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**DOJ & FTC  
Antitrust and Consumer Protection  
Investigations and Prosecution  
for the Civil Practitioner**

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&  
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Dartmouth Lawyers Association  
The Canyons, Park City, Utah  
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attorney advertisement

# Antitrust and Consumer Protection Enforcement Overview

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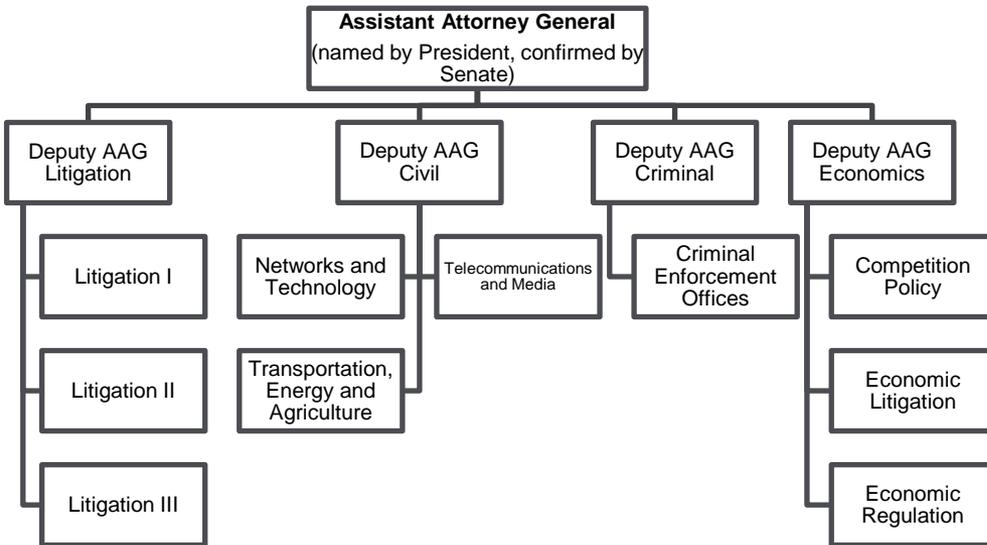
# Antitrust Enforcement – Multiple Enforcers

- Department of Justice Antitrust Division (DOJ) – criminal and civil
- Federal Trade Commission (FTC) – civil (refers criminal cases to DOJ)
- State Attorney Generals (under federal law and analogous state laws)
- Private Plaintiffs – individual plaintiffs and class actions, under federal and state laws
- Foreign Enforcers – 100+ foreign jurisdictions now have similar laws

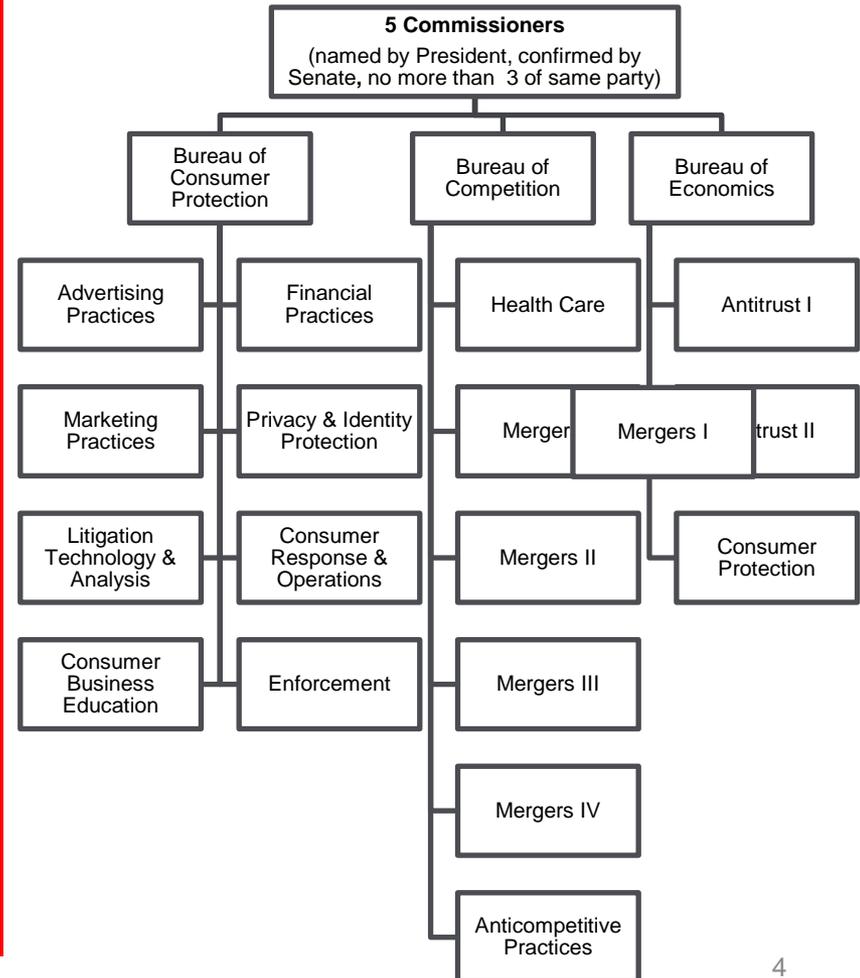


# DOJ v. FTC

## Simplified DOJ Antitrust Division Org Chart



## Simplified FTC Org Chart



# DOJ v. FTC – Types of Cases

## DOJ

- Antitrust – civil and criminal
  - Enforces Sherman and Clayton Acts against
    - agreements in restraint of trade
    - monopolization
    - mergers and acquisitions the effect of which may be to substantially lessen competition



## FTC

- Antitrust – civil only
  - Enforces FTC § 5 (which prohibits “unfair methods of competition”) against conduct which violates the Sherman Act, and the Clayton Act
  - Debate over scope of § 5 beyond other antitrust laws
- Consumer Protection
  - Enforces FTC Act § 5 (which prohibits “unfair or deceptive acts or practices”) and numerous specific statutes
  - Advertising, marketing, privacy



# DOJ v. FTC – Remedies

## DOJ

- Criminal fines and jail time
- Preliminary / permanent injunctions in federal court
  - Clayton Act § 4, 15 confer jurisdiction on federal district courts to “prevent and restrain violations” and direct DOJ “to institute proceedings in equity to prevent and restrain such violations”
- Damages actions for damages suffered by the U.S. as a purchaser of goods

## FTC

- Cease and desist orders after proceedings before Administrative Law Judges (ALJs)
- Civil penalty actions for violations of orders and rules
- Preliminary injunctions pending administrative proceedings, whenever the Commission has "reason to believe" that anyone "is violating, or is about to violate" a provision of law enforced by the FTC, and permanent injunctions “in proper cases,” in federal court (including equitable remedies), under FTC Act § 13(b)
- Jurisdiction limited to persons, partnerships or corporations, “organized to carry on business for its own profits or that of its members”
- Jurisdiction exempts “common carriers subject to the Acts to regulate commerce”

# The Sherman Act – Joint Conduct

- **Sherman Act § 1** – Agreements “in restraint of trade”
  - “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.
  - “Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.” 15 USC § 1.

# The Sherman Act – Unilateral Conduct

- **Sherman Act § 2** – Single Firm Conduct – “monopolization” and “attempted monopolization”
  - “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations,
  - shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.” 15 USC § 2

# The Sherman Act – Per Se v. Rule of Reason

- **Per Se Violations** – conduct always illegal, regardless of intent or actual effects
- **Rule of Reason** – requires weighing all the facts and circumstances, to determine if a practice should be prohibited as imposing an “unreasonable restraint on competition”
  - generally the plaintiff must demonstrate that conduct has had or is likely to have a substantial adverse effect on competition,
  - in which case the defendant must produce evidence of procompetitive virtues, and
  - the plaintiff must then prove the conduct is not reasonably necessary to achieve the stated objectives, or the anticompetitive effects outweigh such procompetitive virtues

# Consumer Protection

- FTC Act § 5(a): “unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”
- Additional consumer protection statutes enforced by FTC (non-inclusive)
  - Children’s Online Privacy Protection Act (COPPA)
  - Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM)
  - Do Not Call Registry Act
  - Fair Credit Reporting Act (FCRA)
  - Fairness to Contact Lens Consumer Act
  - Gramm-Leach-Bliley Act
  - Magnuson-Moss Warranty Act
  - Restore Online Shopper’s Confidence Act (ROSCA)
  - Telemarketing Sales Rule (TSR)
  - Truth in Fur Labeling Act
  - Truth in Lending Act (TILA)
  - Wool Products Labeling Act

# Consumer Protection

- FTC takes multi-faceted approach to consumer protection
  - Law enforcement
  - Rulemaking
  - Consumer and business education
  - Public policy initiatives
- Numerous rules enforced
  - Appliance Labeling; Fuel Rating; R-Value
  - Green Guides; Made in USA; Mail or Telephone Order Merchandise; Textile, Wool Fur and Care Labeling, Jewelry Guides, Contact Lens
  - Telemarketing Sales; CAN-SPAM; Franchise and Business Opportunity; 900 Number; Funeral
- FTC shares financial services enforcement with the Consumer Financial Protection Bureau (CFPB)
- DOJ consumer protection initiatives mainly focus on fraud and health & safety issues
  - Enforce statues such as the Food, Drug, and Cosmetic Act
  - Enforcement actions can be civil or criminal

# Criminal Enforcement

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# Criminal v. Civil Enforcement

- **Sherman Act provides no criteria for distinguishing criminal v. civil offenses**
- DOJ policy:
  - will only seek criminal indictments in cases involving “hard core” per se violations
  - “only where it believes it can prove a clear, purposeful violation of the law”
  - unlikely where law is unclear, there are novel issues of law or fact, or there is clear evidence that defendants did not appreciate the consequences of their actions
  - civil actions usually brought against trade associations and others where the actions are open and notorious rather than covert
- Supreme Court has required “criminal intent,” generally proven by showing defendant knowingly entered into a per se illegal conspiracy

# Common “Hard Core” Scenarios

- **Price-fixing** - competing manufacturers agree to fix the price or a component of the price for goods or services sold to U.S. consumers
- **Bid-rigging** - vendors in competitive contracting process share information and agree not to underbid each other
- **Market allocation** – competitors agree not to sell to each other’s customers or only within certain territories
- **Group boycott** – Competitors agree not to sell an input necessary for another firm to compete, in order to damage the firm’s business or drive it out of the market
- Per se violations can be established with evidence of competitor-to-competitor communications, circumstantial evidence, or through proof of a “hub and spoke” agreement

# Criminal v. Civil Enforcement

- Controversial criminal enforcement
- Healthcare Industry - physician/dentist cases historically brought civilly
  - In late 1980's, the DOJ launched three grand jury investigations, resulting in two civil consent orders (against 22 ob/gyn's in Savannah and against the Mass. Allergy Soc'y) and one criminal indictment
    - *United States v. Alston* (1990) – jury convicted 3 dentist and 2 professional orgs. in Tucson, AZ, for price fixing, for leading 30 dentists to send identical letters to prepaid dental insurance plans to force a fee hike
    - characterized by DOJ as “garden-variety price fixing”
    - 9<sup>th</sup> Circuit held health care industry not exempt or entitled to special treatment
    - but characterized indictment as “elevating to the criminal level a dispute normally handled as a civil enforcement matter, and expressed concern about “crushing consequences of a criminal conviction on the lives and careers” of individuals “singled out” for such treatment

# Criminal Penalties

- Criminal Penalties

- Fines:
  - up to \$100 million for corporations and \$1 million for individuals, 15 U.S.C. § 1-2
  - potential for fine up to “twice the gain or twice the gross loss” under alternative fines provision of the Sentencing Reform Act, 18 U.S.C. § 3571(d)
- Incarceration:
  - up to 10 years, under 15 U.S.C. § 1-2, increased under Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA)
- Ancillary charges common
  - mail or wire fraud
  - obstruction of justice

# Criminal Fines > \$100 Million

- FX Spot Market (May 2015)
  - Citicorp -- \$925 million
  - Barclays -- \$650 million
  - JPMorgan -- \$550 million
  - RBS -- \$395 million
- London Interbank Offered Rate (LIBOR) (April / May 2015)
  - Deutsche Bank -- \$775 million
  - UBS - \$203 million

Defendant (FY)	Product	Fine (\$ Millions)	Country
AU Optronics Corporation of Taiwan (2012)	Liquid Crystal Display (LCD) Panels	\$500	Taiwan
F. Hoffmann-La Roche, Ltd. (1999)	Vitamins	\$500	Switzerland
Yazaki Corporation (2012)	Automobile Parts	\$470	Japan
Bridgestone Corporation (2014)	Anti-vibration rubber products for automobiles	\$425	Japan
LG Display Co., Ltd LG Display America (2009)	Liquid Crystal Display (LCD) Panels	\$400	Korea
Société Air France and KLM (2008)	Air Transportation (Cargo)	\$350	France The Netherlands
Korean Air Lines Co., Ltd. (2007)	Air Transportation (Cargo & Passenger)	\$300	Korea
British Airways PLC (2007)	Air Transportation (Cargo & Passenger)	\$300	UK
Samsung Electronics Co. Samsung Semiconductor, Inc. (2006)	DRAM	\$300	Korea
BASF AG (1999)	Vitamins	\$225	Germany
CHI MEI Optoelectronics Corporation (2010)	Liquid Crystal Display (LCD) Panels	\$220	Taiwan
Furukawa Electric Co. Ltd. (2012)	Automotive Wire Harnesses & Related Products	\$200	Japan
Hitachi Automotive Systems, Ltd (2014)	Automotive Wire Harnesses & Related Products	\$195	Japan
Mitsubishi Electric Corporation (2014)	Automotive Wire Harnesses & Related Products	\$190	Japan
Hynix Semiconductor Inc. (2005)	DRAM	\$185	Korea
Infineon Technologies AG (2004)	DRAM	\$160	Germany
Mitsuba Corporation (2014)	Automotive Wire Harnesses and Electronic Components	\$135	Japan
SGL Carbon AG (1999)	Graphite Electrodes	\$135	Germany
Mitsubishi Corp. (2001)	Graphite Electrodes	\$134	Japan
Toyo Tire & Rubber Co., Ltd. (2014)	Anti-vibration rubber products for automobiles	\$120	Japan
Sharp Corporation (2009)	Liquid Crystal Display (LCD) Panels	\$120	Japan
Cargolux Airlines International S.A. (2009)	Air Transportation (Cargo)	\$119	Grand Duchy Of Luxembourg
Japan Airlines International Co. LTD (2008)	Air Transportation (Cargo)	\$110	Japan
UCAR International, Inc. (1998)	Graphite Electrodes	\$110	U.S.
LAN CARGO S.A. and AEROLINHAS BRASILEIRAS S.A. (2009)	Air Transportation (Cargo)	\$109	Lan Cargo (Chile) Aerolinhas (Brazil)
JTEKT Corporation (2014)	Automotive Bearings and Steering Systems	\$103.27	Japan
Archer Daniels Midland Co. (1996)	Lysine & Citric Acid	\$100	U.S.

# Other Recent Large Criminal Fines

- Auto Parts Price Fixing
  - world's largest cartel probe
  - 37 companies, 58 individuals
  - \$2.6 billion in criminal fines
- TFT-LCD Flat Panel
  - 10 companies and 13 executives convicted
  - more than \$1.39B in criminal fines assessed.
- Real Estate Foreclosure
  - 9 real estate investors plead guilty to bid rigging
- Municipal Tax Liens
  - 15 convictions and \$2 million in fines

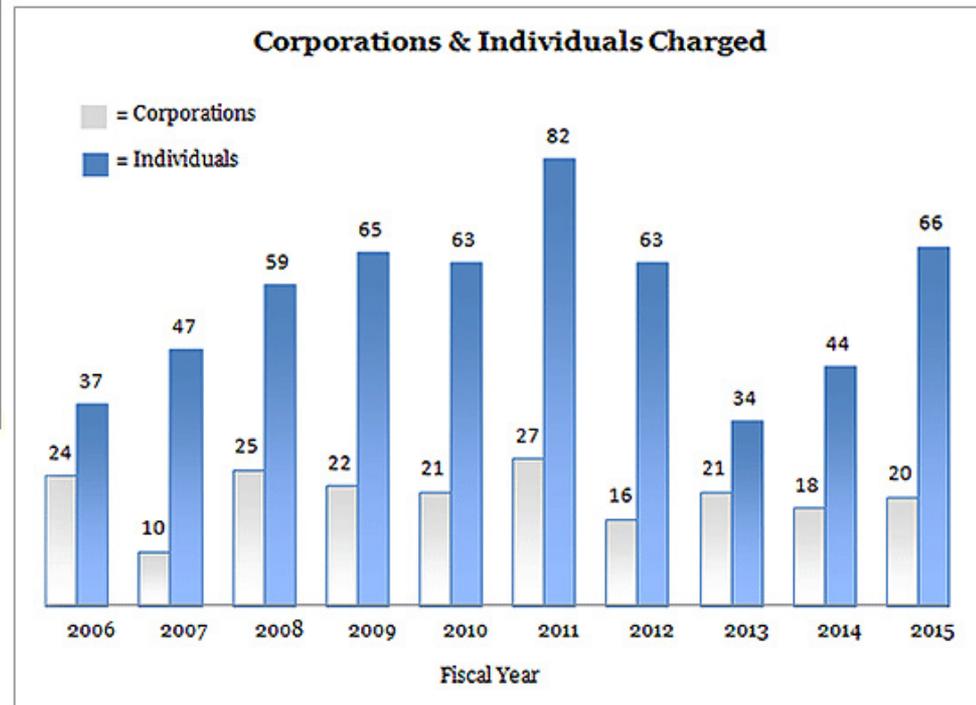
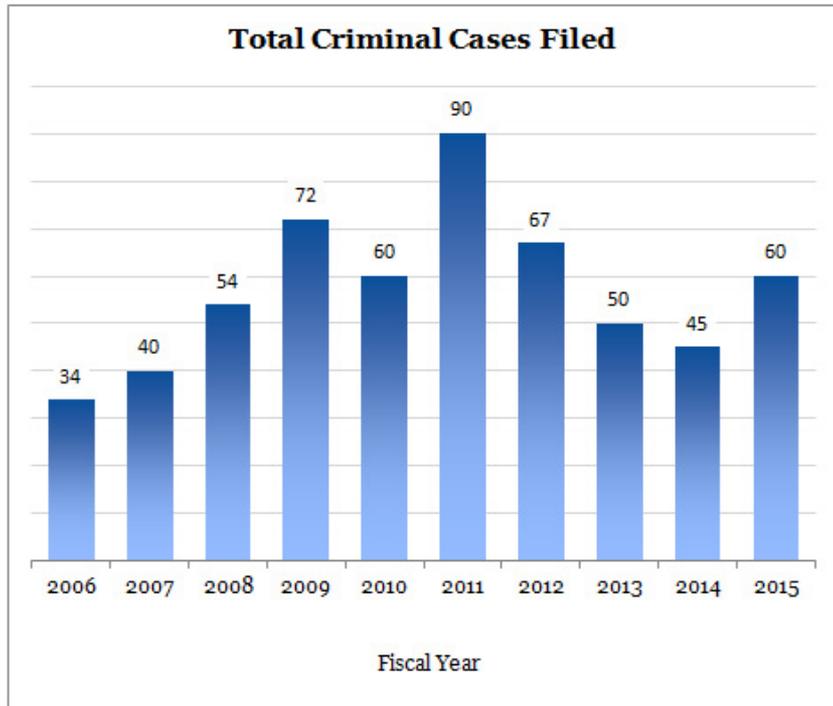
Largest Auto Part Fines

Date	Company	Fine (millions)
Jan-12	Yazaki	\$470
Feb-14	Bridgestone	\$425
Sep-11	Furukawa Electric	\$200
Sep-13	Hitachi Automotive	\$195
Sep-13	Mitsubishi Electric	\$190
Sep-13	Mitsuba Corporation	\$135
Nov-13	Toyo Tire & Rubber	\$120
Sep-13	JTEKT	\$103
Jan-12	Denso	\$78
Sep-13	NSK	\$68.2
Sep-15	NGK Insulators	\$65.3
Sep-15	KYB	\$62
Mar-15	Robert Bosch	\$57.8
Jan-14	Koito	\$56.6
Jan-14	Koito Manufacturing	\$56.6
Aug-14	NGK Spark Plug	\$52

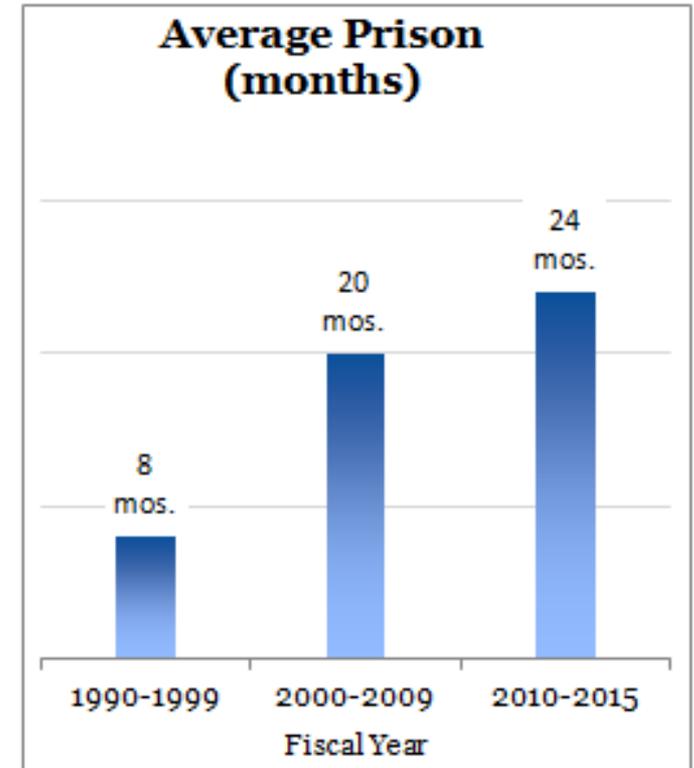
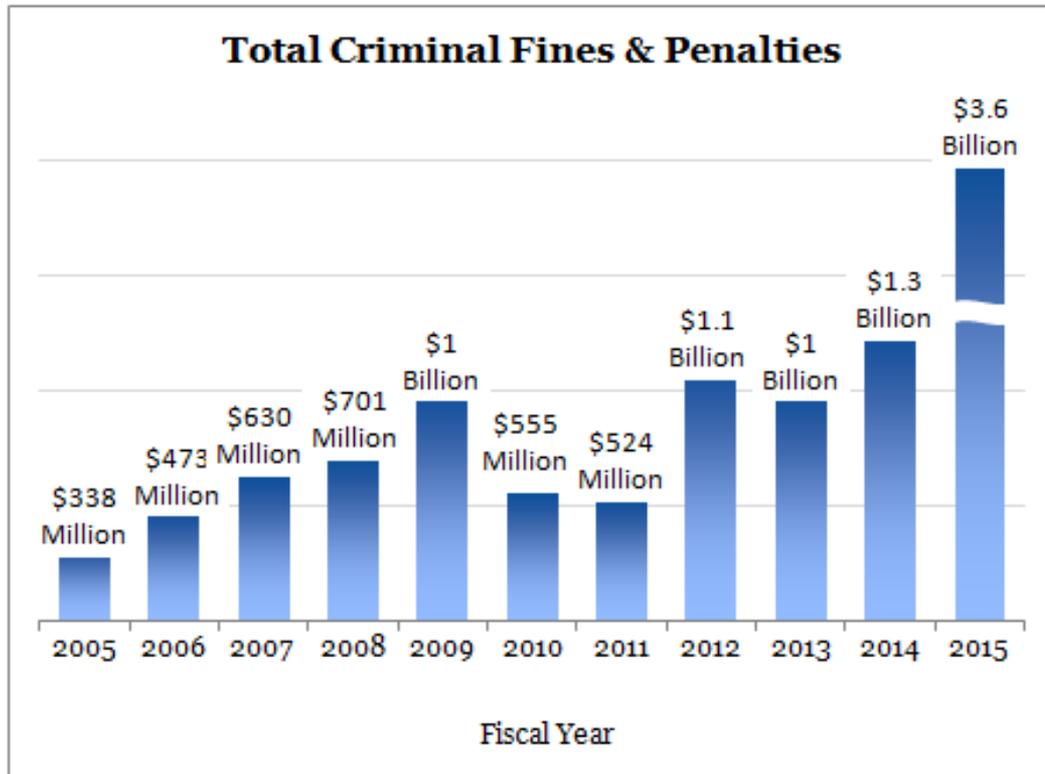
# Other Criminal Enforcement Actions

- Other industries that have been the subject of recent enforcement:
  - air cargo
  - airline charter services
  - airline passenger services
  - cathode ray tubes
  - compressors
  - construction
  - electrolytic capacitors
  - environmental services
  - freight forwarding
  - heir location services
  - ocean shipping services
  - power generation
  - water treatment chemicals
- E-Commerce pricing algorithms
  - Co-conspirators fixed the prices of posters sold online through Amazon Marketplace by agreeing on certain price setting algorithms
  - Former executive agreed to a criminal fine of \$20,000 (Dec. 2015)

# Criminal Enforcement: Cases



# Criminal Enforcement: Penalties



# Leniency: Cornerstone of Enforcement

- Corporate Leniency Policy and Individual Leniency Policy apply to all criminal violations
- Successful applicant can avoid criminal convictions and fines if it complies with policies; incomplete cooperation can result in revocation of leniency
- About half of international cartel investigations underway at any time are initiated by a leniency application
- First applicant - two types of leniency/amnesty; Subsequent applications:

<b>Type A: Apply Before Investigation Starts</b>	<b>Type B: Apply After Investigation Has Starts</b>	<b>Subsequent Applicants</b>	<b>Amnesty Plus and Penalty Plus</b>
<ul style="list-style-type: none"> <li>• Awarded automatically if meet 6 conditions</li> <li>• DOJ has no previous knowledge of illegal activity</li> <li>• Company takes prompt action once discovers illegal activity</li> <li>• Company provides complete information and cooperation</li> <li>• Admission is corporate in nature, not individuals</li> <li>• Company makes restitution where possible</li> <li>• Company was not the leader, originator, or coercer in the activity</li> </ul>	<ul style="list-style-type: none"> <li>• Timing is important; harder to qualify as time progresses</li> <li>• First to come forward and qualify</li> <li>• As of application, DOJ does not have evidence likely to result in conviction of company</li> <li>• Company takes prompt action once discovers illegal activity</li> <li>• Company provides complete information and cooperation</li> <li>• Admission is corporate in nature, not individuals</li> <li>• Company makes restitution where possible</li> <li>• It would not be unfair to other to grant leniency</li> </ul>	<ul style="list-style-type: none"> <li>• Do not qualify for amnesty but may qualify for cooperation credit</li> <li>• Substantially reduced fines</li> <li>• More favorable treatment of culpable individuals</li> <li>• Amount of credit given depends on circumstances</li> <li>• State of investigation at time of application</li> <li>• extent to which the company's cooperation advances the investigation</li> <li>• whether company earns Amnesty Plus for disclosing undetected cartel offenses</li> </ul>	<ul style="list-style-type: none"> <li>• Amnesty Plus: when determining penalties in cartel investigation, the DOJ will consider disclosure of illegal activities in other markets as a mitigating factor</li> <li>• Penalty Plus: failure to provide misconduct that is later discovered by the DOJ is an aggravating sentencing factor</li> <li>• Detrebling: ACPERA limits civil penalties for applicants to actual damages as opposed to treble damages</li> </ul>

# Leniency: Cornerstone of Enforcement

- “Markers”: secures applicant’s place as first-in-line while conducting on-going investigation. To secure a marker, one must:
  - Contact the DOJ and identify the company or individual
  - Report that information has been uncovered indicating there has been a criminal antitrust violation
  - Disclose the general nature of the conduct discovered
  - Identify the industry, product, or service involved with enough detail to allow the Division to determine whether leniency is still available and to protect the marker for the applicant
- Individual leniency under corporate cooperation
  - Type A - all directors, officers, and employees of the company will automatically receive immunity
  - Type B – no individual automatic immunity but seriously considered for all that fully cooperate
- Applicants for individual leniency program must apply before company applies for leniency and meet 3 conditions
  - DOJ has no previous knowledge of illegal activity
  - Individual provides complete information and cooperation
  - Individual was not the leader, originator, or coercer in the activity
- Individuals that do not formally qualify for leniency may still be considered for immunity from criminal prosecution

# Holding Individuals Accountable – Yates Memo

- **Yates Memo**: September 2015
  - DOJ initiative to hold more individuals accountable for company actions
    - “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.”
  - Nov. 2015 announcement: changes to US Attorney’s Manual emphasizing the priority of holding individual wrongdoers accountable in corporate criminal cases
- **Affect on Antitrust**: DOJ Antitrust Division already had policy of holding individuals accountable, but it may cause the Antitrust Division to further increase efforts
  - **Leniency**: there is a stated exception for leniency program, but the Yates Memo will likely have a negative effect on companies without leniency applications
    - Yates, Nov. 2015: “if a company wants credit for cooperating – any credit at all – it must provide all non-privileged information about individual wrongdoing.”
  - **Civil cases**: changes to US Attorney’s Manual include “an entirely new section on enforcing claims against individuals in corporate matters”

# Holding Individuals Accountable - Extradition

- **Extradition** of individuals located outside of the US
  - Once an individual is indicted in an antitrust case, DOJ will
    - Put the individual's name on "border watch" to detect attempts to enter the US
    - Add the name to a "Red Notice" list maintained by the International Criminal Police Organization (Interpol)
      - Red Notice provides the basis for provisional arrest, potential for extradition
      - Defendants who enter a country that participates in the Red Notice list risk extradition to the US
  - Most countries require "dual criminality" for extradition – actions criminal in both countries
- **Blocking Statutes:** in the past, countries opposed to the US's extraterritorial reach of antitrust investigations would prevent the US from collecting evidence or testimony on their soil
  - Although rarely enforced today, many countries still have these laws available
- **Extradition Success:** 2014 – first successful extradition based solely on antitrust charges (previous extraditions dealt with other charges, such as obstruction of justice)
  - Italian national extradited from Germany after being arrested based on a Red Notice while attempting to clear customs. Actions were not criminal in Italy at the time they were committed, so Italy would not extradite

# Impact of Parallel Civil Proceedings

- Reports of criminal antitrust investigations often lead to civil suits
- Under Speedy Trial Act, criminal suits generally take priority
  - Court may stay or restrict discovery in related civil action
  - However, courts have held that simultaneously defending a criminal indictment and private civil actions does not violate due process
  - Competing considerations identified in *Fed. Sav. & Loan v. Molinaro* (9<sup>th</sup> Cir. 1989)
    - plaintiff's interest in proceeding expeditiously and potential prejudice of delay
    - burden imposed on defendants
    - convenience of the court in the management of its cases, and the efficient use of judicial resources;
    - interest of public and persons not parties to the civil litigation
- Criminal suits may affect other matters by allowing defendants to take the 5<sup>th</sup> amendment instead of testifying
- Grand jury materials from criminal matter may be used in subsequent civil matter, but disclosure requires court order

# Conflicts of Interest

- A conflict of interest may occur when counsel represents both a company and its employee(s) in criminal antitrust investigations
  - Dual representation can be efficient as employees may be included in corporate leniency application
    - Should obtain conflict waivers as there is potential for future conflicts
  - Employees that may need separate representation:
    - Individual does not cooperate with the DOJ; continued to participate in conduct after application; obstruction of justice issues
    - Employees of second-in leniency applicants – where employees can be “carved out” and subject to potential prosecution
- Antitrust Division may express conflict concerns during grand jury proceedings where counsel is providing dual representation
  - DOJ may issue *Wheat* letter to counsel, stating that if counsel has dual representation and any of the individuals are called as government witnesses at trial, the Division will seek to disqualify counsel from representing the corporation

# Upjohn Warnings

- Companies may have different interests than individual employees during internal investigations
- “Upjohn warnings” – advise individuals that corporate counsel represents only the corporation.
- Elements of *Upjohn* Warning:
  - counsel is conducting investigation on behalf of company to provide legal advice to the company
  - counsel represents the company and not the employee
  - conversation is protected by the attorney–client privilege, but that privilege belongs to the company, not the employee
  - the company can waive privilege and disclose information provided by the employee to third party
- Best protection is to provide a written Upjohn warning and seek a conflict waiver if appropriate, recommend separate counsel if not
- *United States v. Ruehle* – court found counsel did not give warnings or obtain conflict waivers during internal audit even though represented both company and CFO in related civil proceedings
  - CFO moved to suppress statements in related criminal case claiming reasonable belief of dual representation at the time statement was given. District court suppressed statement, but was reversed by Ninth Circuit
    - Ninth Circuit found that CFO knew information would be disclosed to external auditors, and therefore not confidential. The fact that CFO did not know information would also be disclosed to government in related criminal matter did not change the privilege analysis
  - The district court reasoned that the law firm may have violated its duty of loyalty to the CFO and referred counsel for disciplinary action
    - Ninth Circuit concluded that any ethical violations did not provide grounds for suppression

# DOJ/FTC Civil Investigations

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# Civil Investigations

- **Authorizing Statutes**

- FTC: Federal Trade Commission Act (“FTCA”) (15 U.S.C. § § 41-58)
- DOJ: Antitrust Civil Process Act (“ACPA”) (15 USC § 1311-14)

- **Investigative Tools**

- Informal Requests (less confidentiality protection)
- Subpoenas / Civil Investigative Demands (FTCA § 9; ACPA § 1312)
- Special Reports (FTC only FTCA Section 6(b))

# Civil Investigations

- **Clearance process**

- DOJ and FTC have concurrent jurisdiction over many civil matters (including mergers)
- Before initiating a civil investigation, the agencies must seek “clearance” to avoid duplication
  - documented in formal and informal interagency agreements dating to 1938; 1993 / 1995 agreements currently govern; 2002 agreement to allocate industries abandoned in the face of congressional opposition
  - non-merger investigations often awarded to the agency “that first identified the potential competitive problem and developed the proposed investigation”
  - if contested each agency prepares a “contested matter claim form”
  - principal ground for resolving clearance is “expertise in the product in question gained through a substantial investigation of the product within the last five years, or within ten years, if neither agency has a substantial investigation within five years”
  - agencies have used “possession arrows” and “coin tosses” to resolve disputes

# Confidentiality and Information Sharing

- Information provided to antitrust agencies during course of investigation is treated as confidential
  - Hart-Scott-Rodino Act ("HSR") require filings with DOJ/FTC regarding mergers and acquisitions but restrict agencies from disclosing information in filing
  - Section 6(f) of the FTC Act requires the FTC to protect the confidentiality of trade secrets and other commercial or financial information obtained from a business
  - Section 21(b) of the FTC Act prohibits disclosure of information received through compulsory process without consent of the party
  - Antitrust Civil Process Act § 1313 restricts DOJ from making publically available any documents received through compulsory process
- FOIA Exemptions 3, 4 apply to information obtained by the DOJ and FTC
  - 3. Specifically exempted by other statutes (b)(3)
  - 4. Concerning trade secrets and commercial or financial information obtained from a person that is privileged or confidential (b)(4)

# Confidentiality and Information Sharing

- Agencies are, however, allowed or required to share confidential information in some circumstances
  - **Disclosure to Congress**
    - FTC Act § 21(d) (with notice to the provider or owner of information)
  - **Between FTC and DOJ**
    - Antitrust Civil Process Act § 1313 – allows DOJ to share with FTC
    - FTC Act § 6 – allows FTC to share with DOJ
  - **Use in federal administrative, judicial, or regulatory proceedings**
    - Antitrust Civil Process Act § 1313 - DOJ
    - FTC Act § 21(d) - FTC
  - **Shared with state and foreign law enforcement agencies**
    - International Antitrust Enforcement Assistance Act – permits DOJ and FTC to exchange confidential investigative information with foreign antitrust authorities
    - FTC Act § 6 – allows FTC to share with state law enforcement
    - DOJ must obtain waivers from the parties to share with state law enforcement

# Private Antitrust Litigation

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# Follow-On Private Litigation

- Private litigation often follows government enforcement
  - Class actions on behalf of direct and indirect purchasers
  - Final judgments or decrees in criminal or civil antitrust case may be used in private litigation as “prima facie evidence against such defendant ... as to all matters respecting which said judgment or decree would be an estoppel as between the parties” Antitrust Procedural Improvements Act of 1980
    - However, consent orders do not include an admission of liability and cannot be used as evidence to support follow-on litigation
    - No private right of action under FTC Act § 5

# Follow-On Private Litigation

- Grand jury testimony may be sought by private litigants
  - In *Douglas Oil*, the Supreme Court held that under Rule 6(e) the seeking party must show: (i) the material they seek is needed to avoid possible injustice in another judicial proceeding, (ii) that the need for disclosure is greater than the need for continued secrecy, and (iii) that their request is structured to cover only material so needed
- Damages for federal antitrust violations automatically treble (unless leniency granted or under NCRPA notice)
- 4 year statute of limitations – from time plaintiff should have or did become aware of activity

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Howard is a Washington, DC-based partner and chair of Cooley LLP's Antitrust & Competition practice group.

He is a former Assistant Director of the FTC's Bureau of Competition who represents high-tech businesses before the FTC, the DOJ, and state attorneys general in merger, restraint of trade, monopolization and consumer protection investigations and litigation, with a particular focus on issues at the intersection of antitrust and intellectual property law.

Howard graduated from Dartmouth in 1981, majoring in economics and philosophy, and was a member of the sailing team and managing editor of The Dartmouth.

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