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ANTITRUST UPDATE

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THE ANTITRUST DIVISION SPEAKS: TRENDS IN CRIMINAL ENFORCEMENT AND WHAT TO EXPECT NEXT

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The ABA Antitrust Section Spring Meeting has just concluded in Washington, DC. Senior officials of the United States Department of Justice, Antitrust Division, including William J. Baer, Assistant Attorney General for the Division, spoke on panels covering a variety of topics and provided guidance on Division priorities. The three-day conference was attended by 2,788 competition professionals, including 587 attendees from 58 foreign countries and 35 foreign enforcement agencies.

In this update, we cover developments at the conference, where Mr. Baer offered some of his most extended remarks since becoming head of the Division, including announcing a significant policy change.

The update also recaps major developments in the last year of criminal enforcement – an indication of what may occur in the year ahead.

PERSONNEL CHANGES AND DIVISION REALIGNMENT

Bill Baer took the reins of the Antitrust Division on January 3, 2013, the latest move in a career in both private practice and federal service. During his confirmation hearing, Baer promised to continue to lead a vigorous enforcement effort at the Division.

Baer's solid reputation and credentials should help steady the Division at a time when the organization faces daunting personnel and budget challenges – for instance, on January 30, the Division closed four of its seven regional field offices, and the sequestration is further squeezing its budget.

At the Spring Meeting, Baer addressed the dire budget situation, stating, "This is serious. It's real. We are focusing on mission critical work." Baer said the

Division's approach in light of the budget difficulties would be a modified "Willy Sutton principle." He explained that when Sutton was asked, "Why do you rob banks?" he said, "Because that's where the money is." Baer continued, "Our effort has got to be on behavior that causes the most significant consumer injuries. We are looking hard at where the problems are the biggest: that's where we are going to divert our scarce resources."

On the criminal side, this means a continued focus on international cases, with local and regional bid rigging cases receiving lower priority. (However, the states, especially those with active antitrust sections, may pick up some of this slack.)

Baer added further remarks in the Antitrust Division's Annual Newsletter which was released during the Spring Meeting: "Compare the $1.14 billion in criminal fines with the Division's FY 2012 direct appropriation of $72 million and you can see that the Division gives taxpayers a healthy return on their investment. These fines are contributed to the Crime Victim's Fund, helping Americans harmed by crime throughout our country."

CARTEL ENFORCEMENT – DEVELOPMENTS, TRENDS AND WHAT THE FUTURE HOLDS

Changes to the Antitrust Division's carve-out practice in corporate plea agreements

At the Spring Meeting, Baer announced a significant policy change, issuing a statement on April 12, revising the Division's practice of publicly identifying individuals who were carved out of corporate plea agreements.

Depending on circumstances, the Division may be willing to enter into a plea agreement with a corporation and provide non-prosecution to some, *but not all*, of the corporation's executives. The individuals not covered by the non-prosecution protection are "carved out" of the plea agreement. The most contentious feature of the Division's carve-out practice was that the Division would name carved-out individuals in a public plea agreement, creating the impression that these individuals had been involved in the criminal conduct.

The defense bar had long lobbied for a change in this policy. Baer agreed. "As part of a thorough review of the Division's approach to corporate dispositions, we have decided to implement two changes. The Division will continue to carve out individuals who we have reason to believe were involved in criminal wrongdoing and who are potential targets of our investigations. However, **we will no longer carve out employees for reasons unrelated to culpability**." And, for those carved out, "**the Division will not include the names of carved-out employees in the plea agreement itself**. Those names will be listed in an appendix, and we will ask the court for leave to file the appendix under seal." Baer cautioned, however, that the Division would still "demand the full cooperation of anyone who seeks to benefit" from non-prosecution protection.

Fines and jail sentences continue upward climb

In 2012, the Division filed 67 criminal cases, including cases against individuals and corporations. The defendants were both domestic and foreign. The Division collected over US$1.35 billion from criminal antitrust cases. The bulk of that was in fines (US$1.14 billion), and another US$220 million was levied in restitution to state and federal agencies. These figures do not include the billions collected in civil antitrust suits by victims. The trend toward incarceration for convicted executives continued, with ever-increasing jail sentences being imposed. Forty-five executives were sentenced to prison in 2012, almost double the number from the year before. **The average prison sentence was just over two years**.

Two other less noticeable but important trends are also emerging. First, **the Division is holding more executives per company accountable**. The Division is insisting on pleas from more executives from the same company, especially if the company has not come in early to cooperate.

The Division is trying to **equalize the punishment between foreign-based individual defendants and their US counterparts**. In the first major international cartel case in the 1990s, the Division did not charge a single foreign individual. Over time, however, the Division has come to realize it has great leverage to induce foreign defendants to surrender to US jurisdiction. Extradition, border watches and Interpol red notices all make international travel perilous for an indicted foreign defendant. Many fugitives ultimately choose to come to the US and serve their sentences. In 2012, a foreign executive agreed to come to the US and serve a two-year sentence – the longest to date for a foreign defendant.

International cooperation between the US and other competition regimes continues to grow as well. The US recently signed a Memorandum of Understanding with China and India providing for cooperation and

coordination. Scott Hammond, the Division's Deputy Attorney General for Criminal Enforcement, said at the Spring Meeting, "Both China and India are making great strides on that [cartel] front." Hammond said the US$56 million fine China recently imposed on six liquid crystal manufacturers for price fixing and the US$1.1 billion fine the Competition Commission of India imposed on a cement manufacturers' cartel demonstrate robust cartel enforcement and "got the attention of many folks in this [conference] room." Also, the European Commission recently imposed the largest fine in EU history (US$1.94 billion) against seven companies for collusion involving TV cathode rays tubes.

Cartel enforcement is the number one priority not only of the US Antitrust Division but also of competition commissions worldwide. The plethora of competition authorities interested in prosecuting international cartels requires critical negotiations to minimize penalties and ensure that multiple fines are not imposed for the same commerce. The US Antitrust Division tries to take potential foreign fines into account, but of course, each jurisdiction wants the highest fine it can impose. During a panel on negotiating plea agreements, Lisa Phelan, Chief of the National Criminal Enforcement Section, said, "We are cognizant of that [potential fines in other jurisdictions] but we can't promise there will never be an overlap."

Questions (and answers) about the Division's first use of a deferred prosecution agreement

Deferred prosecution agreements (DPA) and non-prosecution agreements (NPA) are familiar tools in the DOJ's Criminal Division. While the two agreements differ in some respects, they essentially allow a company to take responsibility for criminal conduct and pay fines and/or restitution, while avoiding the often cataclysmic consequences of a guilty plea.

The Division, however, has traditionally relied on its unique Corporate Leniency Program (amnesty) as the sole means for a culpable corporation to avoid a conviction. During the course of the Division's municipal bonds investigation, however, the Division made use of NPAs. Four banks agreed to pay restitution and cooperate in the investigation, but no guilty pleas were required. On February 6, 2013, in connection with the LIBOR rate-fixing investigation, the Division announced its first ever DPA in which it required a financial institution to admit responsibility, pay a US$150 million fine and cooperate. Will the Division use these alternative resolutions to a corporate guilty plea going forward?

The short answer is yes, but only rarely. According to Hammond, these agreements were driven by the heavily regulated nature of the banking industry and the fact that Division was working with the DOJ Criminal Division (which does use these agreements.) "We disfavor the use of NPAs and DPAs," Hammond said. "These cases are not an indication that we've changed our policy, it's an indication that the facts of these cases merited that result." **Outside of cases involving the financial services industry, the Division has not entered into an NPA or DPA**.

Corporate Leniency Program: the race to cooperate

There were no new announcements at the Spring Meeting regarding the Division's hugely successful Corporate Leniency Program. Division officials did, however, comment on related programs, such as Amnesty Plus.

Under the Corporate Leniency Program, the first company to cooperate in an investigation and meet certain other conditions will not be prosecuted. Also, any executive from that company who agrees to cooperate will not be prosecuted.

A related program has become known as **Amnesty Plus**. If a company's cooperation is too late to receive amnesty on the product being investigated, the company may disclose a cartel on a different product. The company would receive amnesty for its conduct on the second product plus a discount on its fine for price fixing on the first product. According to Phelan, the Amnesty Plus discount can be as much as 25 percent. The Amnesty Plus program has been at work in the global auto parts investigation. What started out as an investigation of price fixing on one auto part has expanded into the largest investigation in Division history as companies take advantage of Amnesty Plus to disclose their collusion on additional auto components.

One fact emphasized at the meeting: even when leniency is not available, it can still be advantageous to cooperate early. The Division incentivizes early cooperation by offering significant discounts in fines for early cooperators. Early cooperation will also be of benefit to a company's

executives, often limiting the amount of jail sought under a plea agreement, as well as limiting the number of executives who will be charged. The Division is usually willing to give as many as four companies a significant discount for early cooperation. "The so-called second-in cooperator – a company that is too late for leniency but still offers to cooperate early – can receive a discount of as much as 25-30 percent off of its fine," Phelan noted.

Once the Division believes it no longer needs more evidence or additional witnesses to prove a cartel case at trial, its negotiation posture changes markedly. Reduction from the sentencing guidelines for cooperation is taken off the table, and without a departure from the sentencing guidelines, the result is harsh: more individuals targeted for prosecution, with those convicted facing higher fines and longer jail sentences.

Leniency applications are the chief driver of cartel investigations. Leniency applicants approach the Division for a variety of reasons. Companies may learn of an existing cartel problem though a compliance presentation or through a good compliance program's internal whistleblower provision. Or a company that may have been without a compliance program may uncover a problem when a compliance program is established. Companies also learn of potential problems when conducting due diligence, whether for a proposed acquisition, an internal investigation in another area, an employee dismissal or in a host of other ways. When a company learns it has a cartel problem, the remedy may be to seek leniency or some form of very early cooperation. The Division, with the help of the sentencing guidelines, has structured its enforcement program in a way to provide significant benefits for early cooperators, and a significant escalation of penalties for those who do not.

In an important test case, a jury finds "twice the gain or twice the loss" of at least US$500 million in a criminal trial

Though the maximum corporate fine under the Sherman Act is US$100 million, under the alternative fine provisions of 18 USC Section 3571(d), a defendant can be fined up to "twice the gross gain or twice the gross loss" from the conspiracy.

Over the last decade, the Division has routinely negotiated criminal fines in excess of US$100 million because corporations have agreed in plea agreements to pay these amounts. In one recent case, for the first time, the Division had to prove beyond a reasonable doubt the amount of gain/loss from an alleged price fixing cartel. The indictment charged, and the jury found, that the loss to the victims of the cartel was more than US$500 million. **Based on the jury's finding, a fine of up to US$1 billion could have been imposed**, but the court thought that figure was excessive. The ultimate fine was US$500 million, still significantly above the US$100 million Sherman Act maximum.

Bipartisan whistleblower protection reintroduced in the US Senate

Senators Patrick Leahy (D-VT) and Chuck Grassley (R-IA) recently reintroduced legislation that would provide protection to whistleblowers who provide information to federal prosecutors in criminal antitrust investigations. The proposed Criminal Antitrust Anti-Retaliation Act of 2013 would permit whistleblowers to file a complaint with the Department of Labor if they believe they are the victim of retaliation.

The bill, even if passed, will likely have little impact. First, the only people with knowledge of a price-fixing cartel typically are the conspirators themselves. Second, unlike Dodd-Frank, the legislation provides no financial incentive for whistleblowers.

Status of major investigations and a look ahead

Several of the Division's major cartel matters appear to be winding down. LIBOR will continue to grab headlines for civil suits, but the future involvement of the Division may be limited.[1]

The Division announced in 2012 that the **auto parts investigation** was the "largest criminal investigation the Antitrust Division has ever pursued." Bill Baer noted that "the Division has charged nine companies and 12 individuals for conspiring to fix prices and rig bids on a range of auto parts including seat belts, steering wheels, and instrument cluster panels. The investigation has resulted in $809 million in criminal fines and jail sentences for several executives." The auto parts investigation will go on for years. As each

[1] In a related LIBOR civil case, one district court held that the rate-fixing manipulation may have been many things, but it was not a restraint of trade. The antitrust counts in this civil suit were dismissed.

defendant pleads and cooperates, the Division gains access to more witnesses and documents (which foreign companies voluntarily bring to the US as part of their cooperation agreements). It can take many months to review these documents, starting with translating them into English. And each investigation of one auto part has, through Amnesty Plus, led to evidence of collusion around a different auto part. It appears that every component of an automobile (except perhaps the air freshener hanging from the mirror) may well have been subject to collusion. This matter will be on the Division's docket for the remainder of the Obama Administration – especially if some defendants don't cooperate and instead go to trial.

The Division has also been active in bringing cases for bidder collusion at **real estate auctions**. It is as illegal for bidders to collude on the price they will pay as it is for sellers to collude on the price they will sell at. In these cases, real estate investors have agreed to not bid against each other in order to suppress the prices paid at public real estate auctions.

And what investigation will we hear of next? Chances are the Division is working with a new leniency applicant at this very moment. Somewhere, covert audio and video recordings are being made; coordination with competition authorities from other jurisdictions is taking place. We may find out what comes next when the media reports on a set of surprise dawn raids on companies and their executives, coordinated among competition authorities around the globe.

Practice points: leniency policy heightens need for an active, effective compliance program

Most executives already know it is illegal to fix prices or rig bids. Unfortunately, some think they will never get caught, or have outdated notions that the company can pay a modest fine and move on with minimal damage. Antitrust compliance programs can be key to teaching otherwise, so that companies and executives may avoid the nightmare of a cartel investigation – especially an international one. **An effective antitrust compliance program involves not just a list of "do's and don'ts" but also first-hand, current stories from the trenches about executives whose lives were ruined and companies that saw value and goodwill vanish because they took part in a cartel.** Such a program will involve senior management and experienced antitrust lawyers and presenters and aim to create a top-down culture of ethics and compliance. **A good compliance program also gives executives confidence about what they *can* do**, not just what they should not do, so pro-competitive actions are not unduly restrained by antitrust concerns.

A compliance program should contain another feature that may be a lifesaver: **an emergency plan of action** if evidence emerges of a possible cartel issue. In such a situation, time is of the essence – **the Division is fond of stating that a matter of minutes can determine which company gets the leniency**. What will happen if a cartel problem is discovered? The compliance program should spell it out. Who in management gets notified? Who issues a hold on company documents? Employees' first instinct may be to destroy documents – a critical misstep that can destroy any hopes of a favorable resolution for the company. Who conducts the internal investigation and who should be interviewed? Which authorities exactly should be contacted if leniency is to be sought? In the US? EU? Elsewhere?

A cartel can involve many companies and during the cartel each member has a strong incentive to hide the existence of the conspiracy. But, as soon as a hint of the cartel becomes public, each cartel member has the incentive to be the first to cooperate and get amnesty. The decision of whether to seek amnesty is time-critical and can mean life or death to an organization (and prison or freedom for individuals). Seeking leniency even if a cartel issue is discovered is not always the best strategy, but to make an informed decision in a crisis requires planning ahead of the crisis – planning that hopefully will never be needed.

WHEN ENFORCEMENT IS ON THE RISE

Cartels have existed virtually since the beginning of commerce and they still persist. For the DOJ's Antitrust Division, cartel enforcement has always been a top priority – indeed, the Division has successfully exported this priority to jurisdictions around the globe. Each year, penalties seem to escalate and, by deploying leniency programs, investigators are learning how to expand their reach. In this climate, it makes plain sense to be aware of the consequences of doing the wrong thing, and the value of doing the right thing.

All of these intertwining threads are what make cartels one of the most interesting subjects in antitrust law – but better to be learned about in a client alert than as a participant.

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For more information about the work of the Antitrust Division, and to learn more about compliance programs for your workplace and the DOJ's amnesty programs, visit www.dlapiper.com or contact:

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