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**“Recent Developments, Trends, and Milestones In The Antitrust Division’s
Criminal Enforcement Program”**

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Recent Developments, Trends, and Milestones In The Antitrust Division's Criminal Enforcement Program¹

The detection, prosecution, and deterrence of cartel offenses remain the highest priority of the Antitrust Division. The Division places a heightened emphasis on combating international cartels that target U.S. markets because of the breadth and magnitude of the harm that they inflict on American businesses and consumers. The Division's cooperation and coordination with foreign anti-cartel enforcers has strengthened our ability to investigate and prosecute international cartel activity. The carrot and stick enforcement strategy of coupling the Division's Corporate Leniency Program with severe sanctions and the use of all available investigatory tools to create a significant fear of detection, both inside and outside the United States, has succeeded in cracking dozens of international cartels, securing convictions and jail sentences against culpable U.S. and foreign executives, and obtaining hefty corporate fines. The Division has steadfastly emphasized the importance of individual accountability and stiff corporate fines to optimize deterrence of cartel conduct. This deterrent message will undoubtedly be bolstered by the Division's enforcement efforts in FY 2007 and so far in FY 2008, which included a number of milestones, as set forth below.

- ***Record Number of Jail Days Imposed:*** In FY 2007, defendants prosecuted by the Antitrust Division were sentenced to serve 31,391 jail days. That figure represents the highest total number of jail days imposed in any given year, *more than doubling* the previous high of 13,157 jail days imposed in FY 2005. Prior to 2000, the highest annual total was 7,473 jail days – less than a quarter of the 2007 figure.

- ***Record Jail Sentences For Foreign Nationals Violating U.S. Antitrust Laws:*** In May 2007, a Korean executive was sentenced to serve 14 months in prison for his participation in the international Dynamic Random Access Memory (DRAM) price-fixing cartel, which was the then-longest prison sentence imposed against a foreign antitrust defendant. That mark was matched in November 2007, when two French nationals agreed to plead guilty and serve 14 month jail sentences for their participation in the international marine hose cartel. Then, in December 2007, the bar was raised again when the Division filed historic plea agreements with three British participants in the marine hose cartel calling for agreed-upon 30-month, 24-month and 20-month prison sentences.

- ***Second Highest Total Annual Fines:*** In FY 2007, the Division obtained over \$630 million in criminal fines. This is the second highest amount of total fines obtained by the Division in a single year. The bulk of this year's fines were the result of the Division's investigation of the air transportation industry. On August 1, 2007, the Division charged British Airways Plc with conspiring to fix international cargo rates and

¹This paper was presented before the ABA Section of Antitrust Law's Fall Forum (November 16, 2007), available at <http://www.atrnet.gov/subdocs/227740.htm>, and was updated for this conference.

conspiring to fix the passenger fuel surcharge for long-haul international air transportation and charged Korean Air Lines Co., Ltd. with conspiring to fix international cargo rates and conspiring to fix fares charged to passengers and travel agents for flights from the United States to Korea. Both companies pled guilty and were sentenced to pay a fine of \$300 million each. The British Airways and Korean Air fines tie the \$300 million fine imposed against Samsung in connection with the DRAM investigation as the second largest criminal antitrust fine ever imposed. On November 27, 2007, Qantas Airways Limited also agreed to plead guilty and pay a \$61 million criminal fine for its role in a conspiracy to fix rates for international air cargo shipments. These cases mark the first criminal convictions ever obtained against a commercial airline for violating the antitrust laws. Several airlines were indicted by the Division in 1977 and again in 1984 for violating the Sherman Act, but the court allowed the defendants to enter nolo pleas, and they paid fines ranging from \$30,000 to \$100,000.

- ***Most Grand Jury Investigations in 15 years:*** At the close of FY 2007, the Division had 135 pending grand jury investigations, including over 50 investigations of suspected international cartel activity. This is the highest number of pending grand jury investigations since 1992. While there may have been years in the Division's history when there were more open investigations, there has never been a time when the Division's docket involved so many matters of national and international scope affecting such massive volumes of commerce.

PROSECUTION OF INDIVIDUALS

The Division has long emphasized that the most effective way to deter and punish cartel activity is to hold culpable individuals accountable by seeking jail sentences.² That view has taken hold in the U.S. and, as discussed later in this paper, is gathering momentum around the world. Recognizing the rising threat to U.S. businesses and consumers, Congress significantly raised the maximum jail term for Sherman Act offenses from three to ten years. The U.S. Sentencing Commission then promulgated a revised Antitrust Guideline to provide for the imposition of stiffer sentences in accordance with the new statutory maximum. The increased Sherman Act ten-year statutory maximum applies to cartel activity that began or continued on or after June 22, 2004, and the revised Antitrust Sentencing Guideline generally applies only to conduct that began or continued on or after November 1, 2005. Thus, some defendants sentenced during FY 2007 for antitrust conduct were still facing a three-year statutory maximum

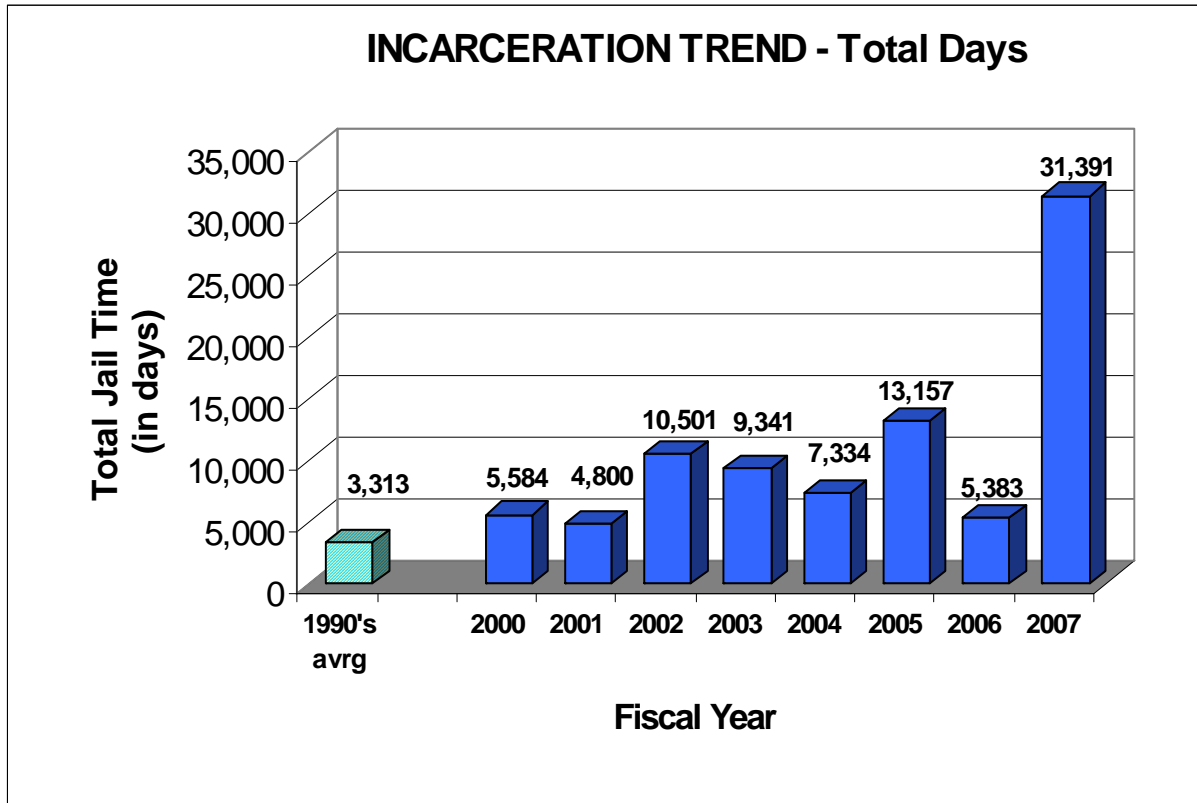
² For more information on Division policies and initiatives directed toward the prosecution of individual offenders, *see*, Scott D. Hammond, "Charting New Waters in International Cartel Prosecutions," speech before the ABA Criminal Justice Section's Twentieth Annual National Institute on White Collar Crime (Mar. 2, 2006), *available at* <http://www.usdoj.gov/atr/public/speeches/214861.htm>; and Scott D. Hammond, "When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom?," speech before the Fifteenth Annual National Institute On White Collar Crime (March 8, 2001), *available at* <http://www.usdoj.gov/atr/public/speeches/7647.htm>.

and were sentenced under the old Antitrust Sentencing Guideline. As the Division continues to target domestic and international cartel activity affecting ever larger volumes of commerce, the new Sherman Act maximum penalties and the greater sentences called for under the revised Antitrust Sentencing Guideline will come increasingly into play.

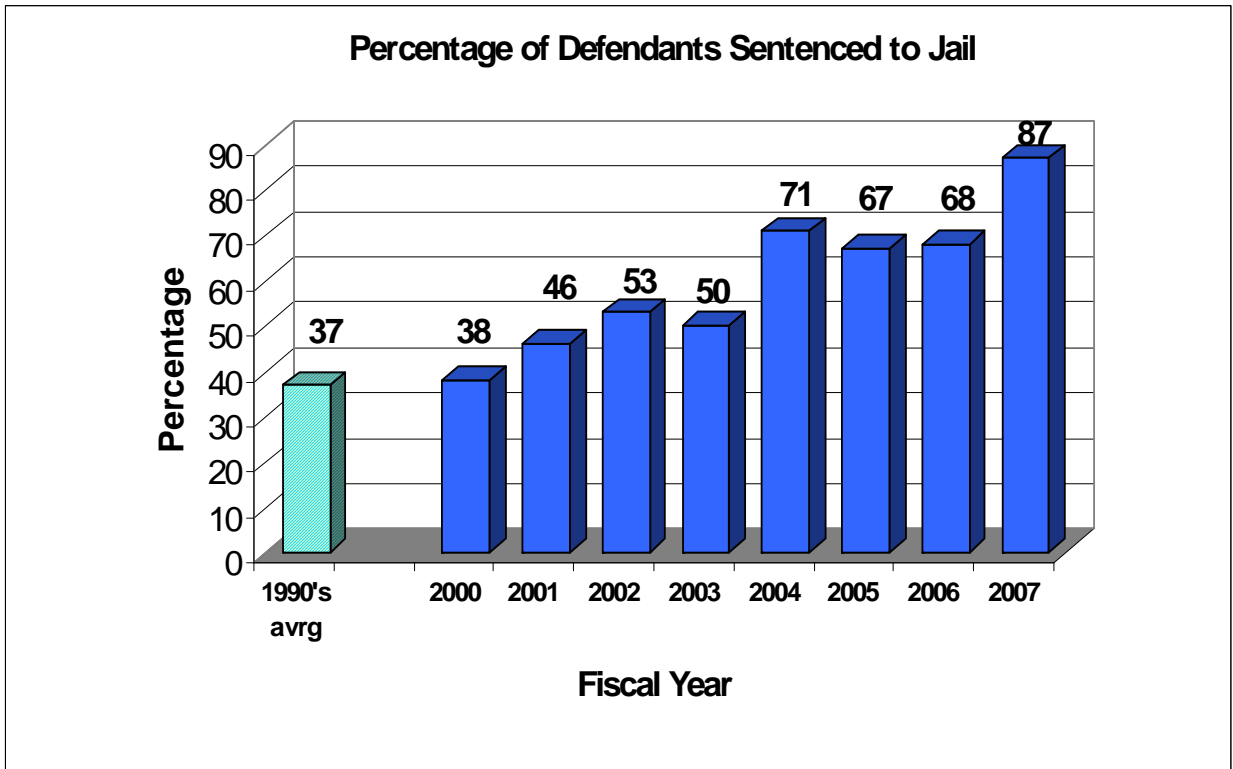
The Division's 2007 enforcement statistics demonstrate that individuals who violate U.S. antitrust laws are already being sent to jail with increasing frequency and for longer periods of time. However, the increased statutory maximum penalties and revised Antitrust Guideline are only two of several factors behind this trend. Like Congress, the federal judiciary has shown an increased willingness to impose harsher sentences on antitrust defendants, notwithstanding the additional discretion to sentence outside the now advisory Guidelines afforded to judges by the Supreme Court decision in United States v. Booker.³ Courts are routinely refusing to depart from the applicable Guideline range for defendants who have failed to provide substantial assistance to an investigation. Another factor behind the increased jail sentences is that the Division has bolstered its negotiating position and is now in a position to insist on stiffer jail sentences in plea agreements with foreign nationals, as a result of more aggressively employing investigative tools, such as the use of border watches, INTERPOL Red Notices, the real possibility of extradition, and the assistance and coordination offered by foreign authorities. Finally, the Division is frequently uncovering and prosecuting collateral federal offenses in connection with investigations of anticompetitive conduct, which often call for penalties greater than antitrust offenses. All of these factors have contributed to a trend toward stiffer penalties for U.S. and foreign nationals convicted of violating the U.S. antitrust laws. Below is a summary of the Antitrust Division's FY 2007 results prosecuting individual defendants.

³ 543 U.S. 220 (2005).

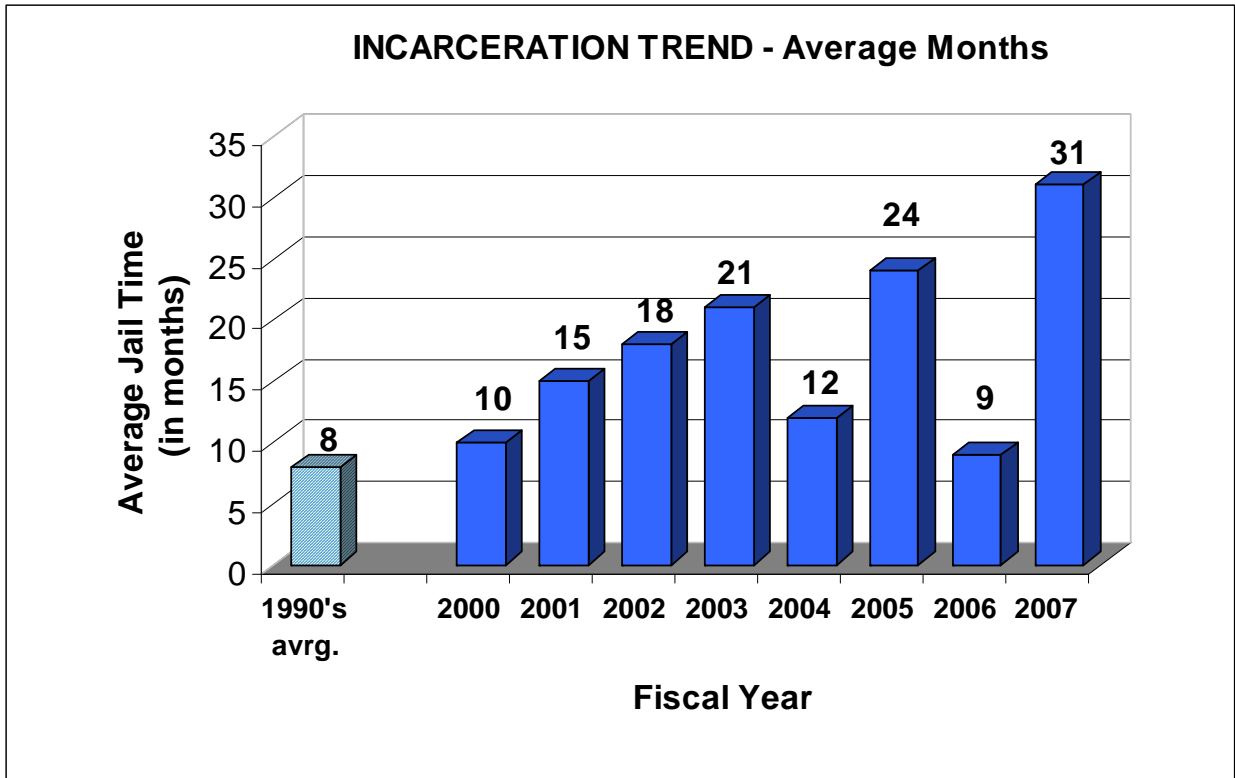
Jail Sentences Reach An All-Time High. Defendants prosecuted by the Division were sentenced to over 31,000 jail days in FY 2007, more than twice the number of jail days imposed in any previous year. The 2007 increase is consistent with the recent trend toward rising jail sentences. In fact, the five highest totals in terms of annual jail days imposed in Division history have all occurred in the last six years, and the 12 longest jail sentences imposed in cases prosecuted by the Division all occurred during this stretch.



Jail Sentences Are Imposed With Increasing Frequency. In the 1990s, 37% of defendants charged by the Division were sentenced to jail time. Since FY 2000, almost 60% of defendants charged by the Division were sentenced to jail time, a 59% increase over the 1990s. In FY 2007, 87% of defendants charged by the Division were sentenced to jail, a 135% increase over the 1990s. Since FY 2000, more than 150 individuals have served, or are currently serving, prison sentences in cases prosecuted by the Antitrust Division.



Average Jail Sentences Rise. Not only are more defendants prosecuted by the Division going to jail, but also those sentenced to jail, on average, are serving increasingly longer sentences. The average jail sentence in the 1990s was eight months but has more than doubled this decade, rising to an average of 19 months since FY 2000. During FY 2007, the average prison sentence for incarcerated defendants charged by the Division reached an all-time high of 31 months.



Foreign Executives Facing Longer Jail Sentences. Since May 1999, 31 foreign defendants have served, or are currently serving, sentences in U.S. prisons for violating the Sherman Antitrust Act or obstructing a federal antitrust investigation. Included in that total are foreign nationals from France, Germany, Japan, Korea, Norway, the Netherlands, Sweden, Switzerland, and the United Kingdom. The “no-jail” sentencing recommendations that were once available to qualifying foreign nationals in the 1990s are no longer an option. Culpable foreign nationals, just like U.S. co-conspirators, are expected to serve jail sentences in order to resolve their criminal culpability.⁴ The Division’s policy of placing indicted international fugitives on a “Red Notice” list maintained by INTERPOL, and seeking to extradite any apprehended fugitive defendant, has raised the stakes for foreign executives who hope to avoid prosecution by remaining outside of the United States.

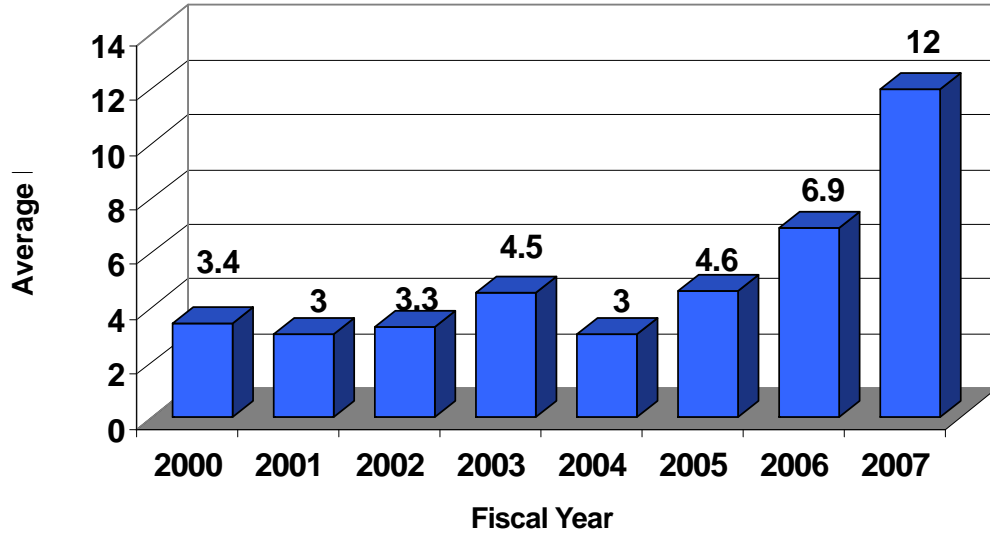
Enforcement of these policies resulted in lengthier jail sentences for culpable foreign-based defendants in FY 2007. From 2000 through 2005, the average prison sentence imposed on foreign nationals in international cartel cases was between three and four months. The average prison sentence for foreign defendants in international cartel cases rose to approximately seven months in FY 2006 and then to 12 months in FY 2007. This trend has continued in FY 2008. On November 6, 2007, the Division announced that the first executives agreeing to plead guilty in the Division’s marine hose cartel investigation, two French nationals, had each agreed to serve 14-month prison sentences.⁵ Shortly after, on December 12, 2007, the Division’s longest agreed-upon jail sentence for a foreign national in a cartel case was quickly surpassed when the Division filed plea agreements with three British nationals in the marine hose investigation calling for agreed-upon 30-month, 24-month and 20-month prison sentences.⁶ As of January 2008, the average agreed-upon prison sentence for foreign defendants in international cartel cases in FY 2008 is 20 months.

⁴ See Scott D. Hammond, “Charting New Waters in International Cartel Prosecutions,” speech Before the ABA Criminal Justice Section's Twentieth Annual National Institute on White Collar Crime (Mar. 2, 2006), *available at* <http://www.usdoj.gov/atr/public/speeches/214861.htm>

⁵ Press Release, U.S. Justice Department, Antitrust Division, Two Executives Of French Manufacturer Of Marine Hose Agree To Plead Guilty To Participating In Worldwide Bid-Rigging Conspiracy (Nov. 6, 2007), *available at* http://www.usdoj.gov/atr/public/press_releases/2007/227435.htm.

⁶ Press Release, U.S. Justice Department, Antitrust Division, Three United Kingdom Nationals Plead Guilty to Participating in Bid-rigging Conspiracy in the Marine Hose Industry (Dec. 12, 2007), *available at* http://www.usdoj.gov/atr/public/press_releases/2007/228561.htm.

Average Prison Imposed On Foreign Defendants in International Cartel Cases *



* Includes defendants charged with §15 U.S.C and/or obstruction offenses

Using All Available Investigative Tools. The Division will use all available investigative tools – such as covert taping, informants, search warrants, and foreign assistance requests – to vigorously investigate cartel conduct. In 2006, Congress provided the Division with a new investigatory power when it added antitrust offenses to the list of crimes that can be investigated using court-authorized wiretaps.⁷ Thus, Division investigations may be greatly assisted with audio or video recordings of cartel discussions either with or without the consent of one of the participants to the discussion. When a conversation is recorded by Division agents with the consent of one of the participants (“consensual monitoring”), court authorization is not required. When no party to the discussion provides prior consent to the recording, the Division may seek a court order authorizing the wiretap.

As discussed in more detail below, the Division’s ability to gain access to foreign-based documents, witnesses, and defendants has greatly improved over the last several years. So, not only is the Division able to ensure that national boundaries do not interfere with our ability to investigate cartel activity, but also our ability to obtain jurisdiction over defendants residing abroad has been enhanced. In order to track down and prosecute foreign nationals who participate in cartels affecting the United States, the Division will utilize INTERPOL Red Notices, border watches and extradition. The increased risk of detection brought about by the Division’s use of these investigative tools, especially when coupled with severe sanctions, is critical in deterring individuals from engaging in cartel conduct. However, when the conduct is not deterred at its inception, the heightened risk of detection also provides a powerful incentive for cartel members to report the wrongdoing in order to take advantage of the Division’s Corporate and Individual Leniency Programs.

Prosecuting Collateral Federal Offenses. As part of the Department’s National Procurement Fraud Task Force, the Division has stepped up its enforcement efforts aimed at schemes designed to subvert the competitive bidding process through procurement fraud and kickback schemes. In FY 2007, the Division charged defendants with fraud and corruption aimed at federal funds ranging from procurement on Department of Defense contracts in Iraq, to levee reconstruction contracts in New Orleans following Hurricane Katrina, and federal funding for school programs throughout the United States. These cases take money out of the pocket of every American taxpayer and deserve severe condemnation. Consequently, there were a number of defendants convicted of multiple fraud and other Title 18 offenses sentenced to lengthy jail sentences in 2007. These offenses typically result in longer jail sentences than antitrust offenses, even after taking into account the revisions to the Sherman Act statutory maximum and the revised Antitrust Sentencing Guideline.

⁷ See 18 U.S.C. § 2516.

Prosecuting Obstruction. The increased penalties in the United States and abroad for antitrust violations has boosted deterrence and led to an increase in self-reporting. Unfortunately, it has also resulted in an increase in obstructive conduct by individuals and companies who elect not to cooperate and instead take steps to conceal their conduct to avoid detection. Since 2000, the Division has prosecuted 11 corporations and 23 individuals for obstruction offenses – numbers that far exceed the two corporations and seven individuals prosecuted by the Division for obstruction offenses during the 1990s. These numbers back up the Division’s promise to vigorously prosecute to the full extent of the law obstructive conduct designed to subvert the integrity of a grand jury’s investigation. To this end, the Division has led an effort by anti-cartel enforcers worldwide to more vigorously prosecute those who seek to obstruct and conceal cartel conduct.⁸

CRIMINAL FINES

Since the beginning of FY 1997, the Division has imposed over \$4 billion in criminal fines. In June 2004, the maximum penalties for Sherman Act violations were raised significantly by Congress. The new law, the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, increased the maximum Sherman Act corporate fine to \$100 million and the maximum individual fine to \$1 million. Alternatively, fines in excess of the statutory maximum may be imposed pursuant to 18 U.S.C. 3571(d), which provides for a fine of twice the gross gain derived from the crime or twice the gross loss of the victims of the crime, *i.e.* twice the gain derived by, or twice the loss caused by, the cartel rather than the defendant.

Sherman Act violations prosecuted by the Antitrust Division have yielded 56 corporate criminal fines of \$10 million or more, including 11 fines of \$100 million or more, of which three were fines of \$300 million and one of \$500 million – the largest criminal fine ever imposed in the United States under any criminal statute.⁹ The total fines obtained by the Division during FY 2007 were more than \$630 million, the second highest total in Division history.

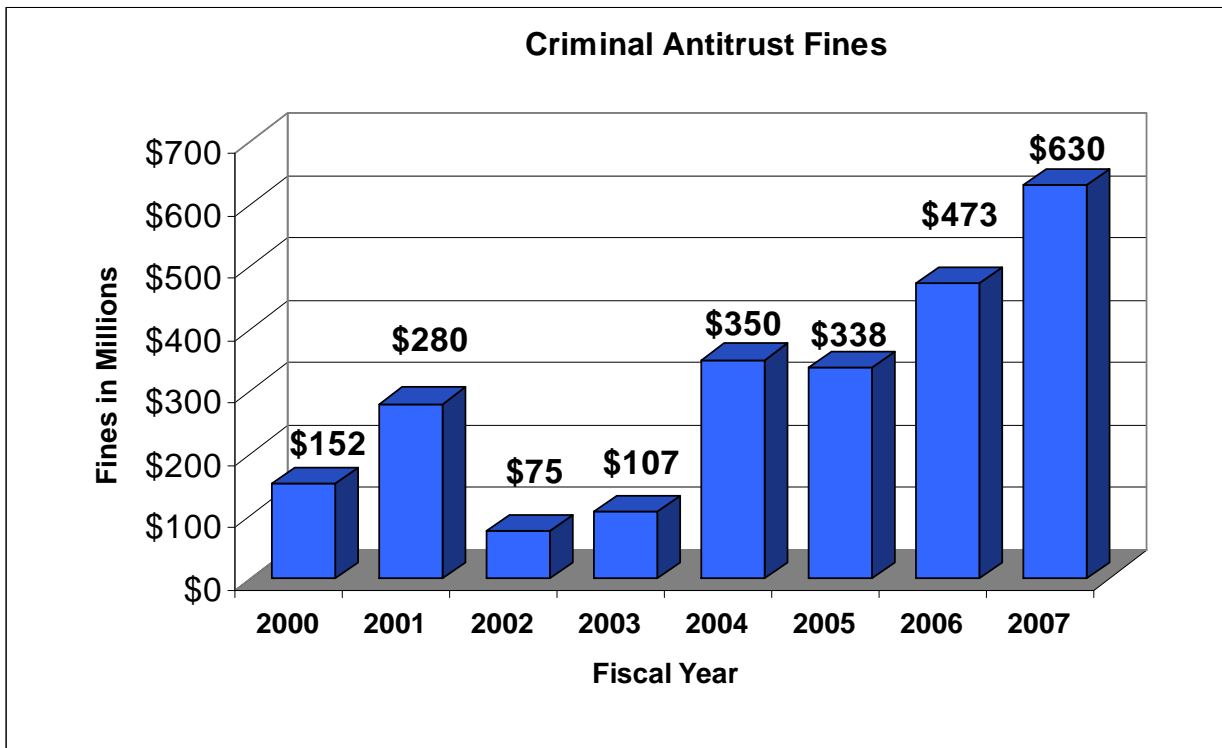
Corporate Fines Are Increasing. International cartels affect massive volumes of commerce. With increasing frequency, the Division is uncovering international cartels where the volume of commerce affected exceeds \$1 billion annually. Recently, the Division prosecuted British Airways, Korean Air and Qantas Airways for cartel conduct in the air transportation industry and the combined cargo and passenger revenue of these industry leaders was over \$15

⁸ See International Competition Network Cartels Working Group, Subgroup 1, “Obstruction of Justice in Cartel Investigations,” report to the ICN annual Conference Cape Town (May 2006), available at http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/ObstructionPaper-with-cover.pdf.

⁹ See Chart of Sherman Act Violations Yielding a Corporate Fine of \$10 Million or More, available at <http://www.usdoj.gov/atr/public/criminal/225540.htm>.

billion annually. Because international cartels like those in the air transportation industry affect such large volumes of U.S. commerce and the U.S. Sentencing Guidelines fines are based in large part on the amount of commerce affected by the cartel, fines obtained by the Division have increased dramatically in the last decade.

Total Fines Exceed \$2 Billion Since 2000. In the ten years prior to FY 1997, the Division obtained, on average, \$29 million in criminal fines annually. In FY 1997, the Division collected \$205 million in criminal fines – which was 500 percent higher than during any previous year in the Division’s history. In FY 1999, the Division secured over \$1.1 billion, which was far more than the total fines the Antitrust Division had secured in the first 109 years of Sherman Act enforcement. In FYs 2000-2006, fines obtained exceeded \$150 million, \$280 million, \$75 million, \$107 million, \$350 million, \$338 million and \$473 million, respectively. In FY 2007, the Division obtained more than \$630 million in total fines, bringing the total fines obtained by the Division so far this decade to \$2.4 billion.



Higher Top-End Fines. Before 1994, the largest corporate fine ever imposed for a single Sherman Act count was \$6 million. However, today Sherman Act violations have yielded criminal fines of \$10 million or more against 56 corporations and 11 fines of \$100 million or more. The \$300 million fines imposed during FY 2007 against British Airways and Korean Air are eclipsed only by the \$500 million dollar fine imposed against F. Hoffmann-La Roche for its participation in the vitamins cartel.

| Antitrust Division Fines of \$100 Million or More | | |
|--|----------------------|---------------|
| F. Hoffmann-La Roche, Ltd. (1999) | Vitamins | \$500 Million |
| Korean Air Lines Co., Ltd. (2007) | Air Transportation | \$300 Million |
| British Airways (2007) | Air Transportation | \$300 Million |
| Samsung Electronics Company, Ltd.; Samsung Semiconductor, Inc. (2006) | DRAM | \$300 Million |
| BASF AG (1999) | Vitamins | \$225 Million |
| Hynix Semiconductor, Inc. (2005) | DRAM | \$185 Million |
| Infineon Technologies AG (2004) | DRAM | \$160 Million |
| SGL Carbon AG (1999) | Graphite Electrodes | \$135 Million |
| Mitsubishi Corp. (2001) | Graphite Electrodes | \$134 Million |
| UCAR International, Inc. (1998) | Graphite Electrodes | \$110 Million |
| Archer Daniels Midland Co. (1996) | Lysine & Citric Acid | \$100 Million |

CORPORATE LENIENCY PROGRAM

In August 1993, the Division revised its Corporate Leniency Program to make it easier and more attractive for companies to come forward and cooperate with the Division.¹⁰ Three major revisions were made to the program: (1) leniency is automatic for qualifying companies if there is no pre-existing investigation; (2) leniency may still be available even if cooperation begins after the investigation is underway; and (3) all officers, directors, and employees who come forward with the company and cooperate are protected from criminal prosecution.¹¹ As a result of these changes, the Leniency Program is the Division's most effective investigative tool. Moreover, it has served as a model for similar corporate leniency programs that have been adopted by antitrust authorities around the world.

Case Generator. Since the Division revised its leniency program, cooperation from leniency applications has resulted in scores of convictions and nearly \$4 billion in criminal fines. In fact, the majority of the Division's major international investigations have been advanced through the cooperation of a leniency applicant.

¹⁰ Antitrust Division, U.S. Department Of Justice, Corporate Leniency Policy (1993), *available at* <http://www.usdoj.gov/atr/public/guidelines/lencorp.htm>.

¹¹ For more information on the requirements and application of the Division's Leniency Program, *see* Antitrust Division, U.S. Department of Justice Corporate Leniency Policy (1993), *available at* <http://www.usdoj.gov/atr/public/guidelines/0091.htm>; "Cornerstones of an Effective Leniency Program" speech by Scott D. Hammond, before ICN Workshop on Leniency Programs (November 22 - 23, 2004), *available at* <http://www.usdoj.gov/atr/public/speeches/206611.htm>; "When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom?," speech by Scott D. Hammond, Fifteenth Annual National Institute On White Collar Crime (March 8, 2001), *available at* <http://www.usdoj.gov/atr/public/speeches/7647.htm>; "Detecting And Deterring Cartel Activity Through An Effective Leniency Program," speech by Scott D. Hammond, before International Workshop on Cartels (November 21-22, 2000), *available at* <http://www.usdoj.gov/atr/public/speeches/9928.htm>; "Making Companies An Offer They Shouldn't Refuse," speech by Gary R. Spratling, before Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust (February 16, 1999), *available at* <http://www.usdoj.gov/atr/public/speeches/2247.htm>; "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), *available at* <http://www.usdoj.gov/atr/public/speeches/1626.htm>.

Leniency Rewards. FY 2007 was a blockbuster year for showcasing the rewards of the Division's Corporate Leniency Program. The Division was able to break up the vast international cartels in the air transportation industry due to cooperation provided by leniency applicants. The biggest reward was to the millions of air passengers and shippers of international air cargo who would no longer be forced to pay the artificially higher prices charged by cartel members.

In addition to the air transportation investigation, the DRAM, vitamins, graphite electrodes, fine arts auctions, USAID construction, and rubber chemicals investigations offer prime examples of the stunning incentives and rewards to companies and their executives that take advantage of the Leniency Program. In each of these matters, the leniency applicant paid *zero* dollars in criminal fines, and its cooperating executives received nonprosecution protection.

- **Air Transportation** The cooperation of two leniency applicants has thus far resulted in three global airlines - British Airways, Korean Air Lines and Qantas Airways - agreeing to pay over \$661 million for participating in cartels in the air cargo and passenger transportation industries. Due to worldwide reliance on air transportation, these are among the largest and most far-reaching antitrust conspiracies ever detected by the Division.
- **DRAM** In the DRAM investigation, the leniency applicant's cooperation allowed the Division to crack this high-tech international cartel, leading to plea agreements with Samsung, Hynix, Infineon and Elpida. Total fines resulting from this investigation currently exceed \$732 million. Of the 18 individuals charged in the DRAM investigation, 16 have pled guilty and been sentenced to a total of 3,185 days in jail. Of the remaining two defendants, one is awaiting trial and the other is an international fugitive.
- **Rubber Chemicals** The leniency applicant's cooperation resulted in the prosecution of Crompton Corporation and Bayer AG and fines totaling \$116 million. Four individuals, two of which were German nationals, pled guilty and were sentenced to pay a total of \$300,000 and to serve a combined 510 days in jail. Additionally, two former top Bayer AG executives were indicted in August 2005 for their participation in the rubber chemicals conspiracy and remain international fugitives.
- **Vitamins** In the vitamins investigation, the leniency applicant's cooperation directly led to F. Hoffmann-La Roche's (HLR) and BASF AG's decision to plead guilty and pay fines of \$500 million and \$225 million, respectively. Six Swiss and German executives from HLR and BASF were convicted for their role in the reported conspiracy, and all served time in U.S. prisons.

- **Graphite Electrodes** In the graphite electrodes investigation, the second company in the door after the leniency applicant paid a \$32.5 million fine, the third company in paid a \$110 million fine, and a fourth company pled guilty and paid a \$135 million fine. Mitsubishi was later convicted at trial for its role as an aider and abettor of the cartel and was sentenced to pay a \$134 million fine. Two U.S. executives were sentenced to lengthy prison terms and paid over \$2 million in fines, and a German executive was fined \$10 million.

Detrebling. The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 enhances the incentive for corporations to self-report illegal conduct by limiting the damages recoverable from an applicant to the Division’s Corporate Leniency Program (that also cooperates with private plaintiffs in their damage actions against remaining cartel members) to the damages actually inflicted by the leniency applicant’s conduct. The detrebling provision removes a major disincentive for self-reporting and makes the Division’s Corporate Leniency Program even more effective at detecting and prosecuting cartels.

Amnesty Plus. Currently, there are roughly 56 sitting grand juries investigating suspected international cartel activity. Many of these investigations began as a result of evidence uncovered during an investigation of a completely separate industry. This track record of successfully rolling one investigation into another has led the Division to engage in “cartel profiling” strategies to ferret out additional offenses. The Division will target its proactive efforts in industries where we suspect cartel activity in adjacent markets or which involve one or more common players from other cartels. When a company already under investigation discovers the additional, unrelated wrongdoing before the Division, it has an opportunity to take advantage of the Division’s Amnesty Plus Program by self-reporting. Qualifying companies will receive amnesty for reporting the second offense. Plus, the Division will provide the company with an additional conspiracy discount when calculating an appropriate fine for its participation in the first conspiracy.¹²

Penalty Plus. Companies that elect not to take advantage of the Amnesty Plus opportunity risk potentially harsh consequences if the additional wrongdoing is disclosed by a nervous co-conspirator or otherwise discovered by the Division. For that reason, a company is well advised to conduct a thorough internal investigation to ensure that its involvement in cartel activity does not extend beyond the products or services already under investigation. If a company fails to report its participation in a second antitrust offense and the conduct is later

¹² For a fuller description of the Amnesty Plus Policy, the factors that the Division weighs in calculating the size of the Amnesty Plus discount, and the policy’s application in the Crompton case, see Scott D. Hammond, “Measuring The Value Of Second-In Cooperation In Corporate Plea Negotiations,” speech before the ABA Antitrust Section 2006 Spring Meeting (March 29, 2006), *available at* <http://www.usdoj.gov/atr/public/speeches/215514.pdf>.

discovered, the Division will seek a sentencing enhancement. Its severity will depend on the basis for the company's inaction.¹³ The penalty will be greater for a company that is aware of the second offense but elects not to report it than one that fails to detect the wrongdoing as a result of an inadequate internal investigation. In assessing the amount of the penalty, the Division will, of course, distinguish between those companies that made every effort to ferret out wrongdoing in their internal investigations and those that simply turn a blind eye. In egregious "penalty plus" cases, the Division's policy is to urge the sentencing court to consider the company's and any culpable executive's failure to report the conduct voluntarily as an aggravating sentencing factor. We will request that the court impose a term and conditions of probation for the company pursuant to U.S.S.G. §8D1.1 - §8D1.4, and we will pursue a fine or jail sentence at or above the *upper end* of the Guidelines range. Moreover, where multiple convictions occur, a company's or individual's Guidelines calculations may be increased based on the prior criminal history. For a company, the failure to self-report under the Amnesty Plus program could mean the difference between a potential fine as high as 80 percent or more of the volume of affected commerce versus no fine at all on the Amnesty Plus product. For the individual, it could mean the difference between a lengthy jail sentence and avoiding jail altogether.

Confidentiality Policy. The Division's policy is to treat as confidential the identity of leniency applicants and any information obtained from the applicant. The Division will not disclose a leniency applicant's identity, absent prior disclosure by or agreement with the applicant, unless authorized by court order. Further, in order to protect the integrity of the Leniency Program, the Division has adopted a policy of not disclosing to foreign authorities, pursuant to cooperation agreements, information obtained from a leniency applicant unless the leniency applicant agrees first to the disclosure. Virtually every foreign authority with a leniency program has adopted a similar policy. Notwithstanding this policy, the Division routinely obtains waivers to share information with another jurisdiction in cases where the applicant has also sought and obtained leniency from that jurisdiction. In addition, leniency applicants may issue press releases or, in the case of publicly traded companies, submit public filings announcing their conditional acceptance into the Corporate Leniency Program, thereby obviating the need to maintain their anonymity.

Foreign Authorities Following The U.S. Model. The extraordinary success of the Division's leniency program has generated widespread interest around the world. We have advised numerous foreign governments in drafting and implementing effective leniency programs in their jurisdictions. As a result, dozens of countries on six continents have announced new or revised leniency programs, with still other countries in the process of following. The convergence in leniency programs has made it much easier and far more attractive for companies to develop a global strategy for reporting international cartel offenses. As a result, the Division is

¹³ See "Measuring the Value of Second-In Cooperation" at § II(C), *available at* <http://www.usdoj.gov/atr/public/speeches/215514.pdf>.

conducting a number of investigations that were initiated by an applicant that simultaneously sought leniency in eight or more jurisdictions.

INTERNATIONAL CARTEL ENFORCEMENT

Investigations. Currently, there are over 50 sitting grand juries investigating suspected international cartel activity. International cartel investigations account for over 40% of the Division's grand jury investigations.

Cartels Prosecuted. The Division has prosecuted international cartels affecting billions of dollars in U.S. commerce. The Division has prosecuted international cartels operating in a number of sectors, including vitamins, textiles, construction, food and feed additives, food preservatives, chemicals, graphite electrodes (used in steel making), fine arts auctions, ocean tanker shipping, marine construction, marine transportation services, rubber chemicals, synthetic rubber, dynamic random access memory used in computers and servers, marine hose and air transportation. The cartel activity uncovered in these cases has cost U.S. businesses and consumers billions of dollars annually.

Fines Imposed. Of the over \$4 billion in criminal fines imposed in Division cases since FY 1997, well over 90 percent were obtained in connection with the prosecution of international cartel activity. The Division has obtained fines of \$10 million or more against U.S., Dutch, German, Japanese, Belgian, Swiss, British, Luxembourg-based, Norwegian, Korean and Liechtenstein-based companies. In 47 of the 56 instances in which the Division has secured a corporate fine of \$10 million or greater, the corporate defendants were foreign-based.¹⁴ 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.

¹⁴ See Chart of Sherman Act Violations Yielding a Corporate Fine of \$10 Million or More, available at <http://www.usdoj.gov/atr/public/criminal/225540.htm>.

INCREASED COOPERATION WITH FOREIGN ANTITRUST AUTHORITIES

Our ability to detect and prosecute international cartel activity has been enhanced by the increased cooperation and assistance that we have received from foreign governments, and from their own enforcement efforts. Over the past several years, there has been a growing worldwide consensus that international cartel activity is pervasive and is victimizing businesses and consumers everywhere. Seemingly with each passing day, the antitrust community learns of a foreign government that has enacted a new antitrust law, created a new cartel investigative unit, obtained a record antitrust fine, or adopted a new corporate leniency program. This shared commitment to fighting international cartels has led to the establishment of cooperative relationships among competition law enforcement authorities around the world in order to more effectively investigate and prosecute international cartels.

Cooperation And Coordination of Investigations. Our cooperation with foreign antitrust authorities is at an all-time high. While the Division is constrained in what we can say about coordination in ongoing investigations, we can point to two high-profile examples of successful cooperation and coordination with foreign authorities during FY 2007. In the air transportation investigation, the Division, along with the FBI, cooperated with authorities on five continents in order to coordinate the executions of search warrants on subject locations in the United States and abroad. The filing of the Division's plea agreement with British Airways calling for a \$300 million fine coincided with the announcement by the UK's Office of Fair Trading that the airline also agreed to pay a record fine of 121.5 million British pounds (roughly \$250 million) for its role in the passenger fare conspiracy.¹⁵

Cooperation Milestone: The Marine Hose Investigation. The Division's recent coordination with the UK's Office of Fair Trading and the European Commission in its investigation of cartel conduct in the marine hose industry is a model of international coordination and the monumental results it can achieve. On the same day that the Division and the FBI arrested eight foreign executives from the United Kingdom, France, Italy and Japan in Houston and San Francisco for their roles in the marine hose conspiracy and conducted multiple searches in the U.S., U.K. and European antitrust authorities searched locations in Europe.¹⁶

¹⁵ See Press Release, U.S. Justice Department, Antitrust Division, British Airways Plc and Korean Air Lines Co. Ltd. Agree to Plead Guilty and Pay Criminal Fines Totaling \$600 Million for Fixing Prices on Passenger and Cargo Flights (Aug. 1, 2007), *available at* http://www.usdoj.gov/atr/public/press_releases/2007/224928.htm; Press Release, UK Office of Fair Trading, British Airways to pay record £121.5m penalty in price fixing investigation (Aug. 1, 2007), *available at* <http://www.offt.gov.uk/news/press/2007/113-07>; Press Release, UK Office of Fair Trading, OFT response to U.S. Department of Justice statement (Aug. 1, 2007), *available at* <http://www.offt.gov.uk/news/press/2007/114-07>.

¹⁶ See Press Release, U.S. Justice Department, Antitrust Division, Eight Executives Arrested On Charges Of Conspiring To Rig Bids, Fix Prices, And Allocate Markets For Sales Of Marine

According to industry reports, the Japan Fair Trade Commission later searched locations in Japan in its investigation in this industry.¹⁷

International cooperation resulted in a new milestone when the Division filed plea agreements with three British nationals on December 12, 2007 in the marine hose investigation. Not only were the 30, 24, and 20 month sentences the defendants agreed to serve the three longest sentences ever agreed to by foreign nationals for antitrust offenses, but for the first time, the plea agreements anticipate and address the criminal prosecution of, and imposition of a jail sentence upon, the defendants for a cartel offense in another jurisdiction. The plea agreements contemplated the defendants' cooperation with and prosecution by the U.K.'s Office of Fair Trading ("OFT") in addition to their cooperation with and prosecution by the Division.¹⁸ The plea agreements also allow for the possibility of concurrent prison sentences, in effect, in the United States and the United Kingdom and provide that if sentences of imprisonment are imposed in the United Kingdom, the Division and defendants will recommend that the U.S. sentencing court reduce the prison sentences recommended in the Division plea agreements by one day for each day of imprisonment imposed in the United Kingdom.¹⁹ After the three British nationals entered their guilty pleas in U.S. district court, in keeping with the terms of the plea agreements, the district court deferred the U.S. sentencing and the defendants were escorted in custody to the United Kingdom for the purpose of cooperating with the OFT's investigation, pleading guilty to a cartel offense and serving any prison time in the UK.²⁰ On December 18, the OFT charged the three executives with violating the Enterprise Act by "dishonestly participating in a cartel to allocate markets and customers, restrict supplies, fix prices and rig bids for the supply of marine hose and ancillary equipment" in the United Kingdom.²¹ The cooperation in the marine hose investigation and the resulting charges and pleas are monumental milestones in international cartel enforcement in a number of ways: (1) the U.S. plea agreements for the first time

Hose (May 2, 2007), *available at* http://www.usdoj.gov/atr/public/press_releases/2007/223037.htm; Press Release, OFT launches criminal investigation into alleged international bid rigging, price fixing, and market allocation cartel (May 3, 2007), *available at* <http://www.of.gov.uk/news/press/2007/70-07>.

¹⁷ See Japanese Rubber Makers Probed Over Worldwide Cartel, Industryweek.com (Apr. 8, 2007) *available at* <http://www.industryweek.com/ReadArticle.aspx?ArticleID=14114>.

¹⁸ See Plea Agreements in United States v. Peter Whittle, United States v. Bryan Allison, and United States v. David Brammar at paragraphs 8-9, *available at* <http://www.usdoj.gov/atr/cases/allison.htm>.

¹⁹ *Id.* at paragraph 16.

²⁰ *Id.* at paragraph 10.

²¹ See Press Release, U.K. Office of Fair Trading, OFT brings criminal charges in international bid rigging, price fixing and market allocation cartel (Dec. 19, 2007), *available at* <http://www.of.gov.uk/news/press/2007/177-07>.

contemplate criminal prosecution and the imposition of jail time against individual cartel participants in multiple jurisdictions; (2) the agreed-upon jail sentences called for by the U.S. plea agreements were record jail sentences for foreign nationals pleading guilty to antitrust offense in the United States; and (3) the charges in the United Kingdom against these defendants are the first criminal cartel offenses charged under the U.K.'s Enterprise Act since it came into force in 2003. This investigation has not only made history, but it raises the stakes and provides a strong deterrent message for would-be cartel participants who seek to victimize consumers in multiple jurisdictions.

Cooperation Through International Organizations. One of the interesting recent developments in international cartel cooperation can be found in the work of the International Competition Network's (ICN) Cartel Working Group. Initiated in 2004, this working group is an important forum for agencies to share expertise in addressing the challenges of anti-cartel enforcement. Since its inception, dozens of agencies have contributed to the group's projects. Informed by input and experiences from participating agencies, the working group seeks to identify the best investigative techniques and policy approaches from around the world. A main focus of ICN work in the cartel area is assisting agencies in honing their operational and practical skills. In this vein, the Cartel Working Group organizes the ICN Cartel Workshops, a continuation of the successful series of agency-led International Cartel Conferences initiated by the U.S. Department of Justice in 1999. This year's workshop took place in El Salvador at the end of October. This annual event provides a venue for anti-cartel enforcers from around the world to come together, learn from each other and develop close working relationships that serve as the basis for future cooperation.

CONCLUSION

In FY 2007, there was a continuation of the trend to impose stiffer sentences against harmful cartels that target U.S. businesses and consumers. More individuals - foreign and domestic - are being sentenced to jail for longer periods of time, and corporations are paying higher criminal fines. Continued vigorous anti-cartel enforcement by the Division and its partners abroad can be expected in the coming year, and it is likely that there will be new milestones to top those of the last year.