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## Tailoring Compliance Programs to Address the Antitrust Division's Tools for Expanding Cartel Investigations

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### Introduction

Price fixing behavior typically increases in recessions or other economic downturns as firms face more pressure to cut prices and competitors scramble for customers and orders. Most cartels are formed to stave off price wars and preserve revenue rather than to fatten healthy profits. Conspiracies, though often ineffective, are typically driven by insecurity and a desire to do something to forestall economic catastrophe.

Yet in recessions or industry contractions, corporate compliance and prevention programs are often subject to budget cuts or even elimination. As a result it has become even more vital for compliance programs to be cost effective and focused on detecting and halting problematic behavior that is most likely to be exposed by investigations launched by the U.S. Department of Justice and other competition authorities around the world.

Price fixing and market allocation creates enormous exposure. In the first six months of its current fiscal year, the U.S. Government has obtained nearly \$1 billion in criminal fines against corporate defendants, and the longest sentence yet for a one-count Sherman Act offense. Included among the fines was the second highest criminal fine ever for an alleged price-fixing conspiracy—a \$400 million fine, agreed to by LG Display as part of its plea agreement in connection with DOJ's ongoing investigation in the thin film transistor liquid crystal display (TFT-LCD) panel industry. LG's potential exposure, according to the sentencing memorandum, had been \$1.6 billion (four times the amount of the agreed fine).

Although the media's coverage of the Obama administration's antitrust policy has focused mostly on reinvigoration of monopolization and merger enforcement, Assistant Attorney General Christine Varney has made clear that DOJ will not be diverting resources from criminal enforcement and from the 135 pending grand jury investigations of alleged domestic and international cartels.<sup>1</sup> Indeed, she has directed the Antitrust Division to focus its efforts on detecting new cartels that may have been encouraged by economic instability and concentration of markets, particularly where the government has infused funding to distressed industries and provided stimulus money through federal, state, and local agencies.

In detecting cartels, the Antitrust Division will rely not only on its highly-successful Leniency Program, but also on variants of that program and innovative investigative techniques to widen Division investigations into related markets within a particular economic sector. In addition to its standard Leniency Program, the Division uses "Affirmative Amnesty," "Amnesty Plus," and "Penalty Plus" programs to create strong incentives for companies already implicated in an ongoing investigation or in a prior offense to self-report potential antitrust violations in other markets. The Antitrust Division has also increasingly used investigative techniques such as "cartel profiling" and "rolling investigations" to expand investigations to include additional markets, especially other markets that involve some of the same participants. These tools have led to expanded Division investigations in many economic sectors, including transportation (air cargo, air passenger, freight forwarding, rail transport, trucking transport); technology (DRAM, SRAM, graphic processing units, flash memory, TFT-LCD panels, cathode ray tube screens); and food and agriculture (cheese, milk, egg processing, mushrooms, tomato processing, citrus-fruit, fertilizer, chocolate).

As a result, firms are well-advised to pay particularly close attention to the markets on which the Division is currently focused<sup>2</sup> and whether any of their competitors are under investigation in other business lines.<sup>3</sup> Firms should take measures to ensure they are not caught off guard if such investigations expand to include their own markets. In the business areas that are at risk, such measures may include enhanced training, establishing, or reinvigorating an internal whistleblower program, focused reviews of business practices, closer assessment of trade association activities and industry gatherings, reviews of employees who have come from competitors, and a pointed compliance certification process. Firms should of course remain vigilant in all of their ongoing compliance efforts, particularly given that these difficult economic times make cartel behavior even more tempting.

### **The Division's Leniency Program**

The Leniency Program is the Division's primary cartel-busting tool and provides the initial impetus for many of the Division's investigations. The Program destabilizes cartels by offering great rewards to the cartel participant that is "first in the door" to report to the Division first-hand information about criminal violations of the antitrust laws, with substantially diminished benefits for other participants that later come forward, admit culpability, and cooperate with the investigation. The Division's criminal enforcement programs has been founded both on the powerful economic incentives for self-reporting that the Leniency Program creates and on reaching early plea agreements and obtaining cooperation from other cartel participants. In so doing, the Division has been able to extract significant fines and jail terms with few trials.

The first company to self-report cartel activity in a particular market—the amnesty applicant—receives for itself and all of its officers, directors, and employees complete immunity from criminal prosecution for the anticompetitive conduct reported, assuming the Division has not already begun an investigation and the company meets certain conditions. Even when the Division has already begun an investigation, the first company in the door to self-report may still be eligible for amnesty. Under the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) of 2004, the successful amnesty applicant can also limit its civil exposure to single damages for its own sales,

rather than the treble damages and joint and several liability facing the other members of the alleged conspiracy, although it must cooperate with plaintiffs.<sup>4</sup> (These civil benefits from ACPERA will sunset in one month unless Congress extends them.)

Companies that are not the first to report cartel activity and participate in the Leniency Program receive strikingly unfavorable treatment relative to the amnesty applicant. They are subject to fines of up to \$100 million or even more—up to twice the gain from the illegal conduct or twice the loss to victims.<sup>5</sup> Probably even more importantly, officers, directors, and employees found guilty of wrongdoing face prison sentences of up to ten years and fines of up to \$1 million. While the amnesty applicant receives complete immunity from prosecution, other companies (even those that cooperate) will often be forced to enter plea agreements that require them to pay large fines, and leave officers, directors, or employees open to prosecution and significant jail terms.

### **Carrots, Sticks, and Offers You Do Not Want To Refuse—The Government's Tools For Expanding Cartel Investigations**

To make matters worse, once a company comes under scrutiny for one line of business, it is likely to be investigated in others. Division prosecutors have adopted a strategy of "cartel profiling," which reflects their view that a company engaging in price-fixing or bid-rigging in one market is particularly likely to have colluded with competitors in other markets as well, especially when the same individuals had pricing authority.<sup>6</sup>

As a result, markets that are "adjacent" to the investigated market, or other markets where one or more companies already under investigation are also important participants, are likely to draw increased scrutiny. For example, the successful prosecutions of cartels in the markets for Vitamins A, C, and E began with leads developed during probes of smaller vitamin markets. The Division ultimately uncovered cartel activity in 12 separate markets and, all told, obtained \$1 billion in fines and jail sentences for 11 executives. Similarly, the successful prosecutions of citric acid, lysine, monosodium gluconate, sodium erythorbate, and maltol cartels resulted from a long "rolling" investigation, which led investigators from one market to another and resulted in \$250 million in fines and criminal convictions of 12 companies and 14 individuals.<sup>7</sup>

The Division has devised three lesser known programs to supplement its Leniency Program, specifically to expand existing investigations into additional markets—Affirmative Amnesty, Amnesty Plus, and Penalty Plus.

### **The Offer That You Do Not Want To Refuse—"Affirmative Amnesty"**

Taking the Leniency Program model one step further, the Division has developed "Affirmative Amnesty." When the Division uncovers potential evidence of a new conspiracy (often in the context of an existing investigation), it may provide a subject company with information about the suspected cartel and the opportunity to cooperate in the covert investigation in return for amnesty. This strategy has reportedly enabled the Division to "expose the inner-workings of the cartel" in an number of cases.<sup>8</sup> The Division is selective in choosing candidates for Affirmative Amnesty—"usually publicly-owned multinational companies ... that have already established their bona fides by accepting responsibility, cleaning house, and offering full and timely cooperation on other Division criminal

matters. Typically, only companies that have obtained amnesty, amnesty plus, or second-in cooperation status would warrant consideration as a candidate for affirmative amnesty."<sup>9</sup>

The purpose of Affirmative Amnesty is to use nascent evidence of a conspiracy found in the course of one conspiracy to generate a new amnesty application in a different line of business, with all the attendant pressures for early cooperation by the other co-conspirators once the investigation becomes public.

### **The Carrot—"Amnesty Plus"**

The Division's Amnesty Plus Program provides incentives for companies under investigation in one market, but do not have amnesty, to be the first to provide information about cartel activity in another market. Participation in this program provides two important benefits. First, the company can receive complete amnesty for violations in the second market—as the first-in-the-door amnesty applicant under the Leniency Program. Second, is the "plus": reporting misconduct in the second market earns the company more lenient treatment in the market already under investigation—typically a substantial discount off any fine in the first investigation. The size of the discount in the first market depends on the strength of the evidence the applicant provides regarding the new market, the potential significance of the uncovered case, and the likelihood the Division would have uncovered collusion absent the cooperation.

Amnesty Plus may be an attractive option for companies that do not have amnesty in an existing investigation and are looking for something to offer prosecutors to reduce their fine. Such companies may also be motivated by fear that prosecutors will eventually uncover evidence of potential violations in the second market in any event, and a desire to avoid again being second, third, or later in the door with respect to that market.

Crompton Corporation's successful use of Amnesty Plus during the investigation and prosecution of the rubber chemicals cartel is a good example. Crompton, which did not have amnesty in the rubber chemicals investigation, offered the Division evidence concerning wrongdoing in multiple, unrelated chemical product markets—including ethylene propylene diene monomers, heat stabilizers, acrylonitrile butadiene, and polyester polyols—and applied for amnesty in those markets. Investigations targeting these additional chemical cartels resulted in \$48 million in fines. For its cooperation, Crompton reportedly received a 59-percent discount off the minimum guidelines-range fine for its participation in the rubber chemicals cartel.<sup>10</sup> (By contrast, second-in-the-door companies typically receive no more than a 30-35 percent discount for cooperation that relates solely to the existing inquiry.<sup>11</sup>) Similarly, BASF's cooperation under the Amnesty Plus program greatly facilitated the Division's identification and prosecution of the various vitamin cartels.<sup>12</sup> The Division has seen Amnesty Plus as its most compelling tool in generating new investigations and reports that fully half of its investigations arise from Amnesty Plus.

### **The Stick—"Penalty Plus"**

Importantly, foregoing amnesty and other benefits of the Leniency Program are not the only potential negative consequences of failing to self-investigate and self-report possible violations in a market

currently targeted for investigation as well as other markets. Under a policy known as "Penalty Plus," the Division will seek sentencing enhancements for offenses if a company under investigation in one market fails to report violations in other markets and the Division later prosecutes it in those other markets based on information from other sources or the company's own witnesses and documents.

Although the Division will seek the greatest enhancements (including higher fines and longer prison sentences for more executives) if a company actually knows about additional violations but willfully fails to report them, even a failure to detect a separate violation after an internal investigation can lead the Division to recommend increased sanctions. Depending on the severity of the act or omission, the Division may urge sentencing in the upper range of the U.S. Sentencing Guidelines, or even a sentence above the range.<sup>13</sup>

For example, in the prosecution of the monochloroacetic acid (MCCA) cartel, the Division sought an upward departure from the Sentencing Guidelines for Hoechst AG, which it argued was an antitrust recidivist that did not report the MCCA-market violations during a prior prosecution involving a related market. The Division requested a sentence of 30 percent above the maximum guideline fine,<sup>14</sup> and the court agreed to that recommendation in imposing a \$12 million fine.<sup>15</sup>

Again, the principal motivation for the Penalty Plus policy is to create strong incentives for firms not only to cooperate in existing investigations, but also to ferret out new conspiracies that will expand existing Division investigations into new businesses and new industries.

## **Conclusion**

Cartel enforcement continues to be a top priority for the Division in the Obama Administration, and the Leniency Program and its progeny will continue to be key tools for expanding the Division's existing investigations into additional markets. Companies currently under investigation for conduct in one market should be aware of the potential for the Division to expand its investigation into other markets in which they conduct business. Similarly, companies not currently under investigation but that happen to participate in a related market or another market with competitors already being investigated should be aware that they are likely to come under the Division's scrutiny as well. All such companies should be especially vigilant in their compliance efforts, track publicly-disclosed investigations that may lead to investigations in their own industries, and consult experienced antitrust counsel immediately on discovery of any indications of possible wrongdoing. That is particularly important in these times of depressed market conditions, when economic pressures can make cartel activity particularly tempting for businesspeople.

One particularly notable public example of a company effectively executing such a compliance strategy is Virgin Airlines. Shortly following the announcement of searches and dawn raids on many air cargo carriers, including its bitter rival British Airways, Virgin applied for leniency regarding fixing fuel surcharges on passenger tickets with British Airways. Virgin did so even though it was not searched (and has not been prosecuted) in the air cargo investigation. British Airways, which cooperated swiftly on the air cargo investigation and could have benefited from an Amnesty Plus reduction by disclosing the passenger conspiracy, was beaten to the punch. It therefore faced two

criminal prosecutions instead of one, agreed to a combined \$300 million fine, and had ten executives carved out of its plea agreement for potential individual prosecution. Virgin escaped with no criminal liability at all—if it had waited the result could have been far different.

Firms should take a proactive approach to reduce exposure to potential cartel investigations, especially when related markets or competitors are under investigation. WilmerHale is very well suited to this type of work. In our cartel practice, we focus on prevention and addressing small problems before they become large ones. We regularly counsel clients on compliance, defend criminal and civil investigations, and represent clients in private litigation. We have handled major investigations in the United States, European Union, and Asia and private litigations in many different industries including consumer electronics, transportation and logistics, healthcare and pharmaceuticals, and financial institutions.

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<sup>1</sup> Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement Antitrust Division U.S. Department of Justice, Recent Developments, Trends, and Milestones In the Antitrust Division's Criminal Enforcement Program, Remarks before the ABA Section of Antitrust Law Spring Meeting, at 2 (Mar. 26, 2008).

<sup>2</sup> In addition to the investigations in transportation/logistics, electronics, agriculture and food, the Division has on-going investigations into financial services and packaged ice. As previously mentioned, AAG Varney has identified those receiving federal funds in connection with financial stabilization, bail-outs or economic stimulus as being subject to closer scrutiny. As a result, commercial and investment banks, lenders, insurers, automotive manufacturers and suppliers, and most government contractors should exercise particular caution.

<sup>3</sup> A competitor analysis requires careful identification of the company's principal competitors for each of its business units and seeking to identify whether they are already subject to an antitrust investigation.

<sup>4</sup> Pub L. No. 108-237, title II §§ 212-213, 118 Stat. 661, 666-667 (Codified as 15 U.S.C. § 1 notes).

<sup>5</sup> 18 U.S.C. § 357(d). Since 1998, at least 13 companies have paid fines of over \$100 million in cartel cases. Many more have paid fines in excess of \$10 million, the statutory maximum in effect prior to ACPERA.

<sup>6</sup> Hammond (2008) at 15; Scott D. Hammond, Deputy Ass't Att'y Gen. for Criminal Enforcement Antitrust Division U.S. Dep't of Justice, Cornerstones of an Effective Leniency Policy, Remarks before the ICN Workshop on Leniency Programs, Sydney Australia , at 15-16 (Nov. 22-23, 2004).

<sup>7</sup> *Id.* at 13-15.

<sup>8</sup> Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement Antitrust Division U.S. Department of Justice, Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations, Remarks before the ABA Section of Antitrust Law Spring Meeting, at 11 (Mar. 29, 2006).

<sup>9</sup>*Id.*

<sup>10</sup>*Id.* at 6.

<sup>11</sup>*Id.* at 5.

<sup>12</sup> Catherine Roux and Thomas von Ungern-Sternberg, Leniency Programs in a Multimarket Setting: Amnesty Plus and Penalty Plus, CESifo Working Paper no. 1995, at 2 (May 2007), available [here](#).

<sup>13</sup> James M. Griffin, Dep Ass't Att'y Gen. U.S. Dep't of Justice, The Modern Leniency Program After Ten Years, A Summary Overview of the Antitrust Division's Criminal Enforcement Program, The ABA Sec. of Antitrust Law Annual Meeting, at 9-10 (August 12, 2003).

<sup>14</sup> Hammond (2004) at 17.

<sup>15</sup>*Id.* See also, Plea Agreement of Hoechst AG at 6, *United States v. Hoechst AG*, No. CR 03-0035 SI (N.D.C.A. Jan. 20, 2003).