DEPARTMENT OF JUSTICE

Individual Accountability for Antitrust Crimes

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Last year, the Antitrust Division obtained over $2.5 billion in criminal fines from financial firms prosecuted for antitrust violations in the foreign-currency exchange spot market. Although the fines imposed in that investigation were the largest ever obtained by the Division, we have obtained substantial fines in other investigations. Our automobile parts, air transportation, and LCD investigations, which collectively resulted in more than $5 billion in fines, are just a few examples. Foreign competition enforcers, such as the Directorate General for Competition in Europe and the Council for Economic Defense in Brazil, have also imposed very large fines for cartel violations.

Such fines have occasionally sparked a debate about whether corporate accountability and corporate fines are a meaningful punishment for antitrust crimes. For instance, I participated in a panel discussion on this topic at the Bundeskartellamt's Berlin Conference last year. During the discussion, a panelist provocatively suggested that competition enforcers are "drunk on fines" and suggested that corporate fines are not serving their intended deterrent purpose.

While I won't offer an opinion on the buzz-worthiness of corporate fines for my fellow enforcers, I will say that corporate prosecutions and fines have their place in our enforcement toolkit. They punish firms that are in business to make money by taking money away from them. Fines divest corporate offenders of at least some of the ill-gotten gains that they would otherwise enjoy—gains from conduct that undermines the competition on which we should be able to depend. And, word of corporate prosecutions and big fines travels fast, showing there is a real cost to the bottom line from bad behavior. That promotes deterrence.

Corporate accountability is important as well because it incentivizes compliance with our laws. The Antitrust Division emphasizes that compliance with antitrust laws must be ingrained

in a corporation's culture—one that is established from the top down.[1] And we insist on probation and corporate monitors in criminal resolutions, where corporate offenders fail to demonstrate serious compliance efforts. Those efforts must include responsible action regarding culpable executives and employees who have not accepted responsibility for their conduct.

As the Antitrust Division's Assistant Attorney General, Bill Baer, explained in a September 2014 speech: "It is hard to imagine how companies can foster a corporate culture of compliance if they still employ individuals in positions with senior management and pricing responsibilities who have refused to accept responsibility for their crimes and who the companies know to be culpable."[2]

This brings me to the point that I want to emphasize during my remarks here today. Holding companies accountable and assessing large fines, alone, are not the only means, or even the most effective way, to accomplish our goal of deterring and ending cartels. *Individuals* commit the crimes for which corporate offenders pay. Every corporate crime involves individual wrongdoing. As the Deputy Attorney General of the Department of Justice Sally Yates has said, "[I]t is our obligation at the Justice Department to ensure that we are holding lawbreakers accountable regardless of whether they commit their crimes on the street corner or in the boardroom. In the white-collar context, that means pursuing not just corporate entities, but also the individuals through which these corporations act."[3]

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[1] *See* Brent Snyder, Deputy Ass't Att'y Gen., Antitrust Div., Dep't of Justice, Compliance is a Culture, Not Just a Policy, Remarks as Prepared for the International Chamber of Commerce/United States Council of International Business Joint Antitrust Compliance Workshop 4-6 (Sept. 9 2014), http://www.justice.gov/atr/file/517796/download; *see also* Bill Baer, Ass't Att'y Gen., Antitrust Div., Dep't of Justice, Prosecuting Antitrust Crimes, Remarks as Prepared for the Georgetown University Law Center Global Antitrust Enforcement Symposium 7-9 (Sept. 10, 2014), http://www.justice.gov/atr/file/517741/download.

[2] Baer, *supra* note 1, at 8.

[3] Sally Quillian Yates, Deputy Att'y Gen., Dep't of Justice, Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing (Sept. 10, 2015), http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school.

Recently, Deputy Attorney General Yates issued a memo entitled, "Individual Accountability for Corporate Wrongdoing,"[4] in which she emphasized this principle. "One of the most effective ways to combat corporate misconduct," she said, "is by seeking accountability from the individuals who perpetrated the wrongdoing."[5]

Her memo stressed the importance of individual accountability for deterring future illegal activity, incentivizing changes in corporate behavior, ensuring that the proper parties are held responsible for their actions, and promoting the public's confidence in our justice system.[6] The memo specified measures that all components of the Department must employ to strengthen our pursuit of the individuals responsible for corporate wrongdoing.[7]

This emphasis on individual accountability is fundamental to Antitrust Division prosecutors. The Division has long touted prison time for individuals as the single most effective deterrent to the "temptation to cheat the system and profit from collusion."[8] My predecessors ensured that this message was often repeated.[9] To quote just one of them, Scott Hammond said

[4] Memorandum from Sally Yates, Deputy Att'y Gen., Dep't of Justice, to Assistant Att'y Gen., Antitrust Div., et al. (Sept. 9, 2015), http://www.justice.gov/dag/file/769036/download [hereinafter Yates Memo].
[5] *Id.* at 1.
[6] *Id*.
[7] The memo outlines six key steps to strengthen the pursuit of individual corporate wrongdoing: (l) in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct; (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should memorialize any declinations as to individuals in such cases; and (6) civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay. *Id.* at 2-3.
[8] Baer, *supra* note 1, at 2.
[9] S*ee, e.g.*, Scott D. Hammond, Deputy Ass't Att'y Gen., Antitrust Div., Dep't of Justice, The Evolution of Criminal Enforcement Over the Last Two Decades, Speech at the 24th Annual National Institute on White Collar Crime 4 (Feb. 25, 2010), http://www.justice.gov/atr/public/speeches/255515.pdf [hereinafter Hammond, Evolution of Criminal Enforcement] ("The Antitrust Division has steadfastly emphasized the importance of individual accountability and stiff corporate fines to induce leniency applications and optimize deterrence of cartel conduct."); Scott D. Hammond, Deputy Ass't Att'y Gen., Antitrust Div., Dep't of Justice, Charting New Waters in International Cartel Prosecutions, Speech before the ABA Criminal Justice Section's Twentieth Annual National Institute on White Collar Crime 13 (Mar. 2, 2006), http://www.justice.gov/atr/file/518446/download [hereinafter Hammond,

that "[i]t is indisputable that the most effective deterrent to cartel offenses is to impose jail sentences on the individuals who commit them."[10]

Our record with respect to individual accountability speaks for itself. But we are embracing the Deputy Attorney General's directive to do even better. We have adopted new internal procedures to ensure that each of our criminal offices systematically identifies all potentially culpable individuals as early in the investigative process as feasible and that we bring cases against individuals as quickly as evidentiary sufficiency permits to minimize the risk that cases will be time-barred or that evidence will become stale from the passage of time. We are also undertaking a more comprehensive review of the organizational structure of culpable companies to ensure that we are identifying and investigating all senior executives who potentially condoned, directed, or participated in the criminal conduct.

Our efforts to hold individuals accountable for antitrust crimes are not new, however. For over two decades the Antitrust Division has increasingly held individuals accountable. This

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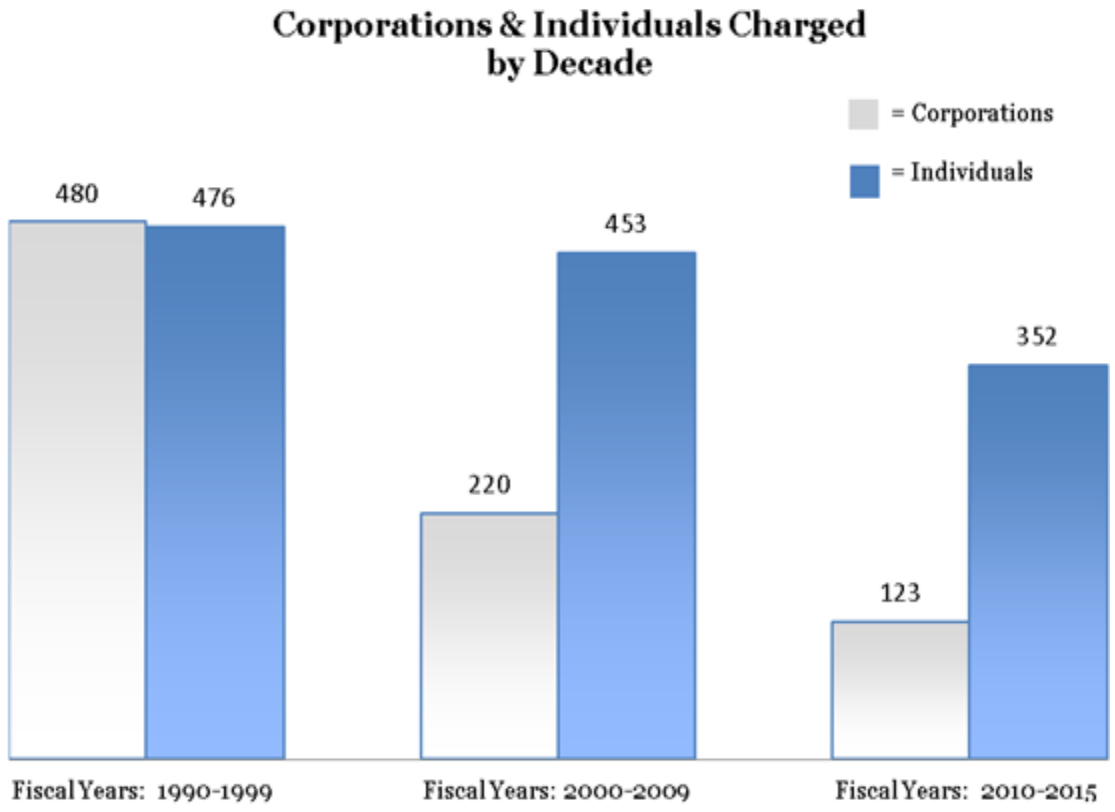
Charting New Waters] ("It is indisputable that the most effective deterrent to cartel offenses is to impose jail sentences on the individuals who commit them."); James M. Griffin, Deputy Ass't Att'y Gen., Antitrust Div., Dep't of Justice, The Modern Leniency Program After Ten Years - A Summary Overview of the Antitrust Division's Criminal Enforcement Program, Speech before the ABA Section of Antitrust Law Annual Meeting 2 (Aug. 12, 2003), http://www.justice.gov/atr/file/518851/download ("The Division has long supported the belief that the best and surest way to deter and punish cartel activity is to hold the most culpable individuals accountable by seeking jail sentences."); Scott D. Hammond, Deputy Ass't Att'y Gen., Antitrust Div., Dep't of Justice, 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 9 (March 8, 2001), http://www.justice.gov/atr/file/519066/download ("An individual defendant faces a greater risk of jail time today than even a few years ago. Approximately 50 individual defendants were imprisoned for antitrust and related offenses in FYs 1999 and 2000, which is more than the total number of individuals imprisoned in the previous *five years combined*."); Stuart M. Chemtob, Special Counsel for Int'l Trade, Antitrust Div., Dep't of Justice, Antitrust Deterrence in the United States and Japan, Remarks at a Conference on Competition Policy in the Global Trading System 7 (June 23, 2000), http://www.justice.gov/atr/file/518541/download ("An integral part of antitrust enforcement policy is the prosecution of culpable individuals as well as their firms. Ultimately, it is individuals that commit antitrust crimes, and it is felt that those responsible for a firm's participation in hard core anticompetitive behavior must be held personally accountable if this behavior is to be prevented."); Gary R. Spratling, Deputy Ass't Att'y Gen., Antitrust Div., Dep't of Justice, International Cartels: The Intersection Between FCPA Violations and Antitrust Violations, Speech at the 7th National Conference on Foreign Corrupt Practices Act 3 (Dec. 9, 1999), http://www.justice.gov/atr/file/518581/download ("Culpable executives of multinational firms who engage in international cartel activity run the risk of imprisonment in addition to heavy fines.").

[10] Hammond, Charting New Waters, *supra* note 9, at 13.

is as critical an aspect of our cartel enforcement program as are stiff fines for corporate offenders. Corporate and individual accountability are not an "either/or" proposition. They go hand-in-hand.

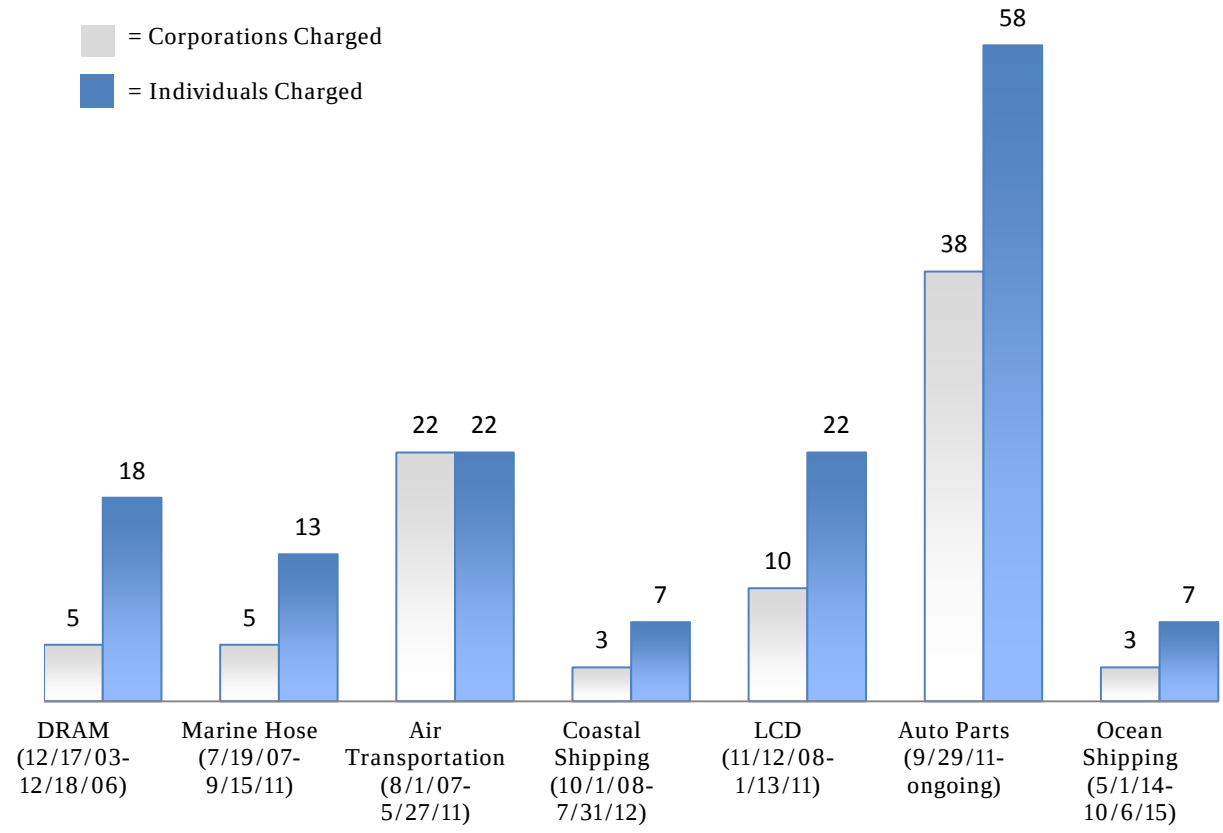
During the 1990's, the Antitrust Division prosecuted almost equal numbers of individuals (476) as corporations (480). From 2000-2009, we prosecuted more than twice as many individuals (453) as corporations (220). And during the most recent five-year period, we prosecuted almost three times as many individuals (352) as corporations (123).



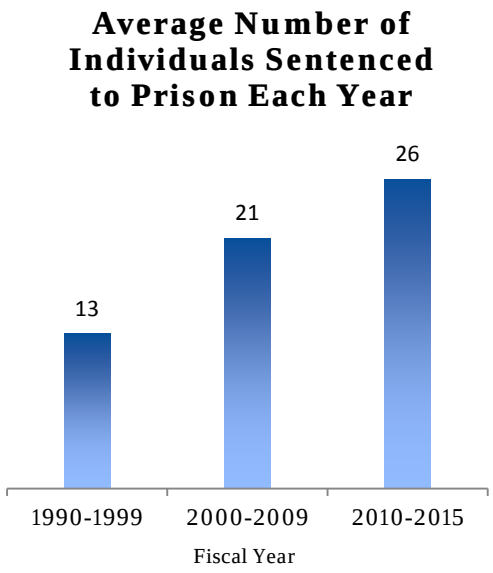
Consistent with the Department's emphasis on individual accountability, the Antitrust Division prosecuted increasing numbers of culpable individuals from each corporate defendant over these years. In particular, in major Division investigations over the last decade—such as

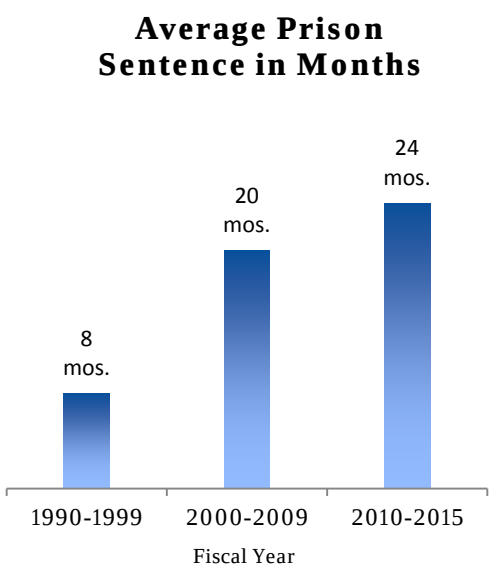
the marine hose, coastal shipping, LCD, and ocean shipping investigations—the ratio of individuals to companies prosecuted was slightly over two to one, and over three to one in the DRAM investigation. These investigations exemplify the Division's determination to promote deterrence and incentivize changes in corporate culture by holding individuals accountable for corporate wrongdoing.

The Antitrust Division is not content merely to charge low-level employees. We are committed to holding accountable the highest-level culpable executives at conspirator companies. In our investigations, charges against senior-level executives are common. In the ongoing auto parts investigation, for example, we so far have prosecuted nine parent or subsidiary Presidents, seven Vice Presidents, two Executive Managing Directors, one CFO, and 30 division directors and general managers. High-level executives were also prosecuted in the DRAM and LCD investigations, including two chairmen/CEOs, four presidents, more than 20 vice presidents, and a number of managers and directors. Among these were the president and executive vice president of the third largest LCD maker in the world. In that case, a jury convicted these two, and they are currently serving 36-month jail terms—the longest sentences ever imposed on foreign-national defendants for antitrust offenses. Their employer, AU Optronics, was also sentenced to pay a then-record fine of $500 million and accept a compliance monitor, after the same jury convicted it.



The Antitrust Division is not only successfully prosecuting more individuals, at higher levels within their firms, but is also obtaining longer prison sentences. Over the last three decades, the average sentence for defendants sentenced to a prison term has increased three-fold, from an average of 8 months in the 1990's, to an average of 24 months for fiscal years 2010 through 2015.



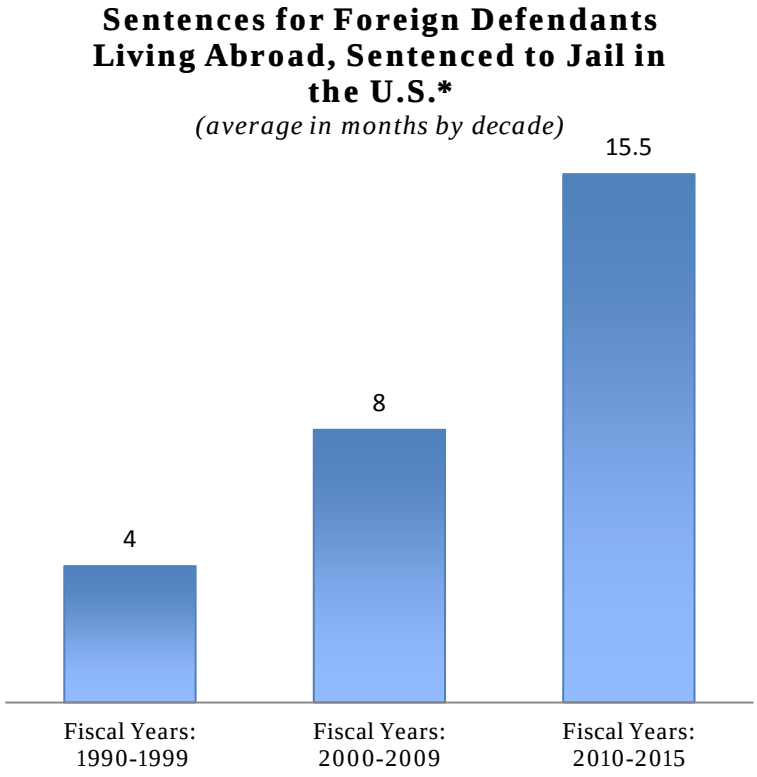


In our investigation of the coastal shipping industry, which was the largest domestic conspiracy ever prosecuted in terms of affected commerce, we obtained convictions of three major U.S. shipping companies as well as a company president, a division president, and three vice presidents. These sentences included the first (60 months) and second (48 months) longest jail terms for antitrust offenses. This willingness to hold individuals accountable with long terms of incarceration distinguishes the United States from virtually every other jurisdiction from a global cartel enforcement perspective.

In international cartel enforcement, individual accountability means holding offenders responsible for their actions, irrespective of where they reside. The Antitrust Division is committed to ensuring that culpable foreign nationals, just like U.S. co-conspirators, serve significant prison sentences for violating the antitrust laws of the United States.

From May 1999 through fiscal year 2015, 88 foreign defendants served, or are serving, prison sentences in the United States for participating in—or for obstructing investigations of—international cartels. The average prison sentence for foreign nationals that the Antitrust

Division prosecutes has increased steadily with each decade. Just one foreign defendant was sentenced to serve time in jail—and only for four months—in the 1990's. In fiscal years 2000 through 2009, the average sentence then doubled, to eight months, for the 38 foreign defendants sentenced. And then it almost doubled again, to an average sentence of 15.5 months for the 49 foreign defendants sentenced during fiscal years 2010 through 2015. Our commitment to individual accountability means using all available means to find, arrest, and even extradite international fugitives attempting to evade the jurisdiction of the United States.



*These statistics represent sentences for participation in—or for obstruction of investigations of—international cartels.

The Department's emphasis on individual accountability enhances the opportunity for offenders to mitigate their criminal penalties by cooperating with the Antitrust Division in its criminal investigations. Every crime that we prosecute under the Sherman Act is a conspiracy.

And like any investigation of any conspiracy, we make our cases using the cooperation of conspirators against their co-conspirators.

The Antitrust Division's Corporate Leniency Policy represents a unique voluntary disclosure program. The first qualifying corporation to self-report its participation in an antitrust cartel, and then fully cooperate in the investigation and prosecution of its co-conspirators, is eligible to receive a nonprosecution commitment from the Division. The policy provides powerful incentives to self-report and cooperate for the company.

And when a corporation self-reports before the Division has received information about the cartel, its qualifying current officers, directors, and employees who admit their involvement in the offense and cooperate against their co-conspirators receive protection from criminal conviction and the resulting punishment along with the corporate offender. When a company applies for leniency after the Division has received information about the cartel, its current officers, directors, and employees who admit their involvement in the offense and fully cooperate against their co-conspirators may also be, and often are, included in the corporate leniency agreement, but the Division has more discretion regarding the treatment of individuals in this situation. Leniency must be fully earned, however. It requires timely, complete, and ongoing cooperation by covered individuals, including admitting to the collusive conduct and truthfully testifying in front of a grand jury and at trial. Since the implementation in 1993 of the current Policy that provides coverage for a corporate applicant's directors, officers, and employees, the Antitrust Division has seen a nearly twenty-fold increase in the leniency-application rate.

The leniency program assists our prosecutors in the timely exposure and prosecution of antitrust conspiracies. Individuals who earn leniency provide unparalleled information from

cartel insiders about the origins and inner-workings of secretive antitrust conspiracies. This allows our prosecutors to immediately focus our efforts on both corporate and individual co-conspirators.

Leniency is also highly effective at incentivizing early cooperation by other conspirators. Because leniency is available only to the first qualifying conspirator who self-reports and begins cooperating, it creates a race to the prosecutor's door. And in some cases the race is lost by mere minutes or hours. The corporate offenders that lose the race for leniency often immediately begin cooperating toward a negotiated agreement to plead guilty. Why? Because they know the leniency applicant likely has given us timely insight into the nature and extent of the wrongdoing. In short, they and their counsel know the bad conduct has been exposed.

Those offenders can still mitigate their penalties by providing cooperation against their co-conspirators. As in any other criminal prosecution, the United States Sentencing Guidelines provide for a substantial assistance departure to account for the cooperation that a defendant—corporate or individual—provides. But this too is earned. And it correlates to the value of the cooperation actually provided, and not simply to the order in which potential cooperators arrive at the Antitrust Division's door.

Providing substantial assistance in an investigation requires more than merely accepting responsibility and agreeing to plead guilty. Fully and truthfully assisting the Antitrust Division's prosecutors in holding other corporate and individual conspirators accountable is essential. A company that approaches the Division early in an investigation is in the best position to provide substantial assistance and thereby earn significant sentencing credit, but being the first company to accept responsibility and plead guilty will not by itself be sufficient to earn a substantial assistance departure.

The Antitrust Division will not recommend a substantial assistance departure for a company that is the first to accept responsibility and plead guilty but otherwise does little to cooperate in the Division's investigation and prosecutions. Also, a company that is the first to accept responsibility and plead guilty but delays providing cooperation risks losing the opportunity to obtain, or diminishing the amount of, a substantial assistance departure.

We will evaluate the nature, extent, timing, and value of cooperation provided by each cooperating company in recommending substantial assistance departures. If one company begins to cooperate later than another but nonetheless provides greater cooperation, the Antitrust Division may recommend a larger substantial assistance departure for that company. As Bill Baer explained, "our sentencing recommendations [are] based on the value of the cooperation we receive, not simply on the order in which companies begin to cooperate."[11]

This, of course, does not mean that companies should sit on their hands and wait to see what their co-conspirators decide to do. Such a tactic seriously jeopardizes the opportunity to provide valuable cooperation meriting a substantial assistance departure. And, the Antitrust Division will calculate the substantial assistance departure from progressively higher points in the fine range the longer a company delays in agreeing to accept responsibility and plead guilty.[12] In this way, a company will partially squander its substantial assistance credit by delaying its decision to accept responsibility, plead guilty, and cooperate. To maximize sentencing credit, culpable companies thus should agree to accept responsibility and provide as much cooperation to the Division as they can as early as they can.

One of the Yates memo's six factors is worth mentioning at this point. The Deputy Attorney General said that in order for a corporate offender to receive *any* credit for cooperating

[11] Baer, *supra* note 1, at 5.
[12] *Id*.

with an investigation, it must "provide all relevant facts about the individuals involved in corporate misconduct."[13] When we negotiate plea agreements with corporate offenders, we insist that culpable employees face the consequences of their crimes. We begin negotiating a corporate disposition only when we have gathered sufficient evidence to identify the executives and employees who are potentially liable for the company's wrongdoing. The corporation must fully cooperate in helping us gather that evidence if it wishes to obtain sentencing credit for substantial assistance.

Those potentially culpable individuals are, as a matter of longstanding Antitrust Division practice, excluded from—or "carved out" of—the nonprosecution protections of a corporate plea agreement. In short, we reserve the right to prosecute those individuals if the evidence so warrants. Those individuals can negotiate a resolution with the Division on their own, or face indictment. But one way or another they will be held accountable.

Until 2013, the Antitrust Division publicly named any individuals carved out from the nonprosecution protections in corporate plea agreements whether they were carved out for culpability or for other reasons. In April of 2013, Bill Baer changed that practice by only carving out those individuals that are potentially culpable and by no longer naming them in order to avoid premature disclosure of the names of subjects who may or may not ultimately be charged with a crime.[14] We now list their names in a confidential addendum to the corporate plea agreement, and ask the court to seal it. Unless and until we charge them, we do not publicly identify carve-outs.

[13] Yates Memo, *supra* note 4, at 3.
[14] *See* Press Release, U.S. Dep't of Justice, Statement of Assistant Attorney General Bill Baer on Changes to Antitrust Division's Carve-Out Practice Regarding Corporate Plea Agreements (Apr. 12, 2013), http://www.justice.gov/opa/pr/statement-assistant-attorney-general-bill-baer-changes-antitrust-division-s-carve-out.

Those company employees not carved out of the corporate plea agreement will not be prosecuted so long as they meet the same obligations as the corporate offender: the requirement of timely, ongoing, and complete cooperation. Our prosecutors use this cooperation to quickly develop additional sources of information and to build evidence against culpable conspirators, including those carved out of the corporate plea agreement.

Occasionally, counsel have construed prior statements of the Antitrust Division to argue that the order in which companies accept responsibility should determine the number of employees who will be carved out of their plea agreements and, thus, subject to prosecution. This is not how we look at it. The decision about who to carve out and ultimately prosecute is not the product of a formula derived from the timing of a corporate offender's decision to accept responsibility and cooperate.[15]

The Antitrust Division's prosecutors, like all criminal prosecutors, apply the Principles of Federal Prosecution in exercising their discretion about which individuals to prosecute. And they consider several factors, including the individual's role in the conspiracy, his seniority and level in the company, and the quality of assistance that he offers toward bringing other wrongdoers to justice.[16] A decision about who to prosecute or whether to reserve the right to prosecute a corporate official always involves a careful, individualized assessment of one's culpability based on evidence. That is the Division's policy, and it is the Department's policy, as reflected in the Yates memo.

In light of my emphasis on individual accountability, one final point should come as no surprise. In reaching corporate dispositions, including leniency, the Antitrust Division will not as a general rule include former employees in the nonprosecution terms of the agreement. We

[15] *See* Baer, *supra* note 1, at 3.
[16] *See id*. at 6-7.

are prepared to make individualized determinations, just as we do when deciding whether to immunize a material witness. But we reserve the right to prosecute former employees who may have been involved in the criminal misconduct.

In closing, some of what I have said today may seem to travel well-trodden ground. I have mentioned all of these aspects of the Antitrust Division's practice because corporate offenders who hope to obtain leniency, or to receive credit for substantial assistance, need to be aware of our current expectations and practices in this regard. The Yates memo emphasizes what the Division already expects of corporate offenders who wish to mitigate their criminal penalties, and highlights our focus on holding accountable the individuals who commit antitrust crimes for which these offenders are liable.

Thank you.