Overview

- The Antitrust Division
- Criminal Antitrust Violations
- Compliance
The Antitrust Division

Our mission is the promotion and maintenance of competition in the American economy.
DOJ Antitrust Division

Civil
- Defense, Industrials, and Aerospace Section
- Healthcare and Consumer Products Section
- Media, Entertainment, and Professional Services Section
- Technology and Financial Services Section
- Telecommunications and Broadband Section
- Transportation, Energy, and Agriculture Section

Criminal
- Washington I
- Washington II
- New York
- Chicago
- San Francisco

Economic Analysis Group
- Civil enforcement, regulatory proceedings, competition advocacy

Antitrust Division Criminal Offices
The Sherman Act: 15 U.S.C. § 1

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”

Penalties Are Significant

Criminal Penalties
- Individuals: Incarceration up to 10 years
- Corporations: Fines up to $100 million or twice gain/loss
- Volume of commerce drives the sentence for both individuals and corporations

Other Penalties
- Restitution paid to identified victims
- Civil lawsuits for three times the damages
- Because plea or conviction is based on beyond a reasonable doubt standard, debarment from federal and other contracts is often a foregone conclusion
Results of Antitrust Division Efforts

Corporations & Individuals Charged

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Corporations</th>
<th>Individuals</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009</td>
<td>65</td>
<td>22</td>
</tr>
<tr>
<td>2010</td>
<td>63</td>
<td>21</td>
</tr>
<tr>
<td>2011</td>
<td>63</td>
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<td>2014</td>
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<td>2016</td>
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<td>19</td>
</tr>
<tr>
<td>2017</td>
<td>27</td>
<td>8</td>
</tr>
<tr>
<td>2018</td>
<td>28</td>
<td>5</td>
</tr>
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</table>

Total Criminal Fines & Penalties

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Total Fines</th>
</tr>
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<tbody>
<tr>
<td>2009</td>
<td>$1 Billion</td>
</tr>
<tr>
<td>2010</td>
<td>$555 Million</td>
</tr>
<tr>
<td>2011</td>
<td>$524 Million</td>
</tr>
<tr>
<td>2012</td>
<td>$1.1 Billion</td>
</tr>
<tr>
<td>2013</td>
<td>$1 Billion</td>
</tr>
<tr>
<td>2014</td>
<td>$1.1 Billion</td>
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<td>2015</td>
<td>$3.6 Billion</td>
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<tr>
<td>2016</td>
<td>$599 Million</td>
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<tr>
<td>2017</td>
<td>$67 Million</td>
</tr>
<tr>
<td>2018</td>
<td>$172 Million</td>
</tr>
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Average Prison Sentence in Months

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Average Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990-1999</td>
<td>8 mos.</td>
</tr>
<tr>
<td>2000-2009</td>
<td>20 mos.</td>
</tr>
<tr>
<td>2010-2018</td>
<td>19 mos.</td>
</tr>
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Criminal Antitrust Violations

1. Price Fixing Agreements
2. Bid Rigging Agreements
3. Allocation Agreements

Elements of a Sherman Act Violation:

• **Conspiracy to**
  o Fix prices
  o Allocate markets or customers
  o Rig bids
• **Knowingly joined—intended to agree**
• **Interstate or foreign commerce**
• **Statute of limitations:** Generally 5 years
**Per Se Violations**

- Criminal antitrust focuses on “per se” or “hardcore” violations
- Categorically illegal agreements
- Agreement is the crime
- Must be horizontal agreement

**Per Se Violations – Don’t Have to Prove**

- That agreement was successful
- Loss or harm as a result of the agreement
- That conduct was unreasonable or lacked economic justification
Price Fixing Agreements

- **Competitors agree to fix or otherwise determine the prices at which their products or services are sold**

- **Include agreements to:**
  - Charge the same price or raise prices together
  - Add fees or other surcharges
  - Eliminate discounts or have uniform discounts
  - Establish minimum or floor prices
  - Establish a standard pricing formula
  - Coordinate and not compete on other commercial terms (i.e., credit terms, warranties, etc.)

Warning Signs in Pricing

- Sudden and identical increases in price or price ranges that cannot be explained by cost increases

- Anticipated discounts or rebates disappear unexpectedly

- Similar transportation costs specified by local and non-local companies

- Attempts to “shop around” stonewalled
Bid Rigging Agreements

Competitors agree in advance who will win the bid.

Types of Bid Rigging:

• Bid Rotation or Allocation—competitors agree to take turns winning bids

• “Complementary” or “Cover” Bids—competitors agree to submit intentionally high bids, or otherwise unacceptable bids

• Bid Suppression or Limitation—competitors agree to refrain from bidding

Allocation Agreements

Competitors agree to divide up a market, usually by geographic area, customer, or type of product.

May also include a bid rigging component to implement the allocation scheme.
What to Watch For: Suspicious Statements

- References to “courtesy” bids or “throwing in a number”

- Use of same terminology or rationales by companies when explaining price increases

- Statements indicating advance knowledge of competitor’s pricing

- A customer or territory “belongs” to a supplier

- References to “respecting” the customers or territories of competitors

Antitrust Leniency Program

- Unique investigative tool to Antitrust Division

- First company and/or individual to self-report its involvement in criminal antitrust offense obtains immunity from prosecution by the Antitrust Division (“Race to the Government”)

- Applicant provides ongoing cooperation to assist Division in prosecution of co-conspirators

- Additional information about the Leniency Program is available at www.justice.gov/atr/leniency-program
Compliance Programs

**New Incentive: Consideration in Charging**

- AAG Delrahim announced on July 11, 2019 that the Antitrust Division will consider compliance programs at the charging stage.

- Announced Changes to:
  - Justice Manual
  - Antitrust Division Manual

- Issuance of Guidance Document

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**Justice Manual Revisions:**

- 9-28.400 Special Policy Concerns, Section B:
  - “With this in mind, the Antitrust Division has established a firm policy, understood in the business community, that credit should not be given at the charging stage for a compliance program and that amnesty corporate leniency is available only to the first corporation to make full disclosure to the government.”

- 9-28.800 Corporate Compliance Programs, Section A:
  - “In addition, the nature of some crimes, e.g., antitrust violations, may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program.”
Compliance Programs

Antitrust Division Manual Revisions:

- Revised Manual directs prosecutors to consider in charging decisions:
  - All Filip Factors, including compliance program
  - Leniency policy
  - ATR guidance document questions

- Allows Deferred Prosecution Agreement (DPA) when Filip Factors, including compliance, support it

- Non-Prosecution Agreements (NPAs) disfavored

Compliance Programs

Background on Corporate Compliance Programs:

- DOJ does not provide specific requirements
  - See Justice Manual § 9-28.800

- Sentencing Guidelines provide a minimum “to do” list

- Common themes
  - Compliance starts at the top
  - Not “one size fits all”
Compliance Programs

**Antitrust Division Guidance Document:**

- Intended to assist prosecutors and provide predictability and transparency into prosecutors’ compliance evaluation
- Two sections:
  - Charging stage
  - Sentencing stage
- Not a checklist or a formula
- And compliance is only one of ten factors

Compliance Programs

**Questions Posed to Prosecutors in Justice Manual § 9-28.800:**

- Is the corporation’s compliance program well designed?
- Is the program being applied earnestly and in good faith?
- Does the corporation’s compliance program work?
**Compliance Programs**

**Antitrust Division Guidance Document – Preliminary Questions:**

- Does the company’s compliance program address and prohibit criminal antitrust violations?
- Did the antitrust compliance program detect and facilitate prompt reporting of the violation?
- To what extent was a company’s senior management involved in the violation?

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**Compliance Programs**

1) Design and Comprehensiveness
   - Format, Accessibility
2) Culture of Compliance
   - Management Conduct/Leadership
3) Responsibility for the Compliance and Ethics Program
   - Autonomy, Seniority, Experience
4) Risk Assessment
   - Tailored for Antitrust Risk
5) Training and Communication
   - Obligations Understood
Compliance Programs

Antitrust Division Guidance Document – Factors to Consider 6-9:

6) Periodic Review, Monitoring and Auditing
   • What Process and Mechanisms

7) Reporting
   • Accessible, Confidential

8) Incentives and Discipline
   • Integrated into Operations

9) Remediation and Role of Compliance Program in the Discovery of the Offense

Potential Sentencing Benefits:

• Potential Sentencing Credit: U.S.S.G. § 8C2.5(f)
  o Reduction of culpability score for effective compliance and ethics program
  o Results in lower Guidelines fine range
  o Hard to qualify for Credit
  o “High-level” or “substantial authority” personnel are almost always involved in antitrust offenses, which can be disqualifying

• Substantial Assistance departure to reduce criminal fine: U.S.S.G. § 8C4.1

• Fine reduction for “extraordinary” efforts to enhance or create an effective compliance program
Compliance Programs

Reduction in Fine for Remedial Measures:

- Extraordinary and forward-looking efforts to improve compliance = reduction in fine. See 18 U.S.C. § 3572(a)(8)
  - Antitrust Division has recommended a fine reduction in cases where efforts to improve compliance were extraordinary
- Company institutes or enhances compliance program after violation discovered and before pleading
- Note: No credit for unimplemented programs – not mere promises of future action

Consequences of Ignoring Compliance:

- Egregious Cases May Enhance Sentence
  - Company refuses to admit conduct/accept responsibility
  - Company has a history of antitrust violations
  - Company refuses to institute or enhance its compliance program

- Sentencing Recommendations may include:
  - Probation (1 to 5 years): see U.S.S.G §§ 8D1.1–8D1.4
  - Compliance monitor to design and implement compliance
  - At expense of the company
Compliance Programs

Consequences of Ignoring Compliance:

- Terms of Probation may include:
  - Periodic reports to the Court, Probation Office, and the Antitrust Division on status of implementing the Court-ordered compliance program
  - Affirmative duty to report antitrust violations
  - Independent Compliance Monitor

- Compare *United States v. BNP Paribas* (S.D.N.Y. 2018):
  - The government did not seek probation, in part due to “the bank’s substantial efforts relating to compliance and remediation”

Case Example: AU Optronics Corporation of Taiwan (AUO)

- Indicted 2009 for price fixing in LCD market
- AUO had no pre-existing compliance program, and even after investigation, it did little to put one in place
- Before, during, and after conviction, tone from the top was that it did nothing wrong
- Wholly inadequate steps to adopt a compliance program after conviction
- Antitrust Division asked that AUO and U.S. subsidiary be placed on probation
- Division asked for Court to appoint independent monitor to oversee implementation of an appropriate compliance program
- District Court imposed 3-year term of probation and independent monitor to oversee establishment of effective compliance program
Questions?