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Arnold & Porter's US Competition Law Webinar

Wednesday, February 10, 2016

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Arnold & Porter's US Competition Law Webinar

Wednesday, February 10, 2016
12:00 – 1:00 p.m. ET

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Tab 1: Agenda

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Arnold & Porter's US Competition Law Webinar

Wednesday, February 10, 2016
12:00 – 1:00 p.m. ET

Agenda

12:00 – 12:05 p.m. Welcome & Introduction

12:05 – 12:55 p.m. Presentation

Speakers:

Pete Levitas, *Partner, Arnold & Porter LLP*

Barbara Wootton, *Counsel, Arnold & Porter LLP*

Frank Liss, *Partner, Arnold & Porter LLP*

12:55 – 1:00 p.m. Question & Answer Session

1 hour CA and NY MCLE credit is pending. CLE credit for other jurisdictions is also pending.

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Tab 2: Presentation

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Arnold & Porter's Competition Law Webinar Series: US Competition Law Update

February 10, 2016

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Introductions

Pete Levitas

Barbara Wootton

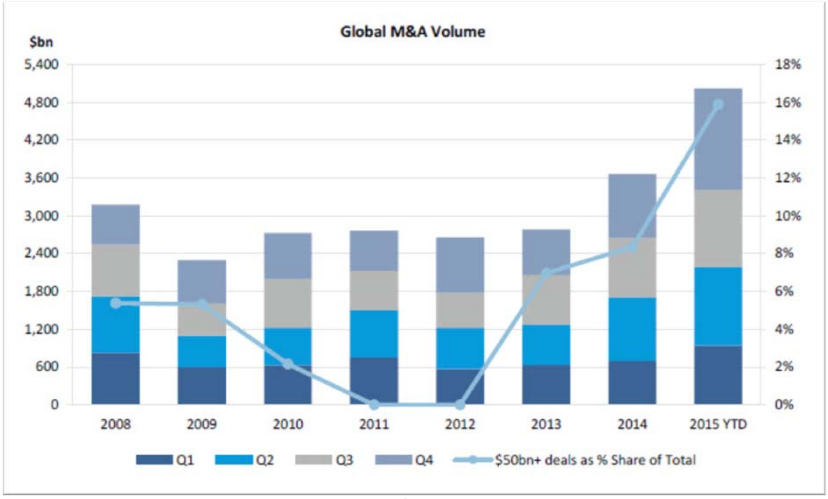
Frank Liss

Agenda

- Transactions
- Agency Enforcement
- Other Litigation
- Criminal Antitrust Enforcement

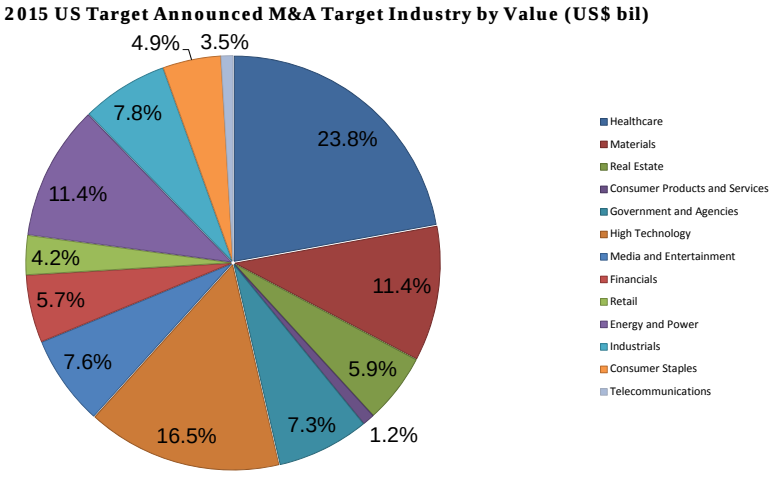
TRANSACTIONS

Global M&A Volume Surpasses $5 Trillion



Source: Dealogic

Global M&A Volume Surpasses $5 Trillion (cont'd)



Source: **Thomson Reuters**

Challenged & Abandoned Transactions

- AB Electrolux & GE
  - $3.3 billion
- Applied Materials & Tokyo Electron
  - $9.3 billion
- Comcast & Time Warner Cable
  - $45 billion
- Thai Union Frozen Products PCL & Bumble Bee Foods LLC
  - $1.5 billion
- Sysco Corp. & U.S. Foods
  - $3.5 billion
- STERIS Corp. & Synergy Health PLC
  - $1.9 billion

Selected Cleared Transactions

- AT&T and DirectTV
  - $48.5 billion
- Dollar Tree & Family Dollar
  - $9.1 billion
- Expedia & Orbitz
  - $1.3 billion

Selected Pending Transactions

- AB InBev & SABMiller
  - $100 billion
- Aetna & Humana
  - $37 billion
- Anthem & Cigna
  - $54 billion
- Charter Communications & Time Warner Cable
  - $78.7 billion
- Staples & Office Depot
  - $6.3 billion [Challenged]

Aetna & Humana ($37 billion)

- On July 3, 2015, Aetna announced it would acquire Humana.
- On September 18, 2015, the DOJ asked both parties for additional information in connection with the agency's ongoing review of the proposed merger.

Anthem & Cigna ($54 billion)

- On July 24, 2015, Anthem announced it would acquire Cigna.
- On September 28, 2015, the DOJ asked both parties for additional information in connection with the agency's ongoing review of the proposed merger.

Comcast & Time Warner Cable ($45 billion)

- In February 2014, Comcast announced that it would acquire Time Warner Cable.
- In April 2015, the parties abandoned the transaction after the DOJ informed the companies that it had significant concerns about the merger's anticompetitive effects.

Charter Communications & Time Warner Cable ($78.7 billion)

- In May 2015, Charter Communications announced that it would acquire Time Warner Cable.
- In September 2015, the FCC started an informal 180-day shot clock of its review of the merger.

Staples & Office Depot ($6.3 billion)

- **1997: Staples sought to acquire Office Depot**
  - The FTC intervened and sued to block the deal in federal district court.
  - The district court judge enjoined the transaction.
- **2013: Office Depot acquired OfficeMax for $1.2 billion**
  - The FTC cleared the transaction in its entirety, without any divestitures.
  - The FTC concluded that big-box office supply stores faced growing competition from online retailers (e.g., Amazon) and broader retailers (e.g., Walmart and Target).

Staples & Office Depot ($6.3 billion) (cont'd)

- **2015:** Staples is (again) seeking to acquire Office Depot.
  - In February 2015, Staples announced its acquisition of Office Depot.
  - In December 2015, the FTC filed an administrative complaint challenging the proposed transaction. The administrative trial is scheduled to begin on May 10, 2016.

M&A TAKEAWAYS

- Agencies continue to be aggressive
- Not afraid to litigate
- Continued focus on divestitures
- FTC merger remedy retrospective

AGENCY ENFORCEMENT

State Action

- Phoebe Putney
  - "Clear Articulation"
- North Carolina State Board of Dental Examiners
  - "Active supervision"

Trade Associations

- *Spotlight on Trade Associations* (FTC Blog):

> "forming a trade association does not shield joint activities from antitrust scrutiny: Dealings among competitors that violate the law would still violate the law even if they were done through a trade association."

- Series of enforcement actions against trade association bylaws that limit competition among members

Reverse Payments

- FTC v. Cephalon
  - $1.2 billion disgorgement
  - Continuing FTC cases/investigations/amicus activity

OTHER LITIGATION

"Reverse Payment" Private Litigation Developments

- Applying *Actavis* – issues for lower courts
  - What constitutes a large and unjustified reverse payment
  - How to apply the rule of reason to pay-for-delay settlements
  - Requirements for plaintiffs to prove causation
    - Litigating the patent merits

Product Switching

- "Product switching": offering new patented drug and possibly removing older product from market as patent expires
- *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638 (2d Cir. 2015):

  "...when a monopolist combines product withdrawal with some other conduct, the overall effect of which is to coerce consumers rather than persuade them on the merits, and to impede competition, its actions are anticompetitive under the Sherman Act."
- A "hard switch" (old product discontinued) is riskier than a "soft switch" (promotion of new product in lieu of old)

Class Certification Developments

- Courts continue to flesh out application of *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013):
  - Parties must satisfy Rule 23 with "evidentiary proof".
  - Trial court must "rigorously analyze" those proofs.
- Courts routinely require Plaintiffs to offer proof that damages can be resolved with common evidence as prerequisite to class certification.
- Application in antitrust cases:
  - *In re Processed Egg Products Antitrust Litig.*, 309 F.R.D. 301 (E.D. Pa. Sept 18, 2015), *and as amended* 2015 BL 302996 (Nov. 10, 2015)
  - *Vista Health Plan Inc. v. Cephalon Inc. et al.*, No. 2:06-cv-01833 (E.D. Pa. June 1, 2015)
  - *In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015)
  - *In re VHS of Mich., Inc.*, 601 F. App'x 342 (6th Cir. 2015)

Treatment of Foreign Component Sales Under FTAIA

- Foreign Trade Antitrust Improvements Act (FTAIA) precludes the application of U.S. antitrust laws to anticompetitive activities outside the U.S. unless:
  - (1) The foreign conduct has a "direct, substantial, and reasonably foreseeable effect" on US domestic or import commerce; and
  - (2) such effect "gives rise" to plaintiff's Sherman Act claims.
- Circuit cases apply differing standards:
  - *Motorola Mobility, LLC. v. AU Optronics Corp.* (7th Cir.).
  - *United States v. Hui Hsiung* (9th Cir.)
- Supreme Court denies cert. (135 S. Ct. 2837 (2015)), leaving open key issues

CRIMINAL ANTITRUST ENFORCEMENT

US Cartel Enforcement 2015

- Record Year for US Criminal antitrust fines — in excess of $3.5B in FY 2015
  - Foreign exchange rates
  - LIBOR
  - Auto Parts
  - Cargo Shipping
  - Capacitors
  - Ball Bearings

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Increased DOJ Focus on Corporate Compliance Efforts

- Brent Snyder Speech from October 2014 entitled "Compliance is a Culture, Not Just a Policy"
  - Emphasized role of compliance policies in preventing occurrence of antitrust violations and facilitating prompt detection of violations that do occur
- Kayaba ("KYB") plea agreement from October 2015
  - Substantial downward departure from Sentencing Guidelines based on implementation of comprehensive compliance program upon discovery of potential price-fixing conduct
  - Detailed discussion of elements of the program are set forth in DOJ's sentencing memorandum

Increased DOJ Focus on Individual Criminal Liability—Yates Memorandum

- Companies must "identify all individuals involved in the wrong doing, regardless of their position, status or seniority in the company" to be eligible for any cooperation credit

- Heightened DOJ emphasis on prosecution of culpable individuals from inception of investigation
  - No impact on entities that qualify for leniency under the operation of DOJ Antitrust Division's Corporate Leniency Policy
  - Impact on pleading/cooperating entities remains unclear

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Tab 3: Speaker Biographies

Peter J. Levitas

Partner

Mr. Levitas has more than 20 years of experience as an antitrust lawyer addressing and resolving complex merger and conduct issues, particularly those affecting the healthcare, pharmaceutical, and technology sectors.

Mr. Levitas has served in a wide range of US government positions; most recently, he served for over four years in the role of Deputy Director in the Bureau of Competition at the Federal Trade Commission (FTC) (2009-2013), where he was responsible for the Mergers 1, Health Care and Anticompetitive Practices divisions, as well as the FTC's Northeast Regional Office in New York.

Other experience includes nearly a decade as an antitrust counsel on Capitol Hill, including seven years as the Staff Director and Chief Counsel to the US Senate Judiciary Committee's Subcommittee on Antitrust, Competition Policy and Consumer Rights, and more than five years as a trial lawyer in the US Department of Justice Antitrust Division, where he was a member of the trial teams in the prosecution of several criminal price-fixing cases.

In private practice, Mr. Levitas provides counseling on the antitrust implications of day-to-day business practices and has represented Fortune 500 and other companies in transactions and in complex federal and state civil investigations focusing on antitrust and competition issues.

Representative Matters

Transactions & Investigations

- *AT&T* in connection with its US$49 billion acquisition of DirecTV.

Contact Information
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fax: +1 202.942.5999

601 Massachusetts Ave., NW
Washington, DC 20001

Areas of Practice
Antitrust/Competition

Education
JD, *cum laude*, Harvard Law School, 1991
BA, *summa cum laude*, University of Pennsylvania, 1988

Admissions
District of Columbia
New York

- *Major pharmaceutical company* in connection with its US$300 million dollar purchase of a competing generics business.
- *Investment fund* in evaluation of antitrust risk of various proposed transactions.
- *Major food services company* as a third-party in FTC investigation of proposed transaction.
- *Major patent holder* as participant in FTC industry study of Patent Assertion Entities.

Experience in Government

Transactions and investigations conducted under Mr. Levitas' supervision as Deputy Director of the Federal Trade Commission Bureau of Competition included:

- *Express Scripts/Medco Health Solutions* in the merger between two of the three largest Pharmacy Benefit Managers.
- *Hertz/Dollar Thrifty* in the merger between these major car rental companies.
- *MDR (Dun & Bradstreet/QED*) in the merger between K-12 educational marketing database companies.
- *Google* in an investigation into allegations of search manipulation.
- *Omnicare/Pharmerica* in the hostile takeover by largest long-term care pharmacy provider of the second-leading provider
- *Teva Pharmaceuticals/Cephalon* in the US$6.8 billion merger between two leading pharmaceutical companies
- *AMERCO* (U-Haul) in an invitation to collude investigation
- *Google/Motorola* in an investigation into the use of injunctions to enforce FRAND-encumbered Standard Essential Patents
- *Thoratec Corporation/HearWare International* in the acquisition of LVAD heart device manufacturer by other leading manufacturer
- *Actavis* in reverse payment patent settlement litigation leading to the Supreme Court decision holding that reverse payment settlements are evaluated under rule-of-reason
- *Cephalon* in reverse payments litigation regarding generic version of Provigil, which eventually led to US$1.2 billion disgorgement settlement
- *North Carolina Dental Board* in the litigation leading to a Supreme Court decision on the contours of the "state action" doctrine

Articles

- Peter J. Levitas and Matthew Tabas "Standard-essential Patents and FRAND Licensing Commitments" *Getting the Deal Through*, November 25, 2015

- Peter J. Levitas "Section 5 Enforcement: Common Law Guidance... Continues" *CPI Antitrust Chronicle*, November 2015
- Peter J. Levitas "Section 5 Enforcement: Common Law Guidance" *Competition Policy International*, July 2015
- Peter J. Levitas and Ross M. Wolland "The Do's and Don'ts of Premerger Coordination" *The Antitrust Counselor*, Volume 9, No. 4, June 2015
- Peter J. Levitas "Intellectual Property & Antitrust" *Getting the Deal Through*, 2015 edition (Contributing Editor), December 2014
- Peter J. Levitas and Kelly Schoolmeester "What Can We Learn From Bazaarvoice?" *Competition Policy International Journal*, Volume 10, No. 1, September 11, 2014
- Peter J. Levitas and Seth J. Wiener "The FTC Section 5 Controversy" *Journal of Competition*, No. 176, (Published in Korean), September 2014
- Peter J. Levitas "Six Things For In-House Counsel to Avoid When Appearing Before the Antitrust Agencies" *The Antitrust Counselor*, Volume 8, No. 3, March 2014
- Peter J. Levitas "Some Lessons from Bazaarvoice" *CPI Antitrust Chronicle*, March 2014
- Peter J. Levitas "Section 2 Monopolization" *Journal of Competition*, No. 173, March 2014 (published in Korean)
- Peter J. Levitas "Post-Actavis, Pay-For-Delay Debate Is Far From Over" *Competition Law360*. Also ran in *Appellate Law360*, *Intellectual Property Law360* and *Life Sciences Law360.* December 18, 2013
- Peter J. Levitas "Q & A With Arnold & Porter's Peter Levitas" *Perspectives in Antitrust*, Volume 2, No. 1, October 16, 2013
- Peter J. Levitas "Interview with Pete Levitas" *The Threshold*, Volume X, Number 3, Summer 2010
- Peter J. Levitas "A Common Sense Guide to Effective Lobbying on Capitol Hill" *Antitrust*, Volume 21, No. 2, Spring 2007

Blogs

- Peter J. Levitas "FTC to App Developers: More Disclosure Needed" *Seller Beware: Consumer Protection Insights for Industry*, August 29, 2014
- Peter J. Levitas "Pete Levitas on Bazaarvoice" Antitrust & Competition Policy Blog, January 27, 2014
- Peter J. Levitas, Nancy L. Perkins, Christina Brenha and Amie L. Medley "The Internet of Things: Great Promise, Great Risk" *Seller Beware: Consumer Protection Insights for Industry,* November 22, 2013

Presentations

- Peter J. Levitas "Washington Perspectives on Healthcare Industry Consolidation" Credit Suisse's Healthcare Symposium, Washington, DC, December 1, 2015
- Peter J. Levitas "Antitrust Analysis in Digital Platform Markets: Just One Side of the Story?" The American Bar Association Unilateral Conduct and Mergers & Acquisitions Committees, Washington, DC, May 8, 2014
- James L. Cooper and Peter J. Levitas "Antitrust Investigations: What Counsel for Pharmaceutical Companies and Medical Device Manufacturers Need to Know" *Bloomberg BNA*, Spring 2014
- Peter J. Levitas "The FTC Begins A Second Century: Is Past Prologue?" Co-Moderator, 62nd ABA Section of Antitrust Law Spring Meeting, Washington, DC, March 2014
- Peter J. Levitas "Competition and the Digital Economy: Fast Innovation - Traditional Tools?" Bundeskartellamt 16th International Conference on Competition, Berlin, Germany, March 22, 2013
- Peter J. Levitas "Anticompetitive Agreements, Mergers, Abuse of Dominance, and Regional Cross-Border Anticompetitive Conduct" Barbados Fair Trading Commission, St. Michael, Barbados, March 21-22, 2012
- Peter J. Levitas "Telecom, Media & Tech Washington, D.C. Policy Day" June 22, 2011
- Peter J. Levitas "Practical Approaches to Pricing Programs After Leegin" International Franchise Association, 44th Annual Legal Symposium, Washington, DC, May 16 and 17, 2011
- Peter J. Levitas "Recent Developments in FTC Enforcement" Oregon State Bar, Antitrust, Trade Regulation and Unfair Business Practices Section Annual Meeting, Portland, OR, November 9, 2010
- Peter J. Levitas "Updates on the FTC" The Antitrust Masters Course V, ABA Section of Antitrust Law, Williamsburg, VA, September 30, 2010
- Peter J. Levitas "Promoting Competition in the Health Care Industry" The Antitrust Masters Course V, ABA Section of Antitrust Law, Williamsburg, VA, September 30, 2010

Advisories

- "FTC Issues Guidance on Application of Section 5 of the FTC Act; Commissioner Wright Steps Down" Sep. 2015
- "2014 Year in Review: Antitrust Developments in the Pharmaceutical Industry" Jan. 2015
- "FTC Finds that McWane, Inc. Engaged in Exclusive Dealing to Unlawfully Maintain its Monopoly, but ALJ's Dismissal of Price-Fixing Claims Stands" Feb. 2014
- "Supreme Court Holds State AG Suits Brought On Behalf Of State Citizens Are Not Removable As CAFA "Mass Actions"" Jan. 2014

- "Northern District of California Decision Finds Bazaarvoice Merger Violates Clayton Act" Jan. 2014

Multimedia

- Peter J. Levitas, J. Matthew Owens, Alan E. Reider and Allison W. Shuren. "Finding the Right Partner and Model: Joint Ventures, Integration, and Outsourcing Strategies to Meet Today's Healthcare Payment and Delivery Challenges" October 13, 2015.
- Susan E. Hendrickson, Peter J. Levitas and Tara L. Williamson. "Standard Setting: Key Lessons for Protecting IP and Avoiding Antitrust Issues" July 2015.
- James W. Cooper, Jonathan Gleklen, Peter J. Levitas and Marleen Van Kerckhove. "Antitrust Developments: 2013 in Review and Looking Forward into 2014" January 28, 2014.

ARNOLD & PORTER LLP

Barbara H. Wootton

Counsel

Barbara Wootton represents clients in government reviews of mergers and acquisitions, antitrust litigation, defense of government investigations, counseling, and establishing effective antitrust compliance and training programs. Ms. Wootton has considerable experience in competition matters involving the pharmaceutical sector in particular and has represented clients in a range of other industries including biotechnology, private equity, telecommunications, consumer products, and real estate. Ms. Wootton also regularly counsels and represents clients regarding filing obligations under the Hart-Scott-Rodino Act.

Before joining Arnold & Porter, Ms. Wootton served as judicial clerk to the Honorable Murray M. Schwartz, United Sates District Court for the District of Delaware and to the Honorable John M. Steadman of the District of Columbia Court of Appeals. Prior to entering law school, Ms. Wootton worked as an economist at the US Department of Labor, Bureau of Labor Statistics.

Representative Matters

Government Investigations/Litigation

- *Pharmaceutical "Reverse Payment" Government Antitrust Investigations*, representing various pharmaceutical companies with respect to non-public FTC and State Attorneys General investigations regarding whether settlement of pharmaceutical patent litigation illegally delayed generic competition.
- *Auto Parts Antitrust Litigation,* representing Koito Manufacturing Co., Ltd. in connection with civil class action litigation involving automotive lighting systems.
- *TPG Capital, L.P.* civil antitrust litigation involving the LBO bidding practices of leading private equity firms.

Contact Information
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Areas of Practice
Antitrust/Competition Litigation

Education
JD, *magna cum laude*, Order of the Coif, Georgetown University Law Center, 1998
MS, University of Wisconsin - Madison, 1993
AB, Cornell University, 1987

Admissions
District of Columbia
Maryland

- *Ferring Pharmaceuticals* in defending monopolization class actions and state attorneys general investigation alleging that enforcement of allegedly fraudulently-obtained patent kept generic competitors off the market (*In re DDAVP Antitrust Litigation*).
- *Wyeth* in Federal Trade Commission lawsuit challenging the settlement of a patent infringement dispute (resolved by consent decree).
- *General Electric Company* with respect to Department of Justice civil antitrust investigation into certain contracting and exclusivity practices (DOJ closed its investigation).

Transactions

- *Monsanto* in its US$930 million acquisition of The Climate Corporation, which offers hyper-local weather monitoring, agronomic data modeling, and high-resolution weather simulations.
- *AT&T Inc.* before the FCC in AT&T's acquisitions of Leap Wireless.
- *AT&T Inc.* in obtaining US Department of Justice and FCC approval for its acquisition of wireless telecommunications providers Allied Wireless.
- *Pactiv Corporation*, a leading manufacturer of packaging products including Hefty® brands, in obtaining FTC clearance of its US$4.5 billion acquisition by Rank Group, private equity owner of Reynolds packaging business.

Counseling & Other

- *Pharmaceutical manufacturers* regarding antitrust implications of patent settlements and filings under the Medicare Prescription Drug, Improvement & Modernization Act of 2003.
- *Numerous clients* on compliance with requirements of the HSR Act.
- *FORTUNE 100 company division and US operations of a global chemical and related products manufacturer* in conducting antitrust audits, counseling on antitrust risks and mitigation options, developing antitrust compliance guidelines and conducting antitrust trainings.
- *Fair Labor Association* as pro bono counsel in connection with potential antitrust issues that may arise in connection with efforts that it coordinates to eliminate sweatshop conditions in the apparel and footwear industry.

Articles

- Barbara H. Wootton and Matthew Shultz "Federal Trade Commission Continues to Put a Spotlight on Pharmaceutical Patent Agreements" *Intellectual Property & Technology Law Journal*, December 2012
- Asim Varma and Barbara H. Wootton "Getting The Deal Through: Pharmaceutical Antitrust - United States" *Global Competition Review,* 2011

- Asim Varma and Barbara H. Wootton "Getting The Deal Through: Pharmaceutical Antitrust - United States" *Global Competition Review*, 2010
- Asim Varma and Barbara H. Wootton "Getting The Deal Through: Pharmaceutical Antitrust - United States" Global Competition Review, 2009
- Barbara H. Wootton "Patent Misuse and Abuse in the United States and Europe: The Case of Pharmaceuticals" Antitrust Healthcare Chronicle, June 2009
- Tim Frazer, Luc Gyselen, Marleen Van Kerckhove, Asim Varma and Barbara H. Wootton "Getting The Deal Through: Pharmaceutical Antitrust" *Global Competition Review*, 2008
- Marleen Van Kerckhove and Barbara H. Wootton "Merger remedies in the EU and US" Practical Law Company's Cross-border Competition Handbook, Volume 1, 2007/08

Advisories

- "FTC August Actions Continue to Put a Spotlight On Pharmaceutical Patent Agreements" Sep. 2012
- "Antitrust Issues For Accountable Care Organizations: Revised Agency Guidance Spotlights Possible Concerns" Nov. 2011
- "Antitrust Agencies Issue Guidance on Accountable Care Organizations" May 2011
- "Antitrust Risks of Accountable Care Organizations" Feb. 2011

ARNOLD & PORTER LLP

Frank Liss

Partner

Mr. Liss has extensive experience representing clients in criminal and civil antitrust investigations, private antitrust litigation and mergers. In addition, Mr. Liss regularly provides clients with counseling to proactively address competition issues.

Representative clients include:

- TPG Capital, L.P.
- Koito Manufacturing Co., Ltd.
- Hoffmann-La Roche Inc.
- Talecris Biotherapeutics
- Zimmer Holdings
- General Electric Company
- Occidental Chemical Company
- Zeon Corporation

Representative Matters

- *TPG Capital, L.P.* in civil antitrust litigation involving LBO bidding practices of the leading private equity firms.
- *Koito Manufacturing Co., Ltd.* in connection with DOJ criminal investigation regarding automotive lighting systems, and in related civil damages litigation.
- *Hoffmann-La Roche Inc. and Roche Vitamins Inc.* in the record-setting vitamins criminal antitrust investigation, and in litigation and settlement of related private damage actions.
    - Principally responsible for developing Roche's economic analysis and defenses in the multibillion dollar civil vitamins litigation.

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Areas of Practice
Antitrust/Competition Litigation
White Collar Defense

Education
JD, Emory University School of Law, 1993
BA, University of Pennsylvania, 1987

Admissions
District of Columbia

- Heavily involved in the international jurisdiction and discovery issues presented in the vitamins matter, including the *Empagran* Supreme Court case, which substantially restricted the ability of foreign purchasers to seek recovery under the US antitrust laws.

- *Talecris Biotherapeutics* (a manufacturer of plasma-derived therapies) in FTC investigations regarding proposed acquisitions of Talecris by CSL and Grifols, respectively.

- *Zeon Corporation and Zeon Chemicals L.P.* in DOJ criminal price-fixing investigation involving acrylo-nitrile butadiene rubber (NBR), and in litigation and settlement of related private damages litigation.

- *Zimmer Holdings* in DOJ criminal price-fixing investigation involving orthopedic implant devices, and in related class action litigation.

- *F. Hoffmann-La Roche Ltd. and Hoffmann-La Roche Inc.*in DOJ criminal price-fixing investigation involving citric acid, and in litigation and settlement of related private damage actions.

- *Pharmaceutical client* in FTC civil collusion investigation regarding supply and pricing issues.

- Numerous clients in counseling regarding pricing and distribution issues, potential mergers, and joint ventures.

Articles

- James W. Cooper, Frank Liss and Wilson D. Mudge "Yates Memo May Change DOJ Cartel Enforcement" Sep. 2015

- Frank Liss and Wilson D. Mudge "Discovery Issues in Multi-Jurisdictional Cartel Investigations: The American View" *Competition Law Yearbook 2012, (Finnish Competition Law Association),* 2013

- Frank Liss "Cartel Regulation 2013" *Latin Lawyer*, 2013

- Frank Liss "Implications Of Starr V. BMG Music" *Competition Law 360*, February 18, 2010

- Frank Liss and Wilson D. Mudge "The International Comparative Legal Guide to: Enforcement of Competition Law 2009 (Chapter: USA)" This article appeared in the first edition of The International Comparative Legal Guide to: Enforcement of Competition Law 2009; published by Global Legal Group Ltd, London. 2009

- Tim Frazer, Luc Gyselen and Frank Liss "Cartel Prosecution in the US and the EU - Recent Developments" *Practical Law Company's Cross-Border Competition Law Handbook* 2007/2008, January 2008

- William Baer, Tim Frazer, Luc Gyselen and Frank Liss "Cartel Prosecution in the US and the EU- Recent Developments" *Practical Law Company's Cross-Border Competition Law Handbook*, 2006/2007

- Luc Gyselen, Tim Frazer and Frank Liss "International Leniency Coordination" The Antitrust Review of the Americas 2007, Global Competition Review, September 2006

- Luc Gyselen, Tim Frazer and Frank Liss "International Leniency Regimes: New Developments and Their Strategic Implications" *The Antitrust Review of the Americas 2006, Global Competition Review,* 2006

Presentations

- Laura Lester, Frank Liss, Daniel M. Hawke and Jeremy Peterson "The Yates Memo: Practical Implications of DOJ's New Guidance on Individual Culpability in Civil and Criminal Investigations" Arnold & Porter LLP Teleconference, December 9, 2015

Advisories

- "DOJ Policy Shift Emphasizes Criminal Prosecution of Culpable Individuals: Potential Implications for Cartel Enforcement" Sep. 2015
- "2014 US Cartel Enforcement Developments" Jan. 2015
- "In Re-Issued Motorola Decision Interpreting the FTAIA, Seventh Circuit Panel Modifies Rationale for Dismissal of Price-Fixing Claims Arising from Foreign Component Purchasing" Dec. 2014
- "Administrative Law Judge Finds that Evidence Did Not Support FTC Allegations of Price-Fixing by McWane, Inc., but Evidence Did Show Monopolistic Practices" Jun. 2013
- "Antitrust Division Announces New Policy on "Carve-Outs" from Corporate Plea Agreements" Apr. 2013
- "Federal Court Consents to Nolo Contendere Plea over DOJ Objections in US v. Florida West International Airways" Aug. 2012
- "The Seventh Circuit's Expansive Take on Extraterritorial Reach of U.S. Antitrust Laws" Jul. 2012
- "DOJ Challenges Non-reportable US$3 Million Deal on Buyer Power Theory" May 2011
- "ACPERA's Civil Damages Limitation Provisions Extended for 10 Years" Jul. 2010
- "Antitrust Division Provides Guidance on Application of Leniency Policy" Dec. 2008
- "The Supreme Court Decision in *Empagran*" Jun. 2004

Multimedia

- Niels Christian Ersbøll and Frank Liss. "US and EU Cartel Investigations: Amnesty-Leniency Strategy" March 20, 2013.

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Tab 4: Supporting Materials

DOJ Policy Shift Emphasizes Criminal Prosecution of Culpable Individuals: Potential Implications for Cartel Enforcement

James W. Cooper, Frank Liss, Wilson D. Mudge and Tiana Russell

September 2015

Last week, Deputy Attorney General Sally Q. Yates announced new Department of Justice (DOJ) policies intended to strengthen the DOJ's efforts to hold corporate executives accountable for unlawful conduct in a memorandum entitled Individual Accountability for Corporate Wrongdoing.[1] This advisory will address potential implications of the new policy on criminal antitrust cases investigated and prosecuted by DOJ's Antitrust Division.

The Justice Department's Policy Changes

The memorandum, also known as the "Yates Memo," outlines six policy changes or clarifications intended to strengthen the DOJ's efforts to hold corporate executives accountable. In explaining the rationale for the policy changes, Deputy Attorney General Yates emphasized the importance of individual accountability in corporate cases, noting that it "deters future illegal activity," "incentivizes changes in corporate behavior," and "ensures that the people who engage in wrongdoing are held responsible for their actions."[2]

The key policy changes outlined in the Yates Memo are as follows:

- First, companies must "identify *all* individuals involved in the wrongdoing, regardless of their position, status, or seniority in the company"[3] to be eligible for *any* cooperation credit.
- Second, DOJ attorneys should focus on individuals from the outset of corporate investigations.

[1] Department of Justice Memo, Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), http://www.justice.gov/dag/file/769036/download.

[2] Department of Justice Speech, Deputy Attorney General Sally Quillian Yates Delivers Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing (Sept. 10, 2015), http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school.

[3] *Id.* (emphasis added).

- Third, criminal and civil DOJ attorneys should remain in "early and routine communication" with each other because the best way to build a case is to ensure that "everyone's talking to each other from the very beginning."[4]
- Fourth, the DOJ will not release individuals from criminal or civil liability in corporate resolutions except in "extraordinary circumstances"[5] or where there are approved DOJ policies such as the Antitrust Division's Corporate Leniency program.
- Fifth, DOJ attorneys must have a "clear plan"[6] to resolve individual cases in order to seek a corporate resolution, and any individual releases or declinations must be approved by the relevant United States Attorney or Assistant Attorney General.
- Lastly, civil attorneys should focus on individuals as well.

Practical Implications

A. No Appreciable Impact Foreseen for Antitrust Amnesty Applicants

The Yates Memo states that it will not alter the current operation of the Antitrust Division's Corporate Leniency Program, which has been highly effective over the past several decades in uncovering illegal cartel activities. Under the Leniency Program ("amnesty"), a company can avoid criminal convictions and fines and obtain a wholesale grant of immunity for all its employees by being the first to confess participation in illegal cartel conduct. Under existing policy, an amnesty applicant must make full disclosure of its cartel involvement in order to qualify; inasmuch as a qualifying applicant will secure both corporate immunity and an agreement to refrain from prosecuting any of its employees, it already has every incentive to disclose the full extent of its wrongdoing. Therefore, the new policy can be expected to have little, if any, effect on the Leniency Program. The real potential for a change in practice reveals itself when companies under investigation who are not amnesty applicants consider their options.

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[4] *Id.*

[5] Department of Justice Memo, Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), http://www.justice.gov/dag/file/769036/download.

[6] Department of Justice Speech, Deputy Attorney General Sally Quillian Yates Delivers Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing (Sept. 10, 2015), http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school.

B. Potential Implications for non-Amnesty Companies in Antitrust Investigations

The Yates Memo's effect on cooperating companies in cartel investigations who are not leniency applicants remains to be seen. One of the most significant developments of the Yates Memo is the instruction that a company's disclosure of information about individuals involved in or responsible for the wrongdoing is now a threshold requirement to receiving any cooperation credit at all, rather than simply one factor that the DOJ considers when deciding whether a company's cooperation warrants a reduction in a potential sentence. Moving forward, according to Deputy Attorney General Yates, DOJ will not allow companies to "pick and choose what gets disclosed" or obtain "partial credit for cooperation that doesn't include information about individuals."[7] Further, she states that DOJ will not "let corporations plead ignorance" and will require that they engage in investigations to identify all responsible individuals and then provide all non-privileged evidence implicating those individuals.[8] Yates stated that the "purpose of this policy is to better identify responsible individuals, not to burden corporations with longer or more expensive internal investigations than necessary"[9] and encouraged defense attorneys to engage in detailed discussions with DOJ attorneys during their internal investigations.

The concept of zero credit for other forms of cooperation is new. Under prior policy, it was possible to provide substantial cooperation -- by disclosing the conduct of colluding competitors, producing foreign-located documents, making available witnesses at the company's expense (frequently witnesses beyond the reach of the federal grand jury), and the like -- and earn cooperation credit. Now, under the Yates Memo, such efforts will earn no credit if they are not accompanied by a disclosure about culpability of individuals within the company. It will be important to follow how this policy develops in practice, as it is typical in cartel cases that the amnesty applicant will already have disclosed culpable employees of competitors as part of the applicant's cooperation. As long as the new obligation is merely to proffer facts -- such as documents exposing competitor communications -- there will be no change. DOJ's objective should be to learn facts that enable it to make a charging decision about individuals, not to hear counsel's opinions about what inferences to draw from the evidence. In international cartel cases, that interest, combined with the Yates Memo's directive to bring cases against individuals (discussed below), may put increased pressure on companies to produce foreign located documents and witnesses. That kind of cooperation already is common in cartel cases. If, however, the new policy becomes a tool for prosecutors to insist that company counsel express views on the potential culpability of senior executives

[7] *Id.*

[8] *Id.*

[9] *Id.*

-- where there is often disagreement about whether particular employees knew about or countenanced cartel conduct -- the new policy could work a real change in interaction between DOJ and cooperating companies.

C. Pursuing Individual Employees of Non-Amnesty Companies

Another departure from previous practice is the exhortation that DOJ Attorneys "should not release individuals from civil or criminal liability when resolving a matter with a corporation, except under the rarest of circumstances."[10] The Yates Memo requires that no corporate resolution will provide protection from civil and criminal liability for any individuals except where there are "extraordinary circumstances" or approved DOJ policies such as the Antitrust Division's Corporate Leniency program. Further, DOJ attorneys must have a "clear plan" to resolve related individual cases in order to seek a corporate resolution and must seek individual declinations approved by the relevant United States Attorney or Assistant Attorney General if they decide not to bring charges against individuals.

In the past, corporate plea agreements for antitrust violations typically provided a guarantee of future non-prosecution to both the company signing the plea agreement and current and former employees who cooperate with the Division's investigation.[11] These non-prosecution assurances often excluded a discrete and limited number of individuals (known as "carve-outs") from the non-prosecution protections afforded by the company's plea agreement, but otherwise provided full immunity to all employees. One question will be whether the policy changes intend to bring about a wholesale change to that framework. We are inclined to doubt it, as the Yates Memo expressly preserves the existing Leniency Policy, which incorporates protections for employees of non-amnesty applicant companies with the exception of certain "carve-outs." Thus, absent clarification from the Antitrust Division, we believe the current framework of "carve-outs" will remain in place as an approved policy.

This does not mean there will be no implications for the Antitrust Division's "carve-out" policy in corporate plea agreements. The renewed emphasis on individual prosecutions could play out in two different ways. The Yates Memo and its emphasis on individual accountability may at face value make it somewhat more difficult for corporate and/or individual counsel to argue -- or prosecutors to justify -- that a particular culpable individual should be "carved-in" to the corporate plea agreements, with a net effect of a shifting of the line between carved-outs and carved-in individuals. For example, it may remain a strong argument

[10] *Id.*

[11] *Id.*

that lower-level executives should be covered by a plea agreement -- in effect, immunized -- on the theory that they can provide evidence against others. But with the Yates's Memo's directive to focus on executives who appear "insulated,"[12] from wrongdoing, prosecutors may demand that companies disclose more information about senior executives (whether or not such information really exists) in a bid to carve out more senior officials and as a condition of receiving cooperation credit.

Another question is whether the new policy will cause more "carve-outs" to be prosecuted. It is not uncommon under current practice that the Division "carves out" employees in order to reserve the right to prosecute them; the "carve-out" decision is not, however an indictment decision. The increased emphasis on prosecution of individuals potentially makes it more likely that individuals who are "carved-out" will ultimately face prosecution. In light of that, the new policy offers opportunities to argue for increased rigor in "carve-out" decisions. For persons against whom the government's evidence is limited or who are merely the object of unresolved suspicion, the new policy could offer a strengthened hand, as any individuals carved-out may be more likely to face criminal charges. The government's interest in obtaining those person's cooperation in the investigation may outweigh any benefit from placing such persons in carve-out status, particularly as the new policy makes prosecution of such individuals more likely. However, they will likely face even more pressure to expose knowledge of wrongdoing in more senior levels of the company.

The new memo also requires DOJ attorneys to focus on individuals from the outset of corporate investigations in order to create a better factual record against individuals, to "increase the likelihood that [corporate employees] will cooperate with the investigation, [and] maximize the chances of [a] final resolution . . . against culpable individuals."[13] However, this early focus on individual culpability coupled with the renewed emphasis on individual prosecution may make it more likely that company and employee interests diverge earlier in the investigative process. As a result, companies and their counsel may face more difficulties when attempting to secure complete cooperation from executives in internal investigations. Executives may fear implicating themselves in suspected wrongdoing if they believe that DOJ is under a mandate to prosecute individuals. Indeed, while tensions between corporate and individual interests in the investigative process are a familiar concern, the new policy initiatives create additional obstacles for companies performing internal investigations.

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[12] Department of Justice Memo, Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), http://www.justice.gov/dag/file/769036/download.

[13] *Id.*

Conclusion

Given the nuances of practice before the Antitrust Division, which has criminal prosecution policies that differ significantly from other prosecuting units at the Department of Justice, it may take time to see what real effect, if any, the Yates Memo has on cartel investigations and prosecutions. Companies must incorporate the new policy memo into their approach to cooperation, and it would be useful if the Division itself clarified its policies to the extent they may incorporate or diverge from the Yates Memo.

If you have any questions about any of the topics discussed in this advisory, please contact your Arnold & Porter attorney or any of the following attorneys:

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U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

September 9, 2015

MEMORANDUM FOR THE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION
THE ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION
THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION
THE ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION
THE ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION
THE ASSISTANT ATTORNEY GENERAL, TAX DIVISION
THE DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
THE DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES
ALL UNITED STATES ATTORNEYS

FROM: Sally Quillian Yates
Deputy Attorney General

SUBJECT: Individual Accountability for Corporate Wrongdoing

Fighting corporate fraud and other misconduct is a top priority of the Department of Justice. Our nation's economy depends on effective enforcement of the civil and criminal laws that protect our financial system and, by extension, all our citizens. These are principles that the Department lives and breathes—as evidenced by the many attorneys, agents, and support staff who have worked tirelessly on corporate investigations, particularly in the aftermath of the financial crisis.

One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system.

There are, however, many substantial challenges unique to pursuing individuals for corporate misdeeds. In large corporations, where responsibility can be diffuse and decisions are made at various levels, it can be difficult to determine if someone possessed the knowledge and criminal intent necessary to establish their guilt beyond a reasonable doubt. This is particularly true when determining the culpability of high-level executives, who may be insulated from the day-to-day activity in which the misconduct occurs. As a result, investigators often must reconstruct what happened based on a painstaking review of corporate documents, which can number in the millions, and which may be difficult to collect due to legal restrictions.

These challenges make it all the more important that the Department fully leverage its resources to identify culpable individuals at all levels in corporate cases. To address these challenges, the Department convened a working group of senior attorneys from Department components and the United States Attorney community with significant experience in this area. The working group examined how the Department approaches corporate investigations, and identified areas in which it can amend its policies and practices in order to most effectively pursue the individuals responsible for corporate wrongs. This memo is a product of the working group's discussions.

The measures described in this memo are steps that should be taken in any investigation of corporate misconduct. Some of these measures are new, while others reflect best practices that are already employed by many federal prosecutors. Fundamentally, this memo is designed to ensure that all attorneys across the Department are consistent in our best efforts to hold to account the individuals responsible for illegal corporate conduct.

The guidance in this memo will also apply to civil corporate matters. In addition to recovering assets, civil enforcement actions serve to redress misconduct and deter future wrongdoing. Thus, civil attorneys investigating corporate wrongdoing should maintain a focus on the responsible individuals, recognizing that holding them to account is an important part of protecting the public fisc in the long term.

The guidance in this memo reflects six key steps to strengthen our pursuit of individual corporate wrongdoing, some of which reflect policy shifts and each of which is described in greater detail below: (1) in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct; (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should

memorialize any declinations as to individuals in such cases; and (6) civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.[1]

I have directed that certain criminal and civil provisions in the United States Attorney's Manual, more specifically the Principles of Federal Prosecution of Business Organizations (USAM 9-28.000 *et seq.*) and the commercial litigation provisions in Title 4 (USAM 4-4.000 *et seq.*), be revised to reflect these changes. The guidance in this memo will apply to all future investigations of corporate wrongdoing. It will also apply to those matters pending as of the date of this memo, to the extent it is practicable to do so.

1. To be eligible for <u>any</u> cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.

In order for a company to receive <u>any</u> consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the Department all relevant facts about individual misconduct. Companies cannot pick and choose what facts to disclose. That is, to be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct. If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about individual wrongdoers, its cooperation will not be considered a mitigating factor pursuant to USAM 9-28.700 *et seq.*[2] Once a company meets the threshold requirement of providing all relevant facts with respect to individuals, it will be eligible for consideration for cooperation credit. The extent of that cooperation credit will depend on all the various factors that have traditionally applied in making this assessment (*e.g.*, the timeliness of the cooperation, the diligence, thoroughness, and speed of the internal investigation, the proactive nature of the cooperation, etc.).

This condition of cooperation applies equally to corporations seeking to cooperate in civil matters; a company under civil investigation must provide to the Department all relevant facts about individual misconduct in order to receive any consideration in the negotiation. For

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[1] The measures laid out in this memo are intended solely to guide attorneys for the government in accordance with their statutory responsibilities and federal law. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States.

[2] Nor, if a company is prosecuted, will it support a cooperation-related reduction at sentencing. *See* U.S.S.G. USSG § 8C2.5(g), Application Note 13 ("A prime test of whether the organization has disclosed all pertinent information" necessary to receive a cooperation-related reduction in its offense level calculation "is whether the information is sufficient ... to identify ... the individual(s) responsible for the criminal conduct").

example, the Department's position on "full cooperation" under the False Claims Act, 31 U.S.C. § 3729(a)(2), will be that, at a minimum, all relevant facts about responsible individuals must be provided.

The requirement that companies cooperate completely as to individuals, within the bounds of the law and legal privileges, *see* USAM 9-28.700 to 9-28.760, does not mean that Department attorneys should wait for the company to deliver the information about individual wrongdoers and then merely accept what companies provide. To the contrary, Department attorneys should be proactively investigating individuals at every step of the process – before, during, and after any corporate cooperation. Department attorneys should vigorously review any information provided by companies and compare it to the results of their own investigation, in order to best ensure that the information provided is indeed complete and does not seek to minimize the behavior or role of any individual or group of individuals.

Department attorneys should strive to obtain from the company as much information as possible about responsible individuals before resolving the corporate case. But there may be instances where the company's continued cooperation with respect to individuals will be necessary post-resolution. In these circumstances, the plea or settlement agreement should include a provision that requires the company to provide information about all culpable individuals and that is explicit enough so that a failure to provide the information results in specific consequences, such as stipulated penalties and/or a material breach.

2. Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.

Both criminal and civil attorneys should focus on individual wrongdoing from the very beginning of any investigation of corporate misconduct. By focusing on building cases against individual wrongdoers from the inception of an investigation, we accomplish multiple goals. First, we maximize our ability to ferret out the full extent of corporate misconduct. Because a corporation only acts through individuals, investigating the conduct of individuals is the most efficient and effective way to determine the facts and extent of any corporate misconduct. Second, by focusing our investigation on individuals, we can increase the likelihood that individuals with knowledge of the corporate misconduct will cooperate with the investigation and provide information against individuals higher up the corporate hierarchy. Third, by focusing on individuals from the very beginning of an investigation, we maximize the chances that the final resolution of an investigation uncovering the misconduct will include civil or criminal charges against not just the corporation but against culpable individuals as well.

3. Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.

Early and regular communication between civil attorneys and criminal prosecutors handling corporate investigations can be crucial to our ability to effectively pursue individuals in

these matters. Consultation between the Department's civil and criminal attorneys, together with agency attorneys, permits consideration of the full range of the government's potential remedies (including incarceration, fines, penalties, damages, restitution to victims, asset seizure, civil and criminal forfeiture, and exclusion, suspension and debarment) and promotes the most thorough and appropriate resolution in every case. That is why the Department has long recognized the importance of parallel development of civil and criminal proceedings. *See* USAM 1-12.000.

Criminal attorneys handling corporate investigations should notify civil attorneys as early as permissible of conduct that might give rise to potential individual civil liability, even if criminal liability continues to be sought. Further, if there is a decision not to pursue a criminal action against an individual – due to questions of intent or burden of proof, for example – criminal attorneys should confer with their civil counterparts so that they may make an assessment under applicable civil statutes and consistent with this guidance. Likewise, if civil attorneys believe that an individual identified in the course of their corporate investigation should be subject to a criminal inquiry, that matter should promptly be referred to criminal prosecutors, regardless of the current status of the civil corporate investigation.

Department attorneys should be alert for circumstances where concurrent criminal and civil investigations of individual misconduct should be pursued. Coordination in this regard should happen early, even if it is not certain that a civil or criminal disposition will be the end result for the individuals or the company.

4. Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.

There may be instances where the Department reaches a resolution with the company before resolving matters with responsible individuals. In these circumstances, Department attorneys should take care to preserve the ability to pursue these individuals. Because of the importance of holding responsible individuals to account, absent extraordinary circumstances or approved departmental policy such as the Antitrust Division's Corporate Leniency Policy, Department lawyers should not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers or employees. The same principle holds true in civil corporate matters; absent extraordinary circumstances, the United States should not release claims related to the liability of individuals based on corporate settlement releases. Any such release of criminal or civil liability due to extraordinary circumstances must be personally approved in writing by the relevant Assistant Attorney General or United States Attorney.

5. **Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized.**

If the investigation of individual misconduct has not concluded by the time authorization is sought to resolve the case against the corporation, the prosecution or corporate authorization memorandum should include a discussion of the potentially liable individuals, a description of the current status of the investigation regarding their conduct and the investigative work that remains to be done, and an investigative plan to bring the matter to resolution prior to the end of any statute of limitations period. If a decision is made at the conclusion of the investigation not to bring civil claims or criminal charges against the individuals who committed the misconduct, the reasons for that determination must be memorialized and approved by the United States Attorney or Assistant Attorney General whose office handled the investigation, or their designees.

Delays in the corporate investigation should not affect the Department's ability to pursue potentially culpable individuals. While every effort should be made to resolve a corporate matter within the statutorily allotted time, and tolling agreements should be the rare exception, in situations where it is anticipated that a tolling agreement is nevertheless unavoidable and necessary, all efforts should be made either to resolve the matter against culpable individuals before the limitations period expires or to preserve the ability to charge individuals by tolling the limitations period by agreement or court order.

6. **Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.**

The Department's civil enforcement efforts are designed not only to return government money to the public fisc, but also to hold the wrongdoers accountable and to deter future wrongdoing. These twin aims – of recovering as much money as possible, on the one hand, and of accountability for and deterrence of individual misconduct, on the other – are equally important. In certain circumstances, though, these dual goals can be in apparent tension with one another, for example, when it comes to the question of whether to pursue civil actions against individual corporate wrongdoers who may not have the necessary financial resources to pay a significant judgment.

Pursuit of civil actions against culpable individuals should not be governed solely by those individuals' ability to pay. In other words, the fact that an individual may not have sufficient resources to satisfy a significant judgment should not control the decision on whether to bring suit. Rather, in deciding whether to file a civil action against an individual, Department attorneys should consider factors such as whether the person's misconduct was serious, whether

it is actionable, whether the admissible evidence will probably be sufficient to obtain and sustain a judgment, and whether pursuing the action reflects an important federal interest. Just as our prosecutors do when making charging decisions, civil attorneys should make individualized assessments in deciding whether to bring a case, taking into account numerous factors, such as the individual's misconduct and past history and the circumstances relating to the commission of the misconduct, the needs of the communities we serve, and federal resources and priorities.

Although in the short term certain cases against individuals may not provide as robust a monetary return on the Department's investment, pursuing individual actions in civil corporate matters will result in significant long-term deterrence. Only by seeking to hold individuals accountable in view of all of the factors above can the Department ensure that it is doing everything in its power to minimize corporate fraud, and, over the course of time, minimize losses to the public fisc through fraud.

Conclusion

The Department makes these changes recognizing the challenges they may present. But we are making these changes because we believe they will maximize our ability to deter misconduct and to hold those who engage in it accountable.

In the months ahead, the Department will be working with components to turn these policies into everyday practice. On September 16, 2015, for example, the Department will be hosting a training conference in Washington, D.C., on this subject, and I look forward to further addressing the topic with some of you then.

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.

Issued August 10, 1993

DEPARTMENT OF JUSTICE

Compliance is a Culture, Not Just a Policy

Brent Snyder
Deputy Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Remarks as Prepared for the
International Chamber of Commerce/
United States Council of International Business
Joint Antitrust Compliance Workshop

New York, NY

September 9, 2014

Thank you to the International Chamber of Commerce and the U.S. Council for International Business for inviting me to speak today. I'm happy to be able to share some thoughts on corporate compliance efforts from the Antitrust Division's perspective.

First, let me say that we're glad to see the work that the ICC, the USCIB and others are doing to improve corporate compliance programs. Compliance with laws of all types is the cornerstone of good corporate citizenship. Although a compliance program must be combined with a real commitment by senior management to be truly effective, this work by the ICC and the USCIB helps ensure that the cornerstone of corporate citizenship will be strong for companies that implement programs based on the Compliance Toolkit.

This work by the ICC and USCIB is also a vital complement to the work of the Antitrust Division. We all have the same goal – to prevent antitrust violations. And, we commend this important contribution by the business community. The most effective way to stop crime is to ensure it never starts. Effective corporate compliance programs are an important part of that effort.

As prosecutors, we are seldom positioned to stop a crime before it starts. We must rely on deterrence. This means we seek large criminal fines for corporations and significant jail time for executives who commit antitrust crimes. Certainly, compliance programs that prevent antitrust violations are far more preferable.

This leads me to the most basic point I want to make today, which is also the most important one. A truly well-run compliance program should prevent a company from conspiring to fix prices, rig bids, or allocate markets. Effective compliance programs should prevent that crime from beginning or, at a minimum, detect it and stop it shortly after it starts. Without question the best outcome for a company and its shareholders is to never be a subject of an

international cartel investigation. And an effective compliance program has the potential to be a significant contributor to that end.

The risks of participating in a price-fixing cartel should be obvious: high fines for the company; significant jail time for executives; expensive attorneys' fees; substantial civil damages owed to customers; and exposure to further criminal investigations -- not to mention the associated bad publicity and internal distraction from the actual business of the company. All these outcomes can be avoided if companies implement effective compliance programs.

Compliance is especially important because the risk of detection and punishment has never been higher. Today dozens of countries have effective and aggressive cartel enforcement programs. An increasing number of them have followed the U.S.'s lead and criminalized anticompetitive conspiracies. More and more countries are working together through Interpol to identify individual conspirators as they travel from country to country. And in the last few years, the U.S. has obtained extradition of executives both for conspiring to fix prices and for obstructing our investigations. In short, with each passing year the world gets smaller and there are fewer places to hide from international cartel enforcement.

In an ideal world, every company would have an effective compliance program, and all compliance programs would prevent cartel activity. Unfortunately, this is not an ideal world. But companies can still benefit from their compliance programs, even when those programs fall short of preventing all collusion.

Even where a company's compliance program does not prevent all collusion, it may allow the company to self-report its conduct to the Division under our Corporate Leniency Program. For those of you who are not familiar with it, the Division's Leniency Program allows companies to self-report their

participation in illegal cartels. In exchange for self-reporting the illegal conduct, and for complete cooperation with the resulting investigation, a corporate leniency applicant will not be prosecuted by the Division.

The Division will take a similar approach to the corporate applicant's current employees, if they admit their knowledge and participation in the conspiracy and cooperate completely with the investigation.

Leniency may also permit a company to obtain a reduction in treble damages liability in the civil lawsuits that inevitably arise from our investigations. Companies may also apply for leniency abroad. Dozens of countries today have leniency programs modeled after the Division's, and we frequently see companies apply for leniency in more than one country at a time.

Even a partially effective compliance program can help a company meet many of the requirements of the Division's leniency program. To earn leniency, among other things a company must be the first to report the illegal conspiracy, must promptly stop its participation in that conspiracy, and must fully disclose its crimes.

A company with at least a partially effective compliance program should be able to discover the cartel early, increasing its chances of seeking leniency before its co-conspirators do, and then promptly stop its participation, disclose its antitrust crimes completely, and fully cooperate with the Division's investigation.

In sum, compliance programs make good sense – both good common sense and good business sense. Compliance programs help prevent companies from committing crimes in the first place. Even if they fail to do so, partially successful compliance programs may help companies qualify for leniency.

Either outcome easily warrants your companies' efforts to adopt and strengthen compliance programs.

This leads to an obvious question, and the next topic I want to address – what makes an effective compliance program?

The Division has not provided a "one size fits all" answer to that question. Nor are we likely to do so. Not all effective compliance programs are built alike. Compliance programs should be designed to account for the nature of a company's business and for the markets in which it operates. A multinational auto parts manufacturer with plants and sales all over the world likely requires a different approach to compliance than a road-building contractor that operates in a single state. Both companies have a need for effective compliance, but the necessary approach may be very different.

Nevertheless, I can make a few points of general application. Federal prosecutors are guided by the United States Sentencing Guidelines when it comes to matters related to sentencing and remedies. Chapter 8 of the United States Sentencing Guidelines provides guidance for minimal requirements of an effective compliance and ethics program. The Guidelines set out several common-sense principles that, when applied, increase the likelihood that a compliance program will be effective. The ICC Antitrust Compliance Toolkit extends those principles, providing guidance for a more comprehensive compliance program.

Today, I want to take a couple of minutes to touch on a few points the Sentencing Guidelines and the Toolkit have in common. These are the sort of things the Division looks for when evaluating a company's compliance program.

First, it starts at the top. A company's senior executives and board of directors must fully support and engage with the company's compliance efforts.

If senior management does not actively support and cultivate a culture of compliance, a company will have a paper compliance program, not an effective one. Employees will pick up on the lead of their bosses. If the bosses take compliance seriously, the employees are far more likely to take it seriously. If they don't, the employees won't. It's as simple as that.

When senior management takes a lax approach to questionable competitor contacts or bosses make jokes about reaching agreements with competitors, they increase the likelihood that employees will treat compliance as optional.

Before taking my current job, I was leading the investigation of a company that had regular, comprehensive compliance training for all key company personnel. I knew the outside attorneys who provided the training. They were very good. A senior company executive was the star pupil in compliance quizzes given by outside counsel.

As it turns out, however, the senior executive, and even the head of the company, would walk out of that compliance training and do the very things the training was designed to prevent. They were fixing prices every single day. For years. Subordinates took their lead from the bosses and were involved, too. From the top of the company to nearly the bottom. The company was rife with price fixing. It started at the top.

Even though they are at the top, senior management must help lay the foundation upon which a company builds its culture of compliance. It does not matter how comprehensive a company's compliance program is if the senior management does not make it a foundation of the company's corporate culture.

For senior management, supporting compliance efforts means being fully knowledgeable about those efforts, providing the necessary resources, and assigning the right people to oversee them. This includes making sure the

compliance program is implemented successfully. This means not just receiving regular reports but actively monitoring the program. Executives and board members cannot simply go through the motions and hope that the company's compliance program works. They must make clear to employees that compliance is important and mandatory.

Second, a company should ensure that the entire organization is committed to its compliance efforts and can participate in them. This means educating all executives and managers, and most employees – especially those with sales and pricing responsibilities. When appropriate, it may also mean providing training for subsidiaries, distributors, agents, and contractors. And it means providing all members of the organization the opportunity to report anonymously and seek guidance about potential or actual criminal conduct without fear of retaliation.

Third, a company should ensure that it has a proactive compliance program. This means that in addition to providing training and a forum for feedback, a company should make sure that at risk activities are regularly monitored and audited. And the company should regularly evaluate the compliance program itself to understand what it can improve. The fact that each of you is here today says to me that your respective companies understand this.

Fourth, a company should think carefully about its approach to individuals who personally violated the antitrust laws or otherwise engaged in conduct inconsistent with an effective compliance program. A company must encourage individuals to adhere to the compliance program. And a company should be willing to discipline employees who either commit antitrust crimes or fail to take the reasonable steps necessary to stop the criminal conduct in the first place. It has been departmental policy not to insert itself into the personnel matters of companies by requiring the termination of culpable employees, and

that has not changed. A company's retention, however, of culpable employees in positions where they can repeat their conduct, impede a company's internal investigation and cooperation, or influence employees who may be called upon to testify against them, raises serious questions and concerns about the company's commitment to effective antitrust compliance.

Finally, a company that discovers criminal antitrust conduct should be prepared to take the steps necessary to stop it from happening again. This likely includes making changes to a compliance program that failed to prevent the criminal conduct initially. A company should also recognize that, in such circumstances, it will be required to accept responsibility for that conduct, which is the final topic I would like to touch on this afternoon.

Effective compliance programs prevent antitrust violations. They do not absolve them. So, it is important that guilty companies accept responsibility for their crimes. With that in mind, I'll start with two hard truths and then get to an easier one.

The first hard truth: The existence of a compliance program almost never allows the company to avoid criminal antitrust charges. Why? Because a truly effective compliance program would have prevented the crime in the first place or resulted in its early detection. This has been the Division's position for at least the last twenty years, and it isn't likely to change. Companies don't accidentally conspire to fix prices, rig bids, or allocate markets. Cartels are seldom short-lived and, in my experience, aren't limited to low level or rogue employees.

Instead, the vast majority of conspiracies we see reflect true corporate acts. The conspiracies primarily benefit the companies. As a result, both the companies and individual participants are proper subjects of our investigations. Companies should be fined so they do not profit from the crimes. And

companies should expect that the Division and the courts will take steps so that they do not commit crimes again.

The second hard truth: the Division, like the Department of Justice as a whole, almost never recommends that companies receive credit at sentencing for a preexisting compliance program. The Sentencing Guidelines allow companies to receive lower culpability scores, and thus lower fines, if they have "effective" compliance programs. Eligibility for this credit requires discovery and self-reporting before the offense is discovered or likely to be discovered outside of the company.

As a practical matter, however, it is almost never the case that a company other than the leniency applicant approaches the Division before we conduct searches or issue grand jury subpoenas. Nor do we see companies detecting, stopping, and reporting illegal conduct before significant time has passed.

In these situations, it is hard to see how a company's compliance program has earned it a significant reduction in its corporate fine. Receiving leniency is the ultimate credit for having an effective compliance program. No other company is likely to satisfy the requirements of the Sentencing Guidelines for an effective compliance program.

These may seem like tough positions for the Division to take, but the Division is no different than the Department as a whole. Now it is time for the easier truth, however. Having a compliance program may still benefit a company preparing to plead guilty to an antitrust crime in a couple different ways.

First, companies may avoid additional oversight by the court and the Division. The Sentencing Guidelines require every convicted company to have an effective compliance program. That is not optional. If a company has no

preexisting compliance program or makes no efforts to strengthen a compliance program that has proved ineffective, then that company is a likely candidate for probation.

In those situations, the Division will seek terms of probation that will require the company either to adopt an effective compliance program or address deficiencies in an existing compliance program. This is where a company's decision to retain culpable individuals who do not accept responsibility in key management positions will be considered in deciding whether the company demonstrates a commitment to effective compliance. Conversely, companies that can demonstrate they have adopted or strengthened existing compliance programs may be able to avoid probation.

In addition, we are actively considering ways in which we can credit companies that proactively adopt or strengthen compliance programs after coming under investigation. Although we have not finalized our thinking in this area, any crediting of compliance will require a company to demonstrate that its program or improvements are more than just a facade. As I mentioned earlier, true compliance starts at the top, is not optional, and is part of the company's culture.

In the most egregious cases, the Division will not give a company the autonomy to decide for itself what compliance program works best for it. In those cases, in addition to probation, the Division will seek the appointment of a compliance monitor to oversee the adoption of an effective compliance program. While those situations will most often be limited to companies that refuse to accept responsibility or acknowledge the illegality of their conduct, there may be cases when it will be appropriate for even a pleading company if that company, through word or deed, demonstrates a risk of recidivism.

To date, the Division has sought the appointment of a compliance monitor in only one a criminal matter, but the appointment of monitors is not uncommon in other contexts in the Department of Justice, and, I suspect the Division will more frequently request it in the future. For that reason, it is worth describing the circumstances that led to the Division's decision to seek the appointment of a compliance monitor.

In 2009, a grand jury indicted AU Optronics, its American subsidiary, and several of its senior executives for their participation in a long-running conspiracy to fix the price of liquid crystal displays – the screens used in laptop computers and computer monitors. The company had no preexisting compliance program and, even after it was under investigation, took few steps to put one in place.

Before, during, and after the 8-week trial that led to its conviction in 2012, AUO maintained not only that it had done nothing wrong, but also that the charged price-fixing conduct should not even be treated as illegal. Even after conviction, it did not accept responsibility. It continued to make defiant public statements and took wholly inadequate steps to adopt a compliance program. And, given the tone from the top executives at the company, any such compliance program could never have been effective. As a result, we asked that AUO and its U.S. subsidiary be placed on probation and that the court appoint an independent monitor to oversee the implementation of an appropriate compliance program.

AUO actively resisted this request, but the district court agreed with us. It imposed a three-year term of probation. That probation required AUO to develop and implement an effective compliance and ethics program. And, as importantly, AUO was required to hire, at its own expense, an independent

monitor to oversee the implementation of an antitrust compliance program and provide quarterly reports to the U.S. Probation Office.

The lesson from the AUO case should be clear: active refusal to accept responsibility, including resisting effective compliance, will result in probation and independent monitors. The Division will take a similarly hard line with companies that do not take their compliance programs seriously.

I want to close with just a few more remarks. I've been told that the Division's approach to compliance programs is all stick and no carrot. I don't think that's true, but more importantly, I think it misses the point. The purpose of having an effective compliance program is not so that the Division will cut you a break if your company commits a crime. That view is a concession of failure. Instead, the purpose of having an effective compliance program is to be a good and responsible corporate citizen. The purpose of having an effective compliance program is to avoid ever being the subject of a criminal antitrust investigation. The purpose of having an effective compliance program is the prospect of early detection and leniency. Each of these reasons for having a compliance program is a carrot – a very valuable carrot. And, if the stick becomes necessary, it is the company's conduct and how it responds to the investigation that will determine what the stick looks like.

That is the point I want to leave you with. At all times, and in all ways, compliance, and the consequences of ineffective compliance, are controlled by the company. It starts and ends there. The ICC is giving you some of the tools of compliance, and they are very good tools. But ultimately how you use the tools, what you build with the tools, and how solid that structure is depends on you and your companies.

Thank you.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA	)	Criminal No. 1:15-CR-00098
	)	
	)	
v.	)	
	)	Violation: 15 U.S.C. § 1
KAYABA INDUSTRY CO., LTD d/b/a KYB COPORATION,	)	
	)	Judge Michael R. Barrett
	)	
Defendant.	)	
	)	

UNITED STATES SENTENCING MEMORANDUM AND MOTION FOR A DOWNWARD DEPARTURE PURSUANT TO UNITED STATES SENTENCING GUIDELINES § 8C4.1

Kayaba Industry Co., Ltd d/b/a KYB Corporation ("KYB" or the "Defendant") is scheduled to appear before this Court for an initial hearing, change-of-plea hearing, and sentencing on October 29, 2015, at 9:30 a.m. The Defendant is charged with violating the Sherman Act, 15 U.S.C. § 1. The United States submits this Sentencing Memorandum to provide the Court with sufficient information that it may meaningfully exercise its sentencing authority under 18 U.S.C. §§ 3553 and 3572.

The United States also hereby moves for a downward departure pursuant to United States Sentencing Guidelines ("U.S.S.G.," "Sentencing Guidelines," or the "Guidelines") § 8C4.1 because the Defendant has provided substantial assistance to the government in its on-going investigation of Sherman Act violations by other companies and individuals in the shock absorber industry.

In support of both this Sentencing Memorandum and this Motion for a Downward Departure, the United States also submits, under seal, Attachment A ("Attachment A").

The United States and the Defendant jointly recommend that the Court sentence the Defendant to pay to the United States a $62 million criminal fine, payable in full before the fifteenth day after the date of judgment, no order of restitution, no term of probation, and to pay a $400 special assessment. This is a joint recommendation under Fed. R. Crim. P. 11(c)(1)(C). *See* Plea Agreement, ¶ 9, Docket No. 9.

I. BACKGROUND

The Sherman Act makes it illegal for competitors to eliminate competition among themselves by allocating markets, rigging bids, and fixing prices. The subversion and elimination of competition for business, whether done through agreement to divide up business by allocating customers or markets; fix prices charged to customers; or rig bids submitted to customers, typically results in the customer paying more than it should have for the work done or the product supplied. The Defendant has admitted that, through its employees, it conspired with other shock absorbers manufacturers to do these things made illegal by the Sherman Act.

Shock absorbers are part of the suspension system on automobiles and motorcycles. They absorb and dissipate energy to help cushion vehicles on uneven roads leading to improved ride quality and vehicle handling. Shock absorbers are also called dampers and on motorcycles are referred to as front forks and rear cushions.

On September 16, 2015, the United States filed a one-count criminal Information charging the Defendant with participating in a combination and conspiracy to suppress and eliminate competition in the automotive parts industry by agreeing to allocate markets, rig bids for, and to fix, stabilize, and maintain the prices of shock absorbers sold to Fuji Heavy Industries Ltd. (manufacturer of Subaru vehicles), Honda Motor Co., Ltd., Kawasaki Heavy Industries, Ltd., Nissan Motor Company Ltd., Suzuki Motor Corporation, and Toyota Motor Company, and

certain of their subsidiaries (collectively, the "Vehicle Manufacturers"), in violation of the Sherman Act, 15 U.S.C. § 1. *See* Docket No. 2.

II. SUMMARY OF THE OFFENSE

During the period charged in the Information, from at least as early as the mid-1990s and continuing until as late as December 2012 (the "Charging Period"), Defendant was a corporation organized and existing under the laws of Japan with its principal place of business in Tokyo, Japan. During the Charging Period, the Defendant and certain of its subsidiaries were engaged in the manufacture and sale of shock absorbers to Vehicle Manufacturers in the United States and elsewhere for installation in vehicles manufactured and sold in the United States and elsewhere. During the Charging Period, one of the Defendant's subsidiaries was KYB Americas Corporation, which has headquarters in Franklin, Indiana, and plants, offices, and facilities in Indiana, Illinois, Michigan, and Kansas.

During the Charging Period, Defendant and its co-conspirators entered into and engaged in a combination and conspiracy to suppress and eliminate competition in the automotive parts industry by agreeing to allocate markets, rig bids for, and to fix, stabilize, and maintain the prices of shock absorbers sold to Vehicle Manufacturers in the United States and elsewhere. The charged combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among Defendant and its co-conspirators. In furtherance of the conspiracy, the Defendant, through its managers and employees, engaged in discussions and attended meetings with co-conspirators employed by other manufacturers of shock absorbers. During these discussions and meetings, agreements were reached to rig bids for, and to fix, stabilize, and maintain the prices of shock absorbers sold to Vehicle Manufacturers in the United States and elsewhere. The Defendant has fully cooperated in the United States' investigation and entered into a plea agreement with the United States.

III. UNITED STATES' FINE METHODOLOGY AND FACTORS TO CONSIDER IN DETERMINING THE SENTENCE

The jointly recommended criminal fine was calculated using sales figures submitted to the United States by the Defendant and the victims of the conspiracy. Based on these sales figures, the United States calculates the volume of commerce under U.S.S.G. § 2R1.1(d), adjusted to reflect information provided to the United States by the Defendant pursuant to U.S.S.G. § 1B1.8, to total approximately $324 million. The affected volume of commerce consists of sales of shock absorbers in the United States by the Defendant's U.S. subsidiary.

A. Sentencing Guidelines Fine Calculation

In determining and imposing sentence the Court must consider the kinds of sentence established by the advisory Sentencing Guidelines, 18 U.S.C. § 3553(a)(4). The Sentencing Guidelines procedure for calculating the Guidelines fine range for a corporation charged with an antitrust offense is set forth below. Organizations, such as the Defendant, are sentenced pursuant to Chapter 8 of the Sentencing Guidelines. In the case of antitrust violations, in addition to the provisions of Chapter 8, special instructions with respect to determining fines for organizations are found in the Antitrust Guideline, U.S.S.G. § 2R1.1.

Under the Sentencing Guidelines, the first step in determining a defendant's fine range is to determine the base fine. The controlling Guideline applicable to the count charged is U.S.S.G. § 2R1.1(d)(1), pursuant to which the base fine is 20% of the approximately $324 million in affected commerce, or approximately $64.8 million.

The next step is to determine the culpability score for a defendant. The base culpability score is 5. *See* U.S.S.G. § 8C2.5(a). The Defendant is a corporation with more than 5,000 employees, and the offense involved certain high-level personnel of the Defendant, which adjusts the culpability score upward by 5 points. *See* U.S.S.G. § 8C2.5(b)(1). The Defendant fully

cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, which adjusts the culpability score downward by 2 points. *See* U.S.S.G. § 8C2.5(g)(2). The resulting total culpability score is 8.

The culpability score is then used to determine the minimum and maximum multipliers. A culpability score of 8 corresponds to a minimum multiplier of 1.60 and a maximum multiplier of 3.20. *See* U.S.S.G. § 8C2.6.

Applying the multipliers to the base fine of $64.8 million yields a Guidelines fine range for the Defendant of $103.68 million to $207.36 million. *See* U.S.S.G. § 8C2.7.

B. Statutory Factors to Consider at Sentencing

In addition to the advisory Sentencing Guidelines, the Court must consider the other factors set forth in 18 U.S.C. §§ 3553(a) and 3572 in determining and imposing sentence. The Court's sentence must be sufficient, but not greater than necessary, to comply with the purposes set forth in 18 U.S.C. § 3553(a)(2). Because the Defendant in this case is a corporation, not all of the statutory factors apply. Below, the factors that are most relevant to the sentencing of this Defendant are highlighted.

1. Relevant Section 3553 Factors

a. The Seriousness of the Offense (3553(a)(2)(A))

Antitrust conspiracies are by their very nature serious offenses. Antitrust crimes strike a blow to the heart of the nation's economy—competition. When competition is eliminated, as it was here, consumers are likely to pay higher prices for goods and services. According to the background comments in the Antitrust Guideline, "there is near universal agreement that restrictive agreements among competitors, such as horizontal price-fixing (including bid-rigging) and horizontal market-allocation, can cause serious economic harm." U.S.S.G. § 2R1.1, commentary (backg'd.).

b. The History, Characteristics, and Cooperation of the Defendant (3553(a)(1))

Prior to this offense, the Defendant had not been charged with any federal crime. The Defendant's cooperation in the United States' investigation was timely and complete, and the Defendant has clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct. Very shortly after the Defendant was notified of the government's investigation, it agreed to cooperate in the investigation and plead guilty to an antitrust violation. KYB then conducted a wide-ranging internal investigation designed to uncover the extent of its involvement in the antitrust crime under investigation. During the course of that investigation, the Defendant uncovered relevant documents located in the United States and elsewhere, and then quickly produced those documents to the United States, with translations where appropriate. The Defendant interviewed employees and then proffered the results of those interviews to the United States. At the request of the United States, the Defendant made its employees, including many who were outside of the United States and thus beyond the reach of grand jury subpoena, available for interviews. The Defendant also provided translators for those interviews.

The Defendant has agreed to continue cooperating in the United States' investigation. *See also* Attachment A.

c. Deterrence and Protecting the Public from Further Crimes of the Defendant (3553(a)(2)(B) and (C))

The large criminal fine of $62 million recommended in this case provides adequate deterrence to criminal conduct. The Defendant has clearly accepted responsibility for its criminal conduct. Additionally, as discussed below, the Defendant has implemented a new compliance policy to educate its employees to ensure that the company does not violate the antitrust laws in the future.

2. Relevant Section 3572 Factors

a. Preventing Recurrence of the Offense—Compliance (3572 (a)(8))

From the moment KYB received notification of the government's investigation, management committed to instituting policies that would ensure that it would never again violate the antitrust laws. Direction for this change came straight from the top—KYB's president, Masao Usui. He directed a full and complete investigation be conducted and ordered all employees to cooperate fully and truthfully with the investigation.

Simultaneously, a comprehensive and innovative compliance policy was conceived and implemented. That policy, at the direction of the Defendant's senior management, sought to change the culture of the company to prevent recurrence of the offense. KYB's compliance policy has the hallmarks of an effective compliance policy including direction from top management at the company, training, anonymous reporting, proactive monitoring and auditing, and provided for discipline of employees who violated the policy. While not exhaustive, the following is a description of some of the highlights of KYB's compliance program.

The new policy required training of senior management and all sales personnel. In addition to classroom training, it provided one-on-one training for personnel with jobs, such as sales people, where there is a high risk of antitrust crimes. The effectiveness of the training was measured by testing employees' awareness of antitrust issues before and after the training. The policy requires prior approval, where possible, of all contacts with competitors and reporting of all contacts with competitors. These reports are audited by in-house counsel. Under the new compliance policy, sales personnel must certify that all prices were independently determined and that they did not exchange information or conspire with competitors when determining the price. An anonymous hotline was set up so that employees can report possible violations of the

antitrust laws. Senior management's efforts set the tone at the top and made compliance with the antitrust laws a true corporate priority.

b. Discipline of Culpable Actors (3572 (a)(8))

Two high-ranking employees who were personally involved, or supervised employees who were involved, in the conduct charged in this case were demoted and no longer have sales responsibilities. Other, lower-ranking, employees who were involved in the conduct may also be disciplined.

c. The Defendant's Financial Position (3572 (a)(1))

The Defendant is a solvent corporation and has agreed to pay the agreed-upon fine of $62 million within 15 days of the final judgment.

IV. MOTION FOR DOWNWARD DEPARTURE PURSUANT TO U.S.S.G. § 8C4.1

The United States requests that the Court impose a sentence that includes a criminal fine of $62 million, which is below the Guidelines fine range of $103.68 million to $207.36 million. While the recommended criminal fine reflects a 40% reduction from the minimum fine under the Sentencing Guidelines, the United States believes it is sufficient, but not greater than necessary, to comply with the purposes set forth in 18 U.S.C. § 3553(a)(2), and reflects the factors enumerated in 18 U.S.C. § 3572. The recommended fine is also appropriate because of the substantial assistance the Defendant provided to the United States in its continuing investigation of Sherman Act violations by other companies and individuals.

A. Legal Framework for Departures/Factors to be Considered

Under U.S.S.G. § 8C4.1, upon motion of the United States, when sentencing an organization, the Court may depart from the fine range determined pursuant to the Sentencing Guidelines based on the defendant's substantial assistance in investigating or prosecuting another

organization or individual. When determining the appropriateness and scope of any such departure, the Court may consider a variety of factors, including (but not limited to):

1. The significance and usefulness of the defendant's assistance;
2. The nature and extent of the defendant's assistance; and
3. The timeliness of the defendant's assistance.

U.S.S.G. § 8C4.1(b)

B. Summary of Substantial Assistance Provided

The United States' request for a downward departure is based on the three factors enumerated above.

First, the Defendant's assistance was extremely significant and useful in quickly moving the investigation forward. As a result of the cooperation provided by the Defendant, the United States was able to obtain important evidence of the conspiracy that was otherwise unavailable to the United States. The United States was able to obtain important documents evidencing the conspiracy that were located outside of the United States and, thus, beyond the reach of grand jury subpoena power. When producing these documents, as well as documents located within the United States, the Defendant provided English translations of important Japanese-language documents, thus making them immediately accessible to the United States and reducing the time and cost of the government's investigation. Additionally, as a result of the cooperation provided by the Defendant and its employees, both within the United States and from Japan, the United States was able to rapidly identify incriminating evidence on key documents and gain an in-depth understanding of the nature and scope of the conspiracy. Upon government request, the Defendant made company employees available for interviews at the Antitrust Division office in Chicago. These employees were based in Japan, beyond the reach of grand jury subpoenas.

When making employees available for interviews, the Defendant also provided Japanese-language interpreters as needed.

Second, the Defendant cooperated fully. It quickly conducted a comprehensive internal investigation designed to uncover the scope of the antitrust conspiracy. The Defendant provided information that assisted the United States in determining the extent to which the conspiracy impacted United States commerce, allowing the United States to more quickly focus its investigation.

In particular, pursuant to U.S.S.G. § 1B1.8, the Defendant provided information that expanded the scope of the conspiracy's impact on U.S. commerce. The United States was able to conduct interviews of the Defendant's employees more efficiently because of the Defendant's thorough and complete internal investigation. The Defendant is committed to continuing its cooperation by, among other things, continuing to provide documents and make its employees available to be interviewed in the United States. The Defendant is also committed to make its employees available to testify before the grand jury or at any trial that may result from the investigation. *See* Plea Agreement, ¶¶ 13-14, Docket No. 9.

Third, the Defendant's assistance was timely. Within a very short time after the service of a grand jury subpoena upon the Defendant, the Defendant agreed to cooperate and acknowledged that cooperation included pleading guilty to conduct that violated the Sherman Act, 15 U.S.C. § 1. Thereafter, the Defendant undertook an internal investigation, and subsequently made several attorney proffers to the United States regarding conduct relating to shock absorbers. Those attorney proffers enabled the United States to focus its investigation. The Defendant's early and wholehearted cooperation significantly advanced the United States'

investigation, particularly since evidence provided by the Defendant implicated another corporation and its employees in conduct that violates the Sherman Act.

C. United States' Evaluation of Substantial Assistance

The Sentencing Guidelines list as a relevant factor the United States' evaluation of the assistance rendered by the organization. U.S.S.G. § 8C4.1(b)(1). The United States believes that the Defendant has provided full, substantial, and timely cooperation that has been significant and provided useful assistance in the United States' ongoing investigation of violations of federal antitrust and related criminal laws in the shock absorbers industry. The Defendant's cooperation has provided the United States with extensive, credible information against both corporate and individual coconspirators, which has significantly advanced its investigation.

V. RECOMMENDED SENTENCE

The sentence recommended in this case takes into account the Defendant's substantial assistance as well as the factors enumerated in 18 U.S.C. §§ 3553 and 3572, and is a sentence sufficient, but not greater than necessary, to reflect the seriousness of the offense, to promote respect for the law, and to afford adequate deterrence. The United States and the Defendant jointly recommend the Court sentence the Defendant as follows. *See* Plea Agreement, ¶ 9, Docket No. 9.

A. $62 Million Criminal Fine

The United States and the Defendant have agreed that a criminal fine of $62 million is an appropriate sentence in this matter. In arriving at this figure, the United States took into account various factors enumerated in 18 U.S.C. §§ 3553(a) and 3572(a)(8), as discussed above, as well as the factors enumerated above in the government's motion for a downward departure for substantial assistance pursuant to U.S.S.G. § 8C4.1.

B. No Order of Restitution

Restitution is also a factor the Court must consider under 18 U.S.C. §§ 3553(a) and 3272 in determining and imposing sentence. Pursuant to 18 U.S.C. § 3663, restitution is not mandatory for violations of 15 U.S.C. § 1, and in light of the availability of civil causes of action that potentially provide for a recovery of a multiple of actual damages, *see* 15 U.S.C. § 15, the United States and the Defendant recommend that the sentence not include a restitution order.

C. No Term of Probation

Pursuant to 18 U.S.C. § 3561(c)(1), the Court may impose a term of probation of at least one year, but not more than five years. In considering whether to impose a term of probation the Court should consider the factors set forth in 18 U.S.C. § 3553. *See* 18 U.S.C. § 3562. However, as noted above, because the Defendant is a corporation many of those factors do not apply. For the same reason, many of the conditions of probation set forth in 18 U.S.C. § 3563 are not applicable. The Court should also consider the factors in U.S.S.G. § 8D1.1 which set forth the circumstances under which a sentence to a term of probation is required. These circumstances include ordering a term of probation to secure payment of the special assessment, the fine, or restitution, or to ensure implementation of an effective compliance program.

In this case, the Defendant, a solvent corporation, has agreed to pay the special assessment and the agreed-upon fine of $62 million within 15 days of the final judgment. Furthermore, as noted above, the United States and the Defendant have agreed to recommend that restitution is not appropriate in this case because of the availability of civil causes of action that potentially provide for a recovery of a multiple of actual damages. *See* 15 U.S.C. § 15.

Finally, as described above, the Defendant has already implemented a new compliance program, taken action against culpable employees and managers, and has is no way indicated anything other than timely and complete acceptance of responsibility. Therefore, for these

reasons, the United States and the Defendant recommend that no term of probation be imposed by the Court in this case.

D. $400 Special Assessment

The Court should order the Defendant to pay a $400 special assessment, pursuant to 18 U.S.C. § 3013(a)(2)(B), and as agreed to by the United States and the Defendant.

VI. CONCLUSION

For these reasons, the United States recommends that the Court impose a sentence requiring the Defendant to pay a fine of $62 million, payable within 15 days of judgment, no order of restitution, no term of probation, and to pay a $400 special assessment.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA	)	Criminal No. 1:15-CR-00098
	)	
	)	
v.	)	
	)	Violation: 15 U.S.C. § 1
KAYABA INDUSTRY CO., LTD d/b/a KYB COPORATION,	)	
	)	Judge Michael R. Barrett
	)	
Defendant.	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on _____, 2015, I caused the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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Respectfully submitted,

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