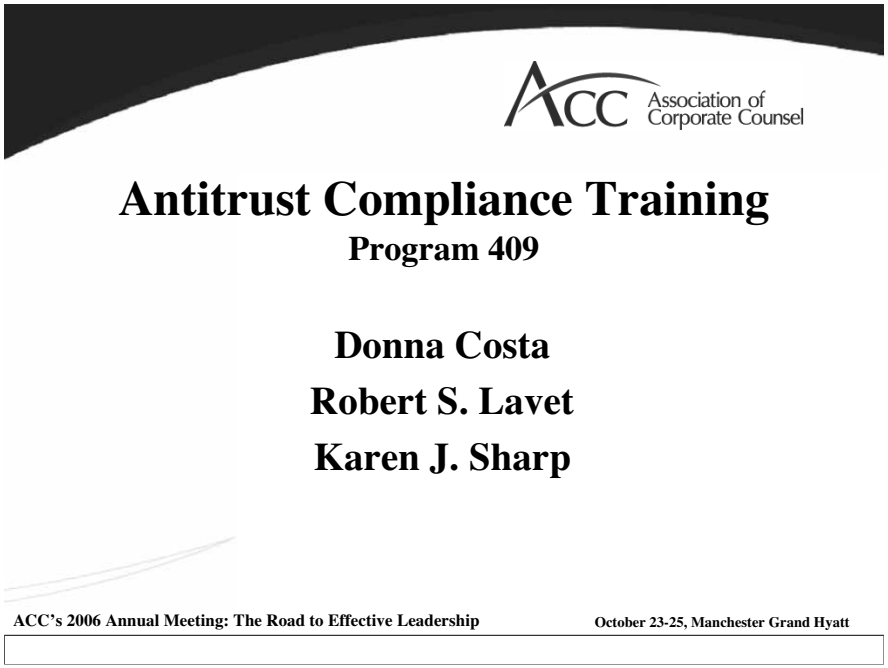
4. Counsel for the industry association or an outside lawyer should attend each meeting. No meeting should be held in the absence of counsel.

5. Counsel in attendance should prepare and circulate to all participants comprehensive and accurate minutes of the meetings. Legal should review the minutes of the meeting.

6. At the meeting, there should not be any agreement or understanding, formal or informal, concerning prices, costs, margins, terms and conditions of sale, customers, markets, capacity or production plans.

7. In the event an anticompetitive issue is unexpectedly raised at a meeting, the Company representative should immediately and publicly distance him/herself and the Company from that discussion, ask that this be noted in the minutes of the meeting, leave the meeting, and contact Legal immediately.

8. In the event the Company representative is uncertain whether an anticompetitive issue was raised at a meeting, s/he should contact Legal immediately.



Antitrust 101

- Criminal Violations
  - Price fixing, bid rigging and market/customer allocation
  - Global enforcement
  - Criminal penalties
- Civil Liability
  - Treble damages

Federal Sentencing Guidelines

- Compliance and ethics training is a key component of an effective program
- Training must include upper levels of the organization (Officers and Directors)
- Communication and training should be ongoing, including periodic updates

Designing an Effective Antitrust Training Program

- Why
- Who
- When
- What
- How

Why: The Benefits

- Prevent antitrust crimes
- Early detection of antitrust crimes > Antitrust Division's Corporate Leniency Policy
- Reduce criminal fines and sentences globally
- Reduce civil liability globally
- Protect company resources
- Protect company reputation and good will

ACC's 2006 Annual Meeting: The Road to Effective Leadership

October 23-25, Manchester Grand Hyatt

Who: Competition Laws Affect More Than Sales and Marketing

- Sales and marketing
- Pricing
- Customer representatives
- Purchasing
- Management
- Board of Directors
- Foreign employees

When: Train Early and Often

- Day one
- Annual trainings
- Special trainings as needed
  - Change in business model
  - Trade association meetings
  - M&A activity

What: Cover the Fundamentals

- What is antitrust
- Costs of non-compliance
- Substance
  - Rules for dealing with competitors
  - Rules for dealing with customers
  - Monopolies
- Internal and external communications
- When to consult counsel

How: Keep It Interesting

- Policy
- Video
- Internet training tools
- In-person training by outside counsel
- In-person training by inside counsel
  - Role-playing, games, tests

How: Keep It Real

- Keep it accessible and in English (or the local language), not legalese
- Keep it relevant; training tools should "fit" your company
- Keep it simple; Do's and Don't's

Global Training Programs

- US competition law
- Global competition law
- Train globally, think locally
  - Language
  - Law
  - Communication style
  - Business culture

Resources

- Handouts
- Antitrust Division Website: www.usdoj.gov/atr
- ABA's "Antitrust Compliance: Perspectives and Resources for Corporate Counselors" (2005)
- www.acca.com