



# DEPARTMENT OF JUSTICE

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## **Antitrust Compliance Programs: The Government Perspective**

Address by

**William J. Kolasky<sup>1</sup>**  
**Deputy Assistant Attorney General**  
**Antitrust Division**  
**U.S. Department of Justice**

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Good morning. I want to thank Joe Murphy, Herb Zinn, and the Practising Law Institute for giving me this opportunity to share with you the Antitrust Division's perspective on the critical importance antitrust compliance programs play in deterring antitrust crimes. I worked on my first internal investigation 25 years ago for a company based here in San Francisco, so it's a particular joy to be back here again talking about this important subject today.

The need for effective corporate compliance programs has never been more evident. It seems that almost every day we read of another case of flagrant disregard of the law by the top executives of yet another large and previously well respected company. These nearly daily disclosures of widespread accounting fraud, self-dealing, and just plain greed threaten to undermine confidence in our financial markets and jeopardize our economic recovery. Given my responsibilities for our relations with other antitrust authorities worldwide, I also fear that these disclosures will undermine our credibility abroad, weakening our ability to serve as a model for the rest of the world, and providing ammunition for those who do not share our commitment to free markets and economic democracy.

During the time I've been at the Antitrust Division, as I've visited our field offices which do the bulk of our criminal enforcement, one consistent theme I've heard is that the companies we investigate rarely have effective antitrust compliance programs. Our staffs tell me they have been surprised at how sloppy many large, publicly traded companies have become about antitrust compliance. It appears that as companies have down-sized their legal and auditing staffs, and turned their attention more and more to deal-making, one of the first places they cut is antitrust (and, I suspect, other) compliance. And we've all now seen the results. It's time for in-house counsel to return to practicing preventive law.

My task today is to talk about how to design a compliance program to prevent and detect antitrust crimes. David and Phil will discuss the role compliance programs can play in preventing environmental crimes and fraud. But in focusing only on criminal misconduct, I do not want us to lose sight of the equally important role compliance programs can play in preventing civil antitrust offenses. As all of you know, violations of the antitrust laws, be they civil or criminal, can expose your companies and clients to hundreds of millions, if not billions, of dollars in treble damage liability. A well-designed compliance program can reduce the risk of this civil exposure as well.

I want to begin by telling you a little bit about our criminal antitrust enforcement program and the important role our leniency program plays in it. Second, I want to share with you some of the common characteristics of the cartels we've prosecuted. Third, I will describe the essential elements of an effective antitrust compliance program. Finally, I will identify some of the common red flags you should be looking for as you counsel your clients and conduct antitrust audits.

## **I. The Antitrust Division's Criminal Enforcement Program**

As I've said in other speeches,<sup>2</sup> investigating and prosecuting hard core cartels has always been, and remains, our number one enforcement priority. Cartels — whether in the form of price fixing, output restrictions, bid rigging, or market division — raise prices and restrict supply, enriching producers at consumers' expense and acting as a drag on the entire economy. In our view, these are crimes, pure and simple, and those who perpetrate them are criminals who belong in jail.

As commerce has become more global, so too have cartels. Over the last five years, we have successfully prosecuted sixteen major multinational cartels in industries as diverse as animal feed additives, vitamins, graphite electrodes for steel mills, and fine arts auction houses. These cartels affected over \$55 billion in commerce worldwide and resulted in mark-ups as high as 100 percent in some cases. We have collected nearly \$2 billion in fines and sentenced some 20 senior corporate executives to jail terms of more than one year, the maximum sentence being ten years. In the last few years, the European Union has joined our battle against cartels with a vengeance. Last year alone, the European Commission imposed fines in the aggregate of 1.9 billion Euros on some 40 companies for engaging in illegal multinational cartels.

Our expanded corporate leniency program has been the key to our uncovering and successfully prosecuting these cartels.<sup>3</sup> This program offers any company that comes forward and blows the whistle on a cartel in which it has been participating, and which then cooperates fully with our investigation, complete amnesty from prosecution, so long as it meets the conditions set forth in the program.<sup>4</sup> Amnesty is automatic if the company comes forward before we have opened an investigation, but may still be available if the company is the first to agree to cooperate in an ongoing investigation. A grant of amnesty protects not only the company, but also all of its directors, officers, and employees who also agree to cooperate.

Since the current version of this program was put in place in 1993, it has been instrumental in most of the major cartel cases we have prosecuted. In the last several years, we have received an average of one amnesty application per month. So successful has our program been that many other jurisdictions around the world, including the European Union, are now copying it.

It should be obvious that our amnesty program substantially increases the importance of having an effective antitrust compliance program that is designed to prevent antitrust violations and to detect them quickly when they occur. The existence of the amnesty program dramatically increases the likelihood that the cartel will be detected and punished. Only a company with an effective antitrust compliance program can hope to be in a position to be the first company in the door.

## **II. Common Characteristics of Multinational Cartels**

Designing an effective antitrust compliance program requires knowing what it is you are trying to prevent. What I want to talk about next, therefore, are the common characteristics of the multinational cartels we've prosecuted. I'm hopeful that this will assist you in counseling your clients about what conduct to avoid and in designing an effective program for assuring they do not engage in unlawful cartel activity.

### **A. Brazen Nature of Cartels**

The most startling characteristic of the multinational cartels we have prosecuted is how cold blooded and bold they are. The members of those cartels showed utter contempt for antitrust enforcement. The cartels invariably involved hardcore cartel activity -- price fixing, bid-rigging, and market- and customer-allocation agreements. Without exception, the conspirators were fully aware they were violating the law in the United States and elsewhere, and their only concern was avoiding detection. The conspirators openly discussed, and even joked about, the criminal nature of their agreements; they discussed the need to avoid detection by antitrust enforcers in the United States and abroad; and they went to great lengths to cover-up their actions -- such as using code names with one another, meeting in secret venues around the world,

creating false “covers” -- *i.e.* facially legal justifications -- for their meetings, using home phone numbers to contact one another, and giving explicit instructions to destroy any evidence of the conspiracy. In one cartel, the members were reminded at every meeting -- “No notes leave the room.”

#### B. Involvement of Senior Executives

The second most startling characteristic of these cartels is that they typically involve the most senior executives at the firms involved -- executives who have received extensive antitrust compliance counseling, and who often have significant responsibilities in the firm’s 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.

These executives are not only disdainful of their customers and of the law, but also show equal contempt for their own company’s rules -- rules adopted to protect the company and them from criminal conduct. They will, therefore, go to great lengths to make sure that you, as inside or as outside counsel, don’t find out about their criminal activity.

A good example is the extent to which one executive of a corporation we recently prosecuted went to frustrate the efforts of the company’s general counsel to enforce the company’s antitrust compliance program. This general counsel had instituted a comprehensive antitrust compliance program, and had made sure that the senior executives were well schooled on the antitrust laws. He had laid out specific rules to follow and adopted stiff penalties for failure to follow those rules. When a top executive at his firm arranged a meeting with his chief

foreign competitor to discuss exchanging technological information, the executive, as required by the policy, notified the general counsel's office of the meeting. The general counsel (perhaps suspecting the worst) 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. He was certain that this way there could be no chance conversation between the company executive and his competitor, and the general counsel would be a witness to everything said. Surely no antitrust problems could arise in such a setting. And the general counsel must have taken some comfort when he, the executive, and the executive from the competitor firm greeted one another at the start of the meeting and the two executives introduced themselves to each other, exchanged business cards, and engaged in small talk about their careers and families that indicated that the two had never met each other before. Imagine how that general counsel must have felt when he learned, during the course of our investigation, that the introduction between the two executives had been completely staged for his benefit -- to keep him in the dark. In fact, the two executives had been meeting, dining, socializing, playing golf, and participating together and with others in a massive worldwide price-fixing conspiracy for years. Furthermore, 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 executive by a code name when he called the office and the general counsel was around.

C. 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 cracking and prosecuting international cartels. Some cartel members go so far as to try to keep their cartel activity secret from all U.S.-based employees, even those responsible for carrying out their instructions as to the firm's output and prices. 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.

D. Using Trade Associations As Cover

International cartels frequently use trade associations as a means of providing "cover" for their cartel activities. In order to avoid arousing suspicion about the meetings they attended, the lysine conspirators actually created an amino acid working group or subcommittee of the European Feed Additives Association, a legitimate trade group. The sole purpose of the new subcommittee was to provide a false, but facially legitimate, explanation as to why they were meeting. 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, a legitimate 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.

E. Fixing Prices Globally

Another common characteristic of an international cartel is its power to control prices on a worldwide basis effective almost immediately. Prosecutors got an unprecedented 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 they 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.

F. 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) a reporting and auditing function, and (3) a compensation scheme -- three more common characteristics of international cartels.

G. 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.

H. 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 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.

#### I. Budget Meetings

Cartels nearly always have budget meetings. Like division managers getting together to work on a budget for a corporation, 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.”

#### J. Retaliation Threats -- Policing The Agreement

As is often said, there is no honor among thieves. Thus, cartel members have to devise ways -- or even make threats -- to keep their co-conspirators honest, at least with respect to maintaining their conspiratorial agreements. It is common for cartel members to try to keep their

co-conspirators in line by retaliating through temporary price cuts or increases in sales volumes to take business away from or financially harm a cheating co-conspirator. Excess capacity in the hands of leading firms can be a particularly effective tool for punishing cheating and thereby enforcing collusive agreements. In lysine, ADM, which had substantial excess capacity, repeatedly threatened to flood the market with lysine if the other producers refused to agree to a volume allocation agreement proposed by ADM. In another case where competitors bought from one another, the cartel member with the extra capacity threatened to not sell to a competitor who was undercutting the cartel.

#### K. The Structure of Cartels

We have found that cartels can involve a surprisingly large number of firms. The number of participants in several of the cartels we prosecuted were surprisingly high. Five or six members were not uncommon and occasionally we have uncovered cartels with 10 or more members. This appears to be due in part at least to fringe players in the market feeling they will profit more by going along with the cartel than by trying to take share away from the larger firms by undercutting their prices. Nevertheless, industry concentration does matter. As economic theory predicts, the industries in which we have detected cartels are usually highly concentrated with the largest firms acting as ringleaders and the fringe players following along. In one case, there was evidence that the industry had attempted unsuccessfully to coordinate prices for several years before the cartel finally got off the ground after the industry consolidated down to approximately six players.

We have also found that a single cartel will often involve multiple forms of agreement. Just as George Stigler observed,<sup>5</sup> cartels can take many forms, with the choice of form being determined in part at least by balancing the comparative cost of reaching and enforcing the

collusive agreement against the risk of detection. The vitamin cartel, for example, included price-fixing, bid-rigging, customer and territorial allocations, and coordinated total sales.

These cartels also tended to be more durable than is sometimes thought. After the ADM plea, the Wall Street Journal stated “If colluders push prices too high, defectors and new entrants will set things right.” Our experience has shown that this is not the case. Several of the cartels we prosecuted had been in existence for over ten years, including one (sorbates) that lasted 17 years, from 1979 to 1996.

We also found that while product homogeneity and high entry barriers may facilitate cartel behavior, they are not essential to it. While the products in our cartel cases tend to be fungible, there are sometimes exceptions. One case we prosecuted involved bid rigging on school bus bodies. School bus bodies have many options, but the conspirators were able to work out a formula that incorporated the options and trade-in value to determine a price at or below which the designated winning bidder was supposed to bid. Similarly, while most of our cartel cases involve industries in which entry tends to be difficult, there are notable exceptions, such as in the Division’s many bid-rigging cases in the road building industry. The road building industry, at least at the time of the conspiracies, was not difficult to enter, yet the Division turned up numerous cartels.

L. Large, sophisticated buyers can still be victims.

In merger analysis, some assume that large purchasers in the market will provide sufficient discipline to prevent cartels. Our experience shows to the contrary that many successful cartels sell to large, sophisticated buyers. In the lysine cartel, the buyers included Tysons Foods and Con Agra; in citric acid, the buyers included Coca-Cola and Procter & Gamble; and in graphite

electrodes, the victims included every major steel producer in the world. It is particularly ironic that one of the largest victims of the vitamins cartel had itself been one of the perpetrators of the citric acid cartel.

M. Cartel members include large, publicly traded companies

Our cases have turned up hard-core cartel activity top management at some of the world's largest corporations and most respected corporations including Christies/Sotheby's, ADM, Hoffmann-La Roche, BASF, ABB, and a host of others. We have repeatedly found that even the largest companies have become sloppy about their antitrust compliance programs and that they are not doing all they should to educate managers about the risks at which they put themselves and their companies by engaging in cartel activity.

N. Cartel participants tend to be recidivists

Finally, we have found that cartel participants tend to be recidivists. The most notorious example is Hoffmann-La Roche, which continued its participation in the vitamin conspiracy even as it was entering into a plea agreement for its participation in the citric acid cartel. Another example was a domestic building materials industry, where one generation of executives engaged in cartel activity during the mid-1980s and their sons did likewise after they took over the reins of the businesses in the 1990s.

### **III. Designing an Effective Compliance Program**

Now that you know what an illegal cartel looks like, let's talk about how to design an antitrust compliance program that can deter cartel activity by your company's executives.

A. The goals of a successful compliance program

A sound antitrust compliance program should have two principal objectives: prevention and detection. From our perspective, the true benefit of compliance programs is to prevent the commission of antitrust crimes, not to enable organizations that commit such violations to escape punishment for them. This should be true for the company as well. A corporate compliance program generally will not protect the company from prosecution and certainly will not protect it from potentially devastating treble damage liability. Therefore, every company's first objective in its compliance program should be to prevent wrongdoing.

A second important objective of a compliance program is to detect wrongdoing as early as possible, while the damages are still small. Early detection of antitrust crimes will give a company a head start in the race for amnesty. But, equally important, it will enable it to nip the wrongdoing in the bud before the damages from the cartel become so large that they would be material to the company's bottom-line.

A well-designed compliance program may also, in some circumstances, help your company qualify for sentence mitigation under the sentencing guidelines. I want to emphasize that once a violation occurs, a compliance program can do little, if anything, to persuade the Division not to prosecute. Organizational liability, both civil and criminal, is grounded on the theory of *respondeat superior*. We have rarely, if ever, seen a case where an employee who committed an antitrust violation was acting solely for his own benefit and not the company's. A strong corporate compliance program can, however, help at the sentencing stage, so long as the employees who committed the violation were not "high-level personnel" of the organization. Again, however, it is important to emphasize that in our experience most antitrust crimes are

committed by just such high-ranking officials, which would disqualify the company from receiving any sentence mitigation, no matter how good its corporate compliance program. This again shows why it is so important if a company learns of a violation that it report it promptly and seek to qualify for our amnesty program. Finally, a strong compliance program may help your company avoid suspension and debarment, so long as the company takes aggressive steps to discipline the wrongdoers, make the victims whole, and assure that future violations do not occur.

B. Minimum requirements for an effective compliance program

The sentencing guidelines set forth seven minimum requirements that a compliance program must satisfy in order to qualify for sentence mitigation.<sup>6</sup> These are:

- Clearly established compliance standards;
- Assigning overall responsibility to oversee compliance to high-level executives within the company;
- Exercising due care not to delegate responsibility to employees who have a propensity to engage in illegal conduct;
- Taking reasonable steps to communicate standards and procedures effectively to all employees;
- Taking reasonable steps to achieve compliance with standards;
- Consistent enforcement of standards through appropriate disciplinary mechanisms; and
- Taking reasonable steps when an offense occurs to respond and to prevent future violations.

It's important to stress that these are minimum requirements. To be truly effective, a



compliance program must be customized to fit the firm's business, organization, personnel, and culture. The first three requirements are reasonably self-explanatory. I want, therefore, to focus my attention on the last four requirements.

*a. Effective communication.* Every compliance program should include a clear statement of the company's commitment to comply with the antitrust laws, accompanied by a set of practical do's and don'ts written in plain English so that every employee can understand them. A policy statement is, however, only the beginning. The company should have an active training program that includes in-person instruction by knowledgeable counsel. The in-person training sessions can be supplemented by video and Internet training tools, but these are no replacement for some personal instruction. The instruction should be as practical as possible, including case studies drawn from the company's actual experiences. The instruction should also include education as to the consequences of antitrust violations, both for the company and the individual employee. You could, for example, tell your employees that in the last several years, the Division has sentenced more than 20 senior executives to serve one year or more of jail time for antitrust crimes. One of these executives, who compounded his antitrust offenses with bribery and money laundering, is now serving a ten-year sentence. And, as Alfred Taubman recently learned, an executive's stature in the community and record of community service will not save him or her from prison. You might also tell your employees about the magnitude of the criminal fines and treble damage violators have had to pay. Hoffman LaRoche alone has paid more than \$1 billion in fines and damages for its involvement in the vitamins price-fixing conspiracy.

*b. Steps to achieve compliance.* While training is important, it is not sufficient to assure compliance with the antitrust laws. To achieve that goal, a company must have a proactive

law department that is dedicated to practicing preventive law. It is critical that the company's lawyers regularly attend management meetings and regularly visit the company's facilities so that employees know whom to call if they have a question or a problem. It is also critical that the lawyers win the respect of their clients by responding quickly to questions with sound legal advice that takes full account of the practical business issues the client faces. A company also needs to have in place and to publicize a reporting system so that employees know to whom to report possible misconduct. Many companies establish ombudsmen and hot lines for this purpose, while others require their employees to report possible wrongdoing to the law department. Whatever system is in place should assure employees seeking to report misconduct confidentiality and protection from retaliation. Finally, a company should conduct regular antitrust audits, preferably unannounced, to monitor compliance. These audits can be kept informal, but should include a review of both the paper and computer files (especially e-mails) of employees with competitive decision-making authority or sales and marketing responsibilities. It is important also to interview employees about their business and their contacts with competitors.

*c. Enforcement of standards through appropriate discipline.* It is absolutely critical that the company establish a record of consistently disciplining employees who disregard the company's antitrust compliance policy or who fail to report misconduct by others. In so doing, it is equally critical that the company discipline the chiefs, not just the Indians. The company should discipline senior managers who failed adequately to supervise or who created a climate of disrespect for antitrust principles in their organizations, even if they did not have actual knowledge of the particular wrongdoing.

*d. Reasonable steps to respond to violations.* When the worst happens and you

discover that your company has committed a possible antitrust crime, it is also critical that the company respond promptly and energetically. This includes initiating an immediate investigation and reporting promptly to the agency. Remember: qualifying for amnesty can sometimes become a race with the first company in the door receiving the most lenient treatment. In addition to disciplining the employees responsible, the company should also take steps to make restitution to its customers, either through settling the inevitable treble damage actions or through commercial arrangements directly with the customers. The company should also re-examine its compliance program in order to learn from its mistakes and should make whatever modifications are necessary to assure that future violations do not occur.

As important these steps are, nothing is more important than senior management commitment and leadership. A culture of competition must begin at the very top of the company. Respect for the law is a necessary, but not sufficient, condition. Senior management must value competition and must be vocal in making that commitment known to employees. In the cases we prosecute, we find almost invariably that in companies that violate the antitrust laws, the tone of disrespect for the law and for competition permeated the entire company, usually starting at the very top. Look at some of the people we have prosecuted: Alfred Taubman, the chairman and principal shareholder of Sotheby's; Mick Andreas, son of the long-time chairman and CEO, Dwayne Andreas, who was himself being groomed to take over the reins. In fact, ADM is a particularly good illustration of the kind of corporate culture that breeds antitrust crimes. It was a culture that believed, as one senior executive put it, that, "Our competitors are our friends. Our customers are the enemy." Both in representing defendants in criminal investigations in private practice and now as a prosecutor, this is exactly the attitude I've found in almost every company

that commits antitrust crimes. And it's an attitude that can be changed only if the company's senior officers and directors all believe in the value of competition and communicate to their employees.

In addition to strong, positive leadership, it is important also that a company have sound incentive structures in place. There should be strong negative incentives against violating the antitrust laws and strong positive incentives for reporting and deterring violations. But companies should also have incentives that reward tough competition, not collusion. You want your sales force, for example, to have an incentive to sell more, not less at a higher price.

#### **IV. Important Red Flags**

In counseling your clients and in conducting antitrust audits, there are any number of common red flags to look for. Here are five.

*Trade association activity.* Look to see whether the positions of attendees at trade association meetings match the ostensible purpose of the meeting. Look for a pattern of meetings outside the United States. Look at whether the association is gathering detailed industry data, especially specific transaction data or forward-looking pricing and output data. Look to see whether meetings are attended by counsel and whether there is an agenda for the meetings and a record of what was discussed.

*Sales transactions between your company and its competitors, particularly around the end of the year.* While there are many legitimate reasons for competitors to buy from one another, such transactions can be used to "true up" a market allocation scheme.

*Data on market shares.* Look at your company's market shares to see if they are more stable than you would expect in a competitive market. Market shares that are stable over a long

period of time are a strong indicator of collusion.<sup>7</sup>

*Executives receiving calls at home or from callers giving fictitious names or refusing to identify themselves.* When conducting audits, therefore, talk not only to the executives, but to their assistants.

*Sudden, unexplained price increases and copies of competitor price announcements in your company's files.* If you find any, look at the fax footprints or the cover e-mail to see where they came from.

## **V. Conclusion**

The stakes have never been higher. An effective antitrust compliance program can literally mean the difference between survival and possible extinction to a corporation whose responsible officers or employees are tempted to engage in -- or are engaging in -- an antitrust conspiracy. In today's enforcement environment, a multinational firm, and its executives, engaged in cartel activity face enormous exposure: criminal convictions in the United States; massive fines 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 treble damage actions in the United States; damage actions in 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. And if 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. I hope my remarks today will serve their intended

purpose of persuading you when you get back to your companies to make it your first priority to assure that your compliance program is up to the task.

1. Deputy Assistant Attorney General for International Enforcement. The material in this paper draws heavily from materials developed and prepared by James M. Griffin, the Deputy Assistant Attorney General for Criminal Antitrust Enforcement, who in turn drew on materials prepared by his predecessor, Gary R. Spratling. I particularly want to thank Rebecca Meiklejohn of our New York Field Office for being the first to alert me to the neglect of corporate compliance the Division has found in several of its investigations and Donna Peel of our Chicago Field Office for contributing several of the common characteristics of multinational cartels. The views expressed in this article reflect those of the author and not necessarily those of the Division and the author accepts full responsibility for any errors.
2. *See, e.g., U.S. and EU Competition Policy: Cartels, Mergers, and Beyond*, An Address Before the Council for the United States and Italy Bi-Annual Conference, New York, N.Y., January 25, 2002, at <http://www.usdoj.gov/atr/public/speeches/9848.htm>.
3. U.S. Department of Justice, Antitrust Division, Corporate Leniency Policy, at <http://www.usdoj.gov/atr/public/guidelines/lencorp.htm>.
4. The six conditions for obtaining automatic leniency are: (1) At the time the corporation comes forward, the Division has not received information about the illegal activity from any other source; (2) The corporation, upon its discovery of the illegal activity, takes prompt and effective actions to terminate its part in the activity; (3) The corporation reports the wrongdoing with candor and completeness and provides full cooperation to the division throughout the investigation; (4) The confession of wrongdoing is truly a corporate act; (5) Where possible, the corporation makes restitution to the injured parties; and (6) The corporation did not coerce another party to participate in the illegal activity and was not the leader or originator of the activity. If condition one is not met, but the others are, the company may still qualify if (1) it is the first corporation to come forward, and (2) the Division at that point does not yet have evidence likely to result in a sustainable conviction against the firm.
5. *See* Stigler, George J., "A Theory of Oligopoly," *Journal of Political Economy*, Vol. 72, pp. 44-61 (1964).
6. U.S. Sentencing Guidelines, Chapter 8 (effective Nov. 1, 1991).
7. *See, e.g., U.S. International Trade Commission, Report to the President on Global Steel Trade: Structural Problems and Future Solutions* 65-84 (July 2000)(citing stable market shares in Japanese steel industry as evidence that the industry is cartelized).