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**INTERNATIONAL CARTELS:
THE INTERSECTION BETWEEN
FCPA VIOLATIONS AND ANTITRUST VIOLATIONS**

By

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Introduction

Some of you may be wondering why a career antitrust prosecutor is addressing a conference on the FCPA. It is not because I mistakenly believe that the initials stand for Federal Career Prosecutors of Antitrust. The fact is that in today's global economy there is a recurring intersection of conduct that violates both the Sherman Antitrust Act and the Foreign Corrupt Practices Act. A payment to a foreign official in violation of the FCPA may also be an act by an international bid-rigging, price-fixing, or market-allocation cartel in furtherance of its scheme injuring American businesses and consumers in violation of the Sherman Act. The Antitrust Division of the United States Department of Justice has made the prosecution of international cartels one of its highest priorities. The prosecutions have resulted in huge criminal fines -- in fact, in one such prosecution, the largest criminal fine ever imposed in the United States for any type of violation. Thus, a compliance audit by a multinational firm that detects a payment potentially in violation of the FCPA may actually have detected much more: international cartel activity with additional -- indeed, likely far greater -- exposure for the firm and its executives. Today I will discuss this intersection, the scope of the Division's international cartel enforcement efforts, the importance of an effective antitrust compliance program, the success of the Division's Corporate Leniency Policy, and, on the premise that it is easier to find something if you know what it looks like, the common characteristics of international cartels.

The Antitrust Division's Crackdown On International Cartels

The Antitrust Division began to crack down on international cartel activity roughly five years ago when it decided to reallocate resources to make the prosecution of international cartels that victimize American businesses and consumers one of its highest priorities. This strategy was based on the premise that international cartels tend to be more complex, broader in scope, larger in terms of affected volumes of commerce, and more harmful in terms of numbers of businesses and consumers injured than their domestic counterparts. It took a while for our efforts to bear fruit. However, over the last few years, the emphasis on international cartel enforcement has led to extraordinary success in terms of cracking international cartels, securing the convictions of major conspirators, and obtaining record-breaking fines.

International Investigations. While five years ago the Antitrust Division had only a few international investigations on its criminal docket, there are now over 35 sitting grand juries looking into suspected international cartel activity. The subjects and targets of these investigations are located on five continents and in over 20 different countries.

Geographic Scope. The geographic scope of the international cartel activity is even broader than the above numbers reflect. The Division's investigations have uncovered meetings of international cartels in over 100 cities and in over 35 countries, including most of the Far East and nearly every country in Western Europe. For example, the Division's investigation of the worldwide vitamin cartel uncovered meetings in over a dozen different countries where the conspirators got together to carry out their agreement. While gouging their customers with agreed-upon price increases, the members of the vitamin cartel spared no expense on themselves. A short list of the interesting meeting places for this cartel include: the Bottminger Schloss, a castle outside of Basel, Switzerland; a hot springs resort in the Japanese countryside outside of Tokyo; and the private wine cellar in the basement of BASF's headquarters in Ludwigshafen, Germany, which was the site of an after-hours cartel meeting involving high-level officials from several of the major vitamin producers.

Volume Of Affected Commerce. The geographic scope of the criminal activity currently under investigation is matched only by the massive amount of commerce impacted by these conspiracies. In some of these matters, the volume of commerce affected by the suspected cartel is over one billion dollars per year; in others, over \$500 million per year; and, in more than half of the investigations, over \$100 million for the term of the conspiracy.

Broad Spectrum Of Commerce. Since the shift in emphasis on international cartel enforcement, the Division has prosecuted international cartels operating in a broad spectrum of commerce including vitamins, food and feed additives, preservatives, chemicals, graphite electrodes used in steel making, magnetic iron oxide particles used in the production of video and audio tapes, and marine construction and transportation services.

Multinational Firms Engaging In Cartel Activity Risk Huge Fines

As a result of the Antitrust Division's crackdown on international cartel activity, multinational firms involved in international trade are exposed to huge criminal fines if they engage in antitrust crimes.

Percentage Of Foreign Defendants. In the early 1990s, less than one percent of the defendants in the Division's cases were foreign-based. Over the last two years, roughly *50 percent* of the corporate defendants in criminal cases brought by the Division were foreign-based.

Year-End Fines. In the 10 years prior to FY 1997, the Division obtained, on average, \$29 million in criminal fines annually. However, in the last three fiscal

years, the Division has obtained over \$1.5 billion in criminal fines -- including over \$1.1 billion in FY 1999, which ended September 30. *Well over 90 percent of these fines were in connection with the prosecution of multinational firms engaged in international cartel activity.*

Higher Top-End Fines. Seven years ago the largest corporate fine ever imposed for a single Sherman Act count was “only” \$2 million. However, in the past few years, fines of \$10 million or more have become commonplace. The five largest fines obtained by the Division thus far are: the \$500 million fine against F. Hoffmann-La Roche in the vitamin prosecution imposed in May of this year; the \$225 million fine against BASF AG, also announced in the vitamin prosecution this past May; the fines of \$135 million and \$110 million against SGL Carbon AG and UCAR International in the graphite electrodes investigation; and the landmark \$100 million fine against Archer Daniels Midland imposed in October 1996 for its participation in the lysine and citric acid cartels.

Fines Of \$10 Million Or More. The Division has obtained fines of \$10 million or more against U.S., Dutch, German, Japanese, Belgian, Swiss, British, and Norwegian-based companies. In 21 of the 26 instances in which the Division has secured a fine of \$10 million or greater, the corporate defendants were foreign-based. These numbers reflect the fact that the typical international cartel likely consists of a U.S. company and three or four of its competitors that are market leaders in Europe, Asia, and throughout the world.

International Cartels: One Of The Most Serious Corporate Crimes. In September 1999, The Corporate Crime Reporter, a business law publication with circulation in the United States and abroad, issued its inaugural report on the “Top 100 Corporate Criminals of the 1990s.” The report listed 100 companies that had been convicted of corporate crimes -- such as environmental crimes, public corruption, bribery, tax evasion and, of course, antitrust offenses. Three of the top four corporate criminals on the list -- including the number one corporate offender on the list, F. Hoffmann-La Roche -- and six out of the top ten, were multinational companies that had been convicted of engaging in international cartel activity. In total, twenty companies with antitrust convictions made this infamous list.

Executives Face Jail As Well As Fines. Culpable executives of multinational firms who engage in international cartel activity run the risk of imprisonment in addition to heavy fines. For example, this past summer three former high-ranking executives from Archer Daniels Midland Company (ADM) were tried and convicted by a Chicago jury for their participation in an international lysine cartel. The ADM executives were recently sentenced to serve prison terms ranging from 24 to 30 months and to pay fines of up to \$350,000. Moreover, it's not just U.S.-based executives of multinational firms who are receiving jail sentences for

antitrust violations. Recently, two high-ranking Swiss executives from F. Hoffmann-La Roche agreed to plead guilty and serve time in a U.S. prison for their participation in the vitamin conspiracy. Both the Swiss executives agreed to travel here and submit to U.S. jurisdiction even though they resided outside of the United States and the United States' extradition treaty with Switzerland does not cover antitrust offenses. Still, the defendants chose to cooperate, admit their guilt, and do their time in a U.S. jail, rather than live their lives as international fugitives.

The Importance Of An Effective Antitrust Compliance Program

In today's enforcement environment, a multinational firm, and its executives, engaged in cartel activity face enormous exposure: criminal convictions in the United States; fines over \$100 million for the firm and substantial jail sentences for the individuals; proceedings by other, increasingly active antitrust enforcement agencies around the world where fines may be, individually or cumulatively, as great as or greater than in the United States; private damage actions in the United States (treble) and other countries; and debarment. Given this exposure, it would be difficult to overstate the value of a compliance program that prevented the violation in the first place. Moreover, if such a violation does occur, it again would be difficult to overstate the value of a compliance program in detecting the offense early because amnesty is available to only one firm, the first to successfully apply in each cartel investigation. (See The Antitrust Division's Corporate Leniency Policy at page 6.)

Much has been written about antitrust compliance programs,¹ and any detailed exposition of that topic is beyond the scope of this presentation. However, two points should be made here. First, an organization's compliance program should provide for affirmative steps to detect price fixing or bid rigging, steps premised on the possibility, or even the assumption, that education and admonition will not deter personnel determined, for whatever reason, to act in bad faith. An example of an affirmative step would be active monitoring of employee conduct -- of, say, particular pricing and bidding decisions and practices -- to improve the chance of detecting and deterring questionable conduct. The program should also provide for both regular and unannounced audits of price changes, discount practices, and bid sheets, conducted by those familiar with the firm's past and present business practices and trained in recognizing divergence. Furthermore, in our view, it is critical to have

¹See, e.g., "Antitrust Compliance Programs Under The Guidelines: Initial Observation From The Government's Viewpoint," article by Neil Roberts, Chief, Legal Policy Section, Antitrust Division, Corporate Conduct Quarterly, Summer 1992; and "Corporate Crime In America: Strengthening The 'Good Citizen' Corporation," speech by Gary R. Spratling, Deputy Assistant Attorney General, Antitrust Division, September 8, 1995.

both regular (scheduled) and unannounced audits of front-line pricing and bidding personnel to test their level of understanding of the antitrust laws and their degree of compliance with a program's requirements and standards relating to prevention and detection, backed up by disciplinary mechanisms and potential penalties for failures. Finally, the compliance program should add to the preceding provisions any elements that are designed to unearth violations in the context of the firm's specific organization, operation, personnel, and business practices.

Second, multinational firms should be thinking about the common characteristics of international cartels (see Common Characteristics Of International Cartels at page 8) when conducting compliance monitoring and audits. For example, many of the international cartels the Division has prosecuted have used trade association meetings as an effective "cover" for their secret cartel meetings. With that in mind, counsel will want to scrutinize international trade association meetings, which typically bring together every significant producer/seller of a particular product on the planet. Counsel probably will not be satisfied by reviewing the association's official antitrust compliance policy and by-laws; by advising the client's executives to avoid discussing competitively sensitive information with their competitors; or by reviewing meeting agendas and minutes. Counsel may want to take a very close look at the purpose of association meetings, personally attend association meetings, and ask hard questions about what's going on there. Counsel also may want to consider the possibility that agendas and minutes of association or committee meetings are fictitious, and being used as a cover for illicit conduct. Further, counsel may want to inquire into what the executives intend to do during periods of time at these gatherings when there are no scheduled association activities, or even inquire into the travel itineraries of executives from other firms in order to assess the opportunities for meetings among executives of two or more firms at places and times other than those officially scheduled. Assuming counsel were still employed/retained after proposing such due diligence with respect to trade association meetings, many of the international cartels prosecuted by the Division could not have functioned in the manner they did, if at all, under this degree of compliance scrutiny.

The Antitrust Division's Corporate Leniency Policy

If, despite the existence of a compliance program, an antitrust offense occurs, then the most significant benefit of a compliance program is early detection of the offense. Early detection affords the organization the opportunity to apply to the Antitrust Division's Corporate Leniency Program ("Amnesty Program"). Acceptance into the Program can result in a complete pass from criminal prosecution for the company as well as all of its officers, directors, and employees who cooperate with the

Division's investigation.

Major Changes In The Antitrust Division's Revised Amnesty Program. In August 1993, the Antitrust Division expanded its Amnesty Program to increase the opportunities and raise the incentives for companies to self-report and cooperate with the Division. Under the old policy that was put into place in 1978, the grant of amnesty was not automatic, but rather an exercise of prosecutorial discretion, and was not available to any company once an investigation had begun. The Amnesty Program was revised in three major respects: (1) amnesty is automatic if there is no pre-existing investigation; (2) amnesty may still be available even if cooperation begins after the investigation is underway; and (3) all officers, directors, and employees who cooperate are protected from criminal prosecution. The Division's revised Amnesty Program was, and is, unique. No other governmental voluntary disclosure program offers as great an opportunity or incentive for companies to self-report and cooperate.² (See attached Corporate Leniency Policy.)

Perhaps because of the Amnesty Program's novelty, the antitrust bar initially was skeptical as to how the Division would apply it. In the meantime, the Division seized every available opportunity to educate the bar and the business community on the merits of the Amnesty Program and, more importantly, built a solid record of applying the Program consistently and fairly. Eventually, Division attorneys were joined by converted members of the antitrust bar who discussed the advantages of the Amnesty Program at continuing legal education programs.

Amnesty Program Generates Large/International Prosecutions. Today, the Amnesty Program is the Division's most effective generator of large cases, and it is the Department's most successful leniency program. Amnesty applications over the past year have been coming in at the rate of approximately two per month -- a more than *twenty-fold* increase as compared to the rate of applications under the old Amnesty Program. Moreover, in the last two years, cooperation from amnesty applications has resulted in dozens of convictions and over one billion dollars in fines. Many of the Division's recent amnesty applications were initiated as a result of early detection by the firm's antitrust compliance program -- which, ultimately,

²For a more detailed discussion of the Antitrust Division's application of its Corporate Leniency Policy, see, "The Corporate Leniency Policy: Answers To Recurring Questions," speech by Gary R. Spratling, Deputy Assistant Attorney General, Antitrust Division, before ABA Antitrust Section 1998 Spring Meeting (April 1, 1998); and "Making Companies An Offer They Shouldn't Refuse," speech by Gary R. Spratling, Deputy Assistant Attorney General, Antitrust Division, before Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust (February 16, 1999).

saved some of these companies tens of millions of dollars and one company at least one hundred million dollars.

The Likely Intersection Between FCPA Violations And Antitrust Violations

The Antitrust Division has occasionally discovered evidence of FCPA payments in the course of international cartel investigations. While such payments do not normally fall within its jurisdiction, if they are possibly related to an antitrust conspiracy, the Antitrust Division may inquire into them. If we determine that they are tangential to the antitrust conduct under investigation, we would refer the facts discovered to the Fraud Section of the Criminal Division for follow-up. Here the important point is that a compliance audit that detects a payment potentially in violation of the FCPA may simultaneously have detected a payment (as part of a bid-rigging or project-allocation scheme) potentially in violation of the Sherman Act, and vice versa.

Domestically, the Antitrust Division has uncovered payments to local government officials to facilitate the award of contracts allocated as a result of a bid-rigging conspiracy. Similarly, internationally, we have found evidence of payments to foreign government officials for the same purpose. In one case, the FCPA payments were discovered among two other types of corrupt payments: (1) payments to an intermediary to facilitate a conspiracy to rig bids; and (2) payments to contracting officials of companies preparing to award contracts, for the purpose of influencing the award decision (corporate bribery).

We believe there are many potential overlaps between FCPA violations and international antitrust violations. The following hypothetical demonstrates one possible intersection. Assume that companies involved in the allocation of construction projects on a worldwide basis would need, as a part of the scheme to allocate work, to ensure that the company designated by the cartel to win a particular construction project was actually awarded the work by, say, a state-run company of some kind. The antitrust conspiracy would thus consist of an agreement to allocate work internationally among the members of the cartel and, in order to ensure the actual award in accordance with the cartel's allocation, to bribe corporate officials and, if necessary, government officials. A well-organized cartel might even account for the costs of such payments, allowing a "deduction" from the value of the project awarded a cartel member based upon its documented cost of bribing corporate and government officials. In this way, a cartel member that incurred high costs in securing the award of the project -- through corporate and government official bribery -- might be allowed to "re-coup" certain of these costs via a credit on the cartel's "scoresheet." (See discussion of Audits And The Use Of Scoresheets at page 12).

Common Characteristics Of International Cartels

At their core, international cartels have essentially the same purpose: to increase profits among the conspirators by carving up world markets -- through fixing prices, rigging bids, allocating territories and customers, and allocating sales volumes among the conspirators on a worldwide basis. International cartel activity may include payments in violation of the FCPA. The intersection between Sherman Act and FCPA violations makes it imperative that counsel for multinational firms recognize the common characteristics of international cartels -- how cartels get started, how they operate, and how they attempt to conceal their activity from law enforcement. The cartels the Antitrust Division has prosecuted have the following common characteristics.

Brazen Nature Of Cartels. The first characteristic common to international cartels is the typically brazen nature of the conduct and the contempt and utter disregard that the members of the cartel generally have for antitrust enforcement. This attitude is significant because the Division is often asked by counsel to treat a certain member of a cartel more favorably because he/she resides in a country where cartel activity is treated differently than it is in the United States. The fundamental problem with this argument is that it is our experience, without exception, that foreign cartel members are fully aware that they are violating the law in the United States and elsewhere, and their only concern is avoiding detection. The international cartels that we have cracked have not involved international business persons who, for cultural, language or some other innocent reason, find themselves mistakenly engrossed in a violation of U.S. antitrust laws. Rather, the cartels that we have prosecuted criminally have invariably involved hard-core cartel activity -- price-fixing, bid-rigging, and market- and customer-allocation agreements. The cartel members have discussed the illegal nature of their agreements; they have discussed the need to avoid detection by antitrust enforcers in the United States and abroad; and then they have gone to great lengths to cover up their actions -- such as by using code names with one another, meeting in secret venues around the world, creating false "covers" for their meetings, using home phone numbers to contact one another, and giving explicit instructions to destroy any evidence of the cartel.

At the recent trial of three former ADM executives, the government introduced into evidence covertly recorded audiotapes and videotapes of meetings and conversations that had been made under the direction of the FBI. The tapes demonstrate the blatant disregard for U.S. antitrust laws and the callous disrespect

for customer victims that is typical of international cartels.³ At one of the taped meetings, the cartel members staggered their arrival times so as not to arouse suspicion by having the entire group of competitors enter the room at the same time. The members of the cartel had to be careful because their meeting was scheduled to coincide with the largest poultry industry trade association convention; the poultry industry is a large purchaser of the feed additive, lysine, so all the cartel's major customers were in town for the trade show. The videotaped recording of this meeting shows that, as the meeting begins, there are some empty seats around the table because of the staggered arrival times. The cartel members are captured on tape jokingly discussing who will fill those empty seats. One cartel member offered that one empty chair was for Tysons Foods, the largest purchaser of lysine in the United States, and that another chair was for Con Agra, also a large U.S. customer. Another cartel member mocked, ironically, that one chair was for the FBI, and a third cartel executive added that the remaining chairs were for the Federal Trade Commission.

In another tape played at the lysine trial, ADM's President summed up the company's attitude towards its customers in a single phrase, when he told a senior executive from his largest competitor that ADM had a corporate slogan that "penetrated the whole company": "Our competitors are our friends. Our customers are the enemy." Imagine, one of the world's largest companies, who bills itself as "the supermarket to the world," having such a disdainful slogan as its internal corporate trademark.

Involvement Of Top Management. International cartels typically involve the top executives at multinational firms -- executives who have received extensive antitrust compliance counseling, and who often have significant responsibilities in the firms' antitrust compliance programs. For example, the vitamin cartel was led by the top management at some of the world's largest corporations, including one company -- F. Hoffmann-La Roche -- which continued to engage in the vitamin conspiracy even as it was pleading guilty and paying a fine for its participation in the citric acid conspiracy. Incredibly, some senior executives of this multinational firm knew about the firm's participation in international cartels in two industries. When the firm's illegal activities were uncovered in one industry, and the firm had to plead guilty and pay millions of dollars in fines, those executives could have *and should have* terminated the firm's cartel activities in the second (and larger)

³ ADM and its co-conspirators from Europe and Asia conspired to carve up the world by allocating sales volumes among the cartel members and agreeing on what prices would be charged to customers worldwide. ADM pled guilty before trial and was sentenced to pay a \$100 million fine - which at the time was nearly seven times larger than the previous record fine for an antitrust conviction in the United States.

industry. Instead, those executives orchestrated false statements to enforcement authorities, took steps to further conceal the firm's illegal activities, and continued to lead the world's other vitamin producers in a global cartel -- actions which will end up costing the firm billions of dollars in fines and damages.

In another international cartel, the general counsel for one of the defendants had instituted a comprehensive antitrust compliance program, and had gone to great lengths to ensure that the senior executives were well schooled on the antitrust laws. When the top executive at the firm was invited to a meeting with the chief executive of his principal foreign competitor, supposedly to discuss exchanging technological information, the general counsel insisted on accompanying the executive to the meeting and remaining at his side throughout the meeting -- never letting him out of his sight even when the executive went to the bathroom. This way, of course, there could be no chance conversation between the company executive and his competitor, and the general counsel would be a witness to everything said. When the general counsel, the executive, and his competitor greeted one another at the start of the meeting, the executives acted like they had never met each other before. What the general counsel did not know, at least not until after the government investigation began, was that the introduction between the competitors had been completely staged for the benefit of the general counsel. In fact, the two executives had been meeting, dining and playing golf for years, all the while engaged in a massive international price-fixing and volume-allocation cartel. Moreover, other employees at the company knew of this relationship and were instructed to keep the general counsel in the dark by referring to the competitor by a code name when he called the office.

Fear Of Detection By U.S. Enforcers. While cartel members know full well that their conduct is illegal under the antitrust laws of many countries, they have a particular fear of U.S. antitrust authorities. For that reason, international cartels try to minimize their contacts in the United States by conducting their meetings abroad. This has been particularly true since 1995, when the lysine investigation became public. In fact, cooperating defendants in several recent cases have revealed that the cartels changed their practices and began avoiding contacts in the United States at all costs once the Division began bringing international cartel cases. However, the cartel members continue to target their agreements at U.S. businesses and consumers; the only thing that has changed is that they conduct nearly all of their meetings overseas.

Using Trade Associations As Cover. Another characteristic of international cartels is that they frequently form trade associations as a means of providing "cover" for their cartel activities. For example, the lysine cartel created an amino acid (lysine) working group of the European Feed Additives Association. The sole purpose of the working group was to provide a false, but facially legitimate,

explanation as to why they were meeting. At the lysine trial, the jurors were shown a videotaped meeting in Hawaii where the cartel members discussed how they would use the trade association as the “perfect cover” for their price-fixing meetings. Lysine cartel members were caught on tape talking about such details as preparing not only *false agendas*, but also *false minutes*, i.e., a completely fabricated narrative of topics ostensibly discussed, for submission to the parent association based in Brussels.

Similarly, the citric acid cartel used a legitimate industry trade association to act as a cover for the unlawful meetings of the cartel. The cartel’s so-called “masters,” i.e., the senior decision-makers for the cartel members, held a series of secret, conspiratorial, “unofficial” meetings, in conjunction with the official meetings of ECAMA, the official industry trade association based in Brussels. At these unofficial meetings, the cartel members agreed to fix the prices of citric acid and set market share quotas worldwide. A former ADM executive testified that the official ECAMA meetings provided a “combination of cover and convenience” for the citric acid cartel. As he explained it, ECAMA provided “cover” because it gave the citric acid conspirators “good cause” to be together at the particular location for the official meetings -- which were held in Belgium, Austria, Israel, Ireland, England, and Switzerland. Since the cartel members were all attending those meetings anyway, it was convenient to meet secretly, in an “unofficial capacity” for illegal purposes, during the time period set aside for the industry association gathering.

Global Price Fixing. Prosecutors got a first-hand view of the incredible power of an international cartel to manipulate global pricing in the lysine videotapes. Executives from around the world can be seen gathering in a hotel room and agreeing on the delivered price, to the penny per pound, for lysine sold in the United States, and to the equivalent currency and weight measures in other countries throughout the world, all effective the very next day. Our experience with the vitamin, citric acid, and graphite electrode cartels, to name a few, shows that such pricing power is typical of international cartels and that cartels of all ilk similarly victimize consumers around the globe. Cartel members often meet on a quarterly basis to fix prices. In some cases the price is fixed on a worldwide basis, in other cases on a region-by-region basis, in still others on a country-by-country basis. The fixed prices may set a range, may establish a floor, or may be a specific price, fixed down to the penny or the equivalent. In every case, customer victims in the United States and around the world pay more because of the artificially inflated prices created by the cartel.

Worldwide Volume-Allocation Agreements. The members of most cartels recognize that price-fixing schemes are more effective if the cartel also allocates sales volume among the firms. For example, the lysine, vitamin, graphite electrode, and citric acid cartels prosecuted by the Division all utilized volume-

allocation agreements in conjunction with their price-fixing agreements. Cartel members typically meet to determine how much each producer has sold during the preceding year and to calculate the total market size. Next, the cartel members estimate the market growth for the upcoming year and allocate that growth among themselves. The volume-allocation agreement then becomes the basis for (1) an annual “budget” for the cartel, (2) an auditing function, and (3) a compensation scheme -- three more common characteristics of international cartels.

Budget Meetings. Cartels nearly always have budget meetings. Like division managers getting together to work on a budget for a firm, here senior executives of would-be competitors meet to work on a budget for the cartel. Budget meetings typically occur among several levels of executives at the firms participating in the cartel; their frequency depends on the level of executives involved. The purpose of the budget meetings is to effectuate the volume-allocation agreement -- first, by agreeing on the volume each of the cartel members will sell, and then periodically comparing actual sales to agreed-upon quotas. Cartel members often use the term “over budget” and “under budget” in comparing sales and allocations. Sales are reported by member firms on a worldwide, regional, and/or country-by-country basis. In our experience, the executives become very proficient at exchanging numbers, making adjustments, and, when necessary, arranging for “compensation.”

Audits And The Use Of Scoresheets. Most cartels develop a “scoresheet” to monitor compliance with and enforce their volume-allocation agreement. Each firm reports its monthly sales to a co-conspirator in one of the cartel firms -- the “auditor.” The auditor then prepares and distributes an elaborate spread sheet or scoresheet showing each firm’s monthly sales, year-to-date sales, and annual “budget” or allocated volume. This information may be reported on a worldwide, regional, and/or country-by-country basis and is used to monitor the progress of the volume-allocation scheme. Using the information provided on the scoresheet, each company will adjust its sales if its volume or resulting market share is out of line, even if over or under by one-tenth of one percent, with its volume or percentage allocation.

Compensation Schemes. Another common feature of international cartels is the use of a compensation scheme to discourage cheating. The compensation scheme used by the lysine cartel is typical and worked as follows. Any firm that had sold more than its allocated or budgeted share of the market at the end of the calendar year would compensate the firm or firms that were under budget by purchasing that quantity of lysine, at a premium, from any under-budget firms. This compensation agreement reduced the incentive to cheat on the sales volume-allocation agreement by selling additional product, which, of course, also reduced the incentive to cheat on the price-fixing agreement by lowering the price on the volume

allocated to each conspirator firm.

The marine transportation cartel involved a unique compensation scheme whereby the cartel members pooled revenues and then divided up the profits. The cartel members colluded on prices for marine services provided by semisubmersible heavy-lift transport ships, which are ocean-going vessels that partially submerge to carry extremely large cargo, most commonly oil rigs and other ships, across long distances in the open ocean. Customers included drilling contractors throughout the world and the U.S. Navy. The cartel members agreed to share information about upcoming jobs, prices quoted to customers, fleet positions, and other aspects of their internal operations. The parties then would agree on which customers each would service, pool the revenues from all customers, and then divide up the profits according to a complex compensation formula developed by the cartel.

A “Textbook” Example - The Vitamin Cartel. Implementing a volume-allocation agreement to restrict output and maximize the incentives of the cartel members to sell at or above the agreed-upon price was at the core of the vitamin cartel, where agreements were reached on everything from how much product each company would produce, which customers they would sell it to, and at what price they would sell it. As with lysine, graphite electrodes, and other cartels, the vitamin conspiracy was not limited merely to a few products, customers or currencies; rather, the cartel members discussed and agreed upon prices and sales volumes for every major vitamin used for human or animal consumption sold throughout the world.

In order to carry out the vitamin conspiracy, the cartel members stopped competing and, instead, worked together as if they were sales divisions of the same company -- a company that one of the conspirators referred to hypothetically as “Vitamins, Inc.” Once a year, for nearly 10 years, the global marketing heads, the product managers, and the regional managers from each conspiring company would get together for two- to three-day summit meetings. At such meetings, the cartel members would discuss and agree on price increases and sales volumes on a global basis for the upcoming year. The cartel also held annual meetings where the members’ global marketing heads and division presidents met and reviewed the results of the preceding year, taking stock, in particular, of the profitability of the continuing conspiracy to each cartel member. In addition to these meetings, lower-level executives, who were charged with the implementation of the global cartel, met with their counterparts around the world on at least a quarterly basis to ensure that the cartel ran smoothly. And it did. Documents prepared by members of the cartel for various meetings reveal that the cartel, over the course of a full decade, was nearly always successful in coordinating and implementing the agreed-upon or “budgeted” price increases for the many products controlled by the cartel and in adhering to the precisely allocated market shares around the world.

Conclusion

Multinational companies, through their corporate compliance programs, need to be alert to the potential overlap between FCPA violations and antitrust violations. Corrupt payments to foreign government officials are often made to facilitate international bid-rigging conspiracies which, if detected by the Antitrust Division, can result in heavy fines for the company as well as imprisonment and fines for the culpable individuals. If a compliance program fails to prevent these violations in the first instance, their early detection by a compliance program can still allow the company to apply to the Antitrust Division's Corporate Amnesty Program. In the final analysis, this can result in a complete pass from prosecution for the antitrust crime for the company and all of its officers, directors, and employees who cooperate with the Division's investigation.