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# United States

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## Legislation and jurisdiction

### 1 Relevant legislation

What is the relevant legislation and who enforces it?

The relevant legislation is section 1 of the Sherman Act, 15 USC 1, which is enforced by the Antitrust Division of the Department of Justice (DoJ).

The Antitrust Division (the Division) employs approximately 360 attorneys organised into 13 sections. The national criminal enforcement section has independent responsibility, concurrent with the DoJ's seven field offices, to investigate criminal matters, including investigation and prosecution of cartels. These attorneys report to a deputy assistant attorney general, devoted solely to criminal enforcement (currently Scott Hammond) who reports to an assistant attorney general (currently Christine Varney). The associate attorney general of the US (currently Thomas Perrelli) oversees the Division.

The number and importance of successful international cartel prosecutions brought by the Division has increased since the early 1990s. Since 1995, the Division has made the prosecution of international cartels one of its highest priorities. In a recent decision, the Supreme Court described collusive behaviour as 'the supreme evil of antitrust' (*Verizon Communications v Curtis V Trinko LLP*, 540 US 398 (2004)). The DoJ has devoted more of its resources to uncovering international cartel behaviour that has significant economic consequences for American consumers.

At the close of the 2008 fiscal year, the Division had 137 pending grand jury investigations. This is the highest number of pending grand jury investigations since 1992. Prosecutions of international cartels have resulted in significant criminal fines. Since the beginning of fiscal year 1997, the Division has prosecuted international cartels affecting over US\$10 billion in US commerce and has imposed more than US\$4 billion in criminal fines. In 2008, the Division obtained more than US\$695 million in criminal fines, and in the first six months of the 2009 fiscal year it obtained nearly US\$1 billion in criminal fines from corporate defendants. In addition, defendants prosecuted by the Division in 2007 were sentenced to serve 31,391 days' imprisonment, more than twice the previous high imposed in 2005, and those prosecuted in 2008 were sentenced to 14,331 days' imprisonment. At the beginning of 2009, the Division obtained the longest prison sentence for a single-count Sherman Act offence in history.

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### 2 Proposals for change

Have there been any recent changes or proposals for change to the regime?

The Antitrust Modernisation Commission (AMC) was authorised by Congress and its members were appointed by Congress and the president in 2004 to analyse existing antitrust laws and to determine whether there was a need to update them. The AMC submitted its

report and recommendations on 2 April 2007 and concluded its work on 31 May 2007.

Based upon its recognition of the importance of prosecution of cartels, the AMC examined the US Sentencing Guidelines. The Guidelines employ a proxy for harm from cartels used in assessing criminal penalties equal to 20 per cent of the volume of commerce affected. The AMC recommended that the US Sentencing Commission re-evaluate the rationale for this 20 per cent proxy, and make explicit that this proxy may be rebutted with proof of the actual overcharge. It seems unlikely that the AMC's recommendation will be adopted, however, as Congress did not act on it when it was made, and the 2009 Guidelines Manual has not been amended in this respect.

On 19 June 2009, Congress extended for one year the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA or the 2004 Act), which limits civil liability for participants in the DoJ's leniency programme to actual rather than treble damages. Citing ACPERA's success at providing incentives for corporations to self-report, Congress passed the bill without objection. In extending ACPERA for only one year, however (contrary to the recommendation of the American Bar Association that it be evaluated over an additional five-year period), both the House and Senate sponsors indicated that Congress should assess the efficacy of the programme and possibly make changes to the Act. It is thus unclear whether ACPERA will be renewed, changed or allowed to expire in June 2010.

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### 3 Substantive law

What is the substantive law on cartels in the jurisdiction?

A cartel is an association by agreement among a group of market participants designed to prevent competition. Illegal cartel activity includes price fixing, bid rigging and allocation of volume, markets or customers.

Section 1 of the Sherman Act prohibits 'every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade'. It does not specifically identify the type of conduct that is illegal. The conduct described above has been found to violate section 1. Cartel behaviour can be subject to both civil and criminal sanctions under section 1. In addition, cartel members may be liable in private civil suits for treble damages under section 4 of the Clayton Act.

An international cartel arrangement that provides for price fixing, bid rigging or allocation of volume, markets or customers, constitutes a per se violation of section 1.

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### 4 Industry-specific offences and defences

Are there any industry-specific offences and defences?

There are some very limited statutory exemptions from the antitrust laws that are generally industry-specific and apply to such businesses as export trade associations, agricultural cooperatives,

communications, energy, financial institutions and markets, certain research and development and production joint ventures, health care, insurance, organised labour, sports, transportation and government contracts. For example, the Webb-Pomerene Act (15 USC 61–65) provides the exemption for associations of otherwise competing businesses to engage in collective export sales. This exemption is narrow. It applies only to the export of ‘goods, wares, or merchandise’ (15 USC 61). It does not apply to conduct that has an anti-competitive effect in the US or to conduct that injures domestic competitors of the members of an export association. Nor does it provide immunity from prosecution under foreign antitrust laws. With the support of the Division, Congress has advanced legislation that would repeal the federal antitrust exemption given to health insurers under the McCarran-Ferguson Act. The Act currently exempts companies in the ‘business of insurance’ from federal regulation (specifically including regulation under the Sherman and Clayton Acts) where those companies are regulated by state law (15 USC 1011–1015).

Foreign sovereigns are generally immune from suit under the Foreign Sovereign Immunities Act (28 USC 1330, 1602–1611). However, a foreign sovereign may be sued in US courts if it is engaged in commercial activity in the US, performs acts in the US related to commercial activity elsewhere, or if its activity causes ‘a direct effect in the United States’ (28 USC 1605(a)(2)).

In addition to these limited statutory exemptions, there are also some judicially created exemptions and immunities from the antitrust laws. These exemptions include the state action doctrine and the solicitation of government action doctrine, including the ‘Noerr-Pennington doctrine’ (see *Eastern RR Presidents Conference v Noerr Motor Freight*, 365 US 127 (1961); *United Mine Workers v Pennington*, 381 US 657 (1965)). Federal agencies and federal officials acting in their official capacity are also generally immune from antitrust challenges.

## 5 Application of the law

Does the law apply to individuals or corporations or both?

The law applies to both individuals and corporations.

## 6 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction?

The US antitrust laws apply to conduct occurring outside the US that produces a substantial effect within the US. The 1995 DoJ and Federal Trade Commission Antitrust Enforcement Guidelines for International Operations (the International Guidelines) state that ‘[a]nticompetitive conduct that affects US domestic or foreign commerce may violate the US antitrust laws regardless of where such conduct occurs or the nationality of the parties involved’ (International Guidelines at 3.1).

However, there are two significant challenges to successfully investigating and prosecuting international cartels: gaining access to evidence and witnesses that are located abroad and out of the reach of US subpoena power and search and seizure authority, and obtaining jurisdiction in the US courts over not only the case itself, but over foreign defendants.

As noted in question 9, the Division cooperates with foreign enforcement agencies and enlists their support in assisting with investigations. This cooperation may range from case-specific arrangements, such as executing search warrants, sharing investigative information, and entering antitrust cooperation agreements, to treaties.

There are two principal ways that a US court may gain subject-matter jurisdiction over an international cartel case involving conduct outside of the US. First, with respect to foreign import commerce, the

‘Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States’ (*Hartford Fire Ins Co v California*, 509 US 764, 796 (1993)). Second, where conduct involves foreign commerce other than import trade or commerce, the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) provides that the Sherman Act will cover such conduct only where it has a ‘direct, substantial and reasonably foreseeable effect’ on domestic commerce, and ‘such effect gives rise to a [Sherman Act] claim’ (15 USC 6a(1)(A), (2)).

If the question of subject-matter jurisdiction is resolved in favour of US jurisdiction, a US court may nevertheless decline to exercise jurisdiction (or the US government may choose not to assert jurisdiction or bring an action) based on considerations of international comity. The threshold question in determining whether to exercise jurisdiction based on international comity is whether any direct conflict exists between US law and the laws of a foreign nation (*Hartford Fire Ins*, 509 US at 798). Where there is no direct conflict, there is no need ‘to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on the grounds of international comity’ (id at 799). A conflict exists only when a party subject to regulation by two states cannot comply with the laws of both (id at 798). In that case, a US court may decline to exercise jurisdiction.

It is well settled in US law that civil antitrust actions predicated on foreign conduct that have an intended and substantial effect in the US fall within the jurisdictional reach of section 1 of the Sherman Act (see *Hartford Fire Ins*, 509 US at 796). However, in 2004, the Supreme Court held that the FTAIA bars US jurisdiction where the anti-competitive conduct that gives rise to the plaintiff’s claim causes solely foreign harm (see *F Hoffman-La Roche v Empagran*, 542 US 155 (2004)). Only one court has ruled as to whether section 1 authorises criminal prosecutions of defendants for their actions committed entirely outside the US (*United States v Nippon Paper Industries Co*, 109 F3d 1, 9 (1st Cir 1997), cert denied, 522 US 1044 (1998)). In *Nippon Paper*, the court held that the jurisdiction of the Sherman Act in criminal cases equals that in civil cases. The Supreme Court has not addressed this issue.

## Investigation

### 7 Steps in an investigation

What are the typical steps in an investigation?

The typical steps in a criminal investigation are as follows.

The Division opens a grand jury investigation, which must be approved by the deputy assistant attorney general (DAAG) for criminal enforcement and the assistant attorney general (AAG). The Fifth Amendment to the US Constitution gives a criminal defendant the right to have his or her case heard by a grand jury before a federal prosecutor may bring criminal charges. The grand jury, comprising a randomly selected group of US citizens, will issue an indictment if it finds that, based on the evidence presented by the prosecutor, there is ‘probable cause’ that the defendant committed a crime. Under the Federal Rules of Criminal Procedure (FRCP) Rule 6(e) the prosecutor, grand jurors and stenographer may not disclose the contents of the grand jury proceeding, but witnesses are free to discuss their testimony.

Prosecutors are given considerable power to obtain testimony and evidence while a case is before the grand jury. Their primary investigative tool is the grand jury subpoena. In addition to grand jury subpoenas, the Division often enlists the assistance of the Federal Bureau of Investigation (FBI) for such tasks as interviewing witnesses, conducting electronic surveillance, executing search warrants, and evaluating and gathering evidence.

Near the end of the grand jury investigation, the Division issues ‘target letters’ to individuals or corporations that it considers to be

putative defendants. The targets are then given the opportunity to testify before the grand jury. In addition, counsel for the target is given the opportunity to meet with appropriate Division staff if they have not done so already. Target letters specifically state that the target must waive his or her Fifth Amendment right against self-incrimination and submit to cross-examination by government lawyers as a condition to testifying before the grand jury. The witness's own lawyer is not permitted to attend the grand jury testimony. Most targets do not avail themselves of the opportunity to testify before the grand jury.

If the Division staff believes an indictment is appropriate, its recommendation is submitted to the DAAG for criminal enforcement. Counsel for the target is typically given the opportunity to make a presentation to the DAAG. If a case poses a rare policy issue or is particularly significant, the AAG may be present for target counsel's presentation. After the presentation, the DAAG presents his recommendation to the AAG. If the AAG agrees that an indictment is appropriate, she instructs the staff to recommend indictment to the grand jury.

The grand jury then votes on the indictment. If the grand jury votes to indict, which it almost always does, it returns the indictment in federal court to a judge who then issues the appropriate warrants or subpoenas to compel the defendants' appearance at arraignment.

Starting with arraignment, the matter is adjudicated in federal court to either conviction or acquittal (see questions 11 to 13).

The typical steps in a civil investigation are as follows. The Division typically issues civil investigative demands (CIDs), which are its main pre-complaint discovery tool. A CID is essentially a general discovery subpoena that may require production of documents, oral testimony or answers to interrogatories. Typically, the recipient of a CID attempts to reduce its scope by engaging in negotiations with Division staff. A recipient of a CID may also refuse to comply by initiating a proceeding in federal district court to modify or set aside the CID. A CID may be challenged on the grounds that it violates the Antitrust Civil Process Act (15 USC 1311–1341 (1994)) or that it violates a legal or constitutional right of the recipient.

The Division reviews information submitted pursuant to a CID and, if appropriate, a complaint is brought in federal district court. After the complaint is filed, the matter is adjudicated until either settlement or a verdict on liability is rendered.

The Division may use information obtained through a CID in any case or proceeding before any court, grand jury or federal administrative or regulatory agency (15 USC 1313(d)(1)). If a civil investigation uncovers evidence of possible criminal violations, the Division normally ceases use of CIDs and convenes a grand jury.

The Division's manual (Division Manual), which explains the structure of the Division and the process by which it investigates, brings, and prosecutes an action, is available at [www.justice.gov/atr/public/divisionmanual/](http://www.justice.gov/atr/public/divisionmanual/).

## 8 Investigative powers of the authorities

What investigative powers do the authorities have?

As noted in question 7, when the Division suspects criminal activity that would constitute a clear violation of the Sherman Act, it typically opens a grand jury investigation. The Federal Rules of Criminal Procedure apply to grand jury discovery.

The grand jury subpoena is the basic investigative tool that the Division uses in criminal investigations. A grand jury subpoena may be used to obtain documents or testimony. The DoJ may serve a subpoena on any person in the US (FRCP 17(e)(1)). The DoJ may also serve a subpoena on any national or resident of the US who is residing in a foreign country (FRCP 17(e)(2)). Foreign parties residing outside the US are not subject to subpoenas. Indeed, a party cannot

be compelled to obey a grand jury subpoena if the court does not have personal jurisdiction over that party. There are, however, other ways in which the Division may obtain evidence located outside the US, such as case-specific cooperation from foreign enforcement agencies, 'soft' antitrust cooperation agreements that the US has in place with certain countries, 'hard' agreements, such as mutual legal assistance treaties, and other legal means, such as letters rogatory. (The means by which the US obtains evidence located abroad is discussed in detail in question 9.)

In contrast to a subpoena, which allows its recipient to collect and submit information that has been requested, a search warrant allows the government to enter the premises and seize materials, including computer hardware and electronic data. The procedures for obtaining and executing a search warrant are governed by the FRCP. A search warrant may be issued only where a federal judge or magistrate finds that there is probable cause to believe that the property to be seized is evidence of the commission of a criminal offence (FRCP 41). Search warrants are directed at specific files or papers of an individual or corporation. The DoJ has used search warrants to obtain documents from corporations either prior to or in conjunction with the issuance of grand jury subpoenas.

An individual may refuse to testify before the grand jury by invoking his or her Fifth Amendment right against self-incrimination. However, such an individual may be compelled to testify under a grant of immunity. Compelled testimony is granted 'use' immunity, which prevents the individual's testimony from being used against him or her. It does not preclude prosecution of the individual. However, if the Division attempts to prosecute a witness whose testimony was immunised, it must show that the information to be used against the witness is wholly independent of the compelled testimony. The Division also grants informal, or 'letter' immunity. This is simply a letter from the DoJ stating that a witness's testimony, as well as any leads derived from that testimony, will not be used against the witness in a subsequent criminal prosecution.

The DoJ uses border watches in cooperation with the Immigration and Naturalization Services (INS) whereby individuals who are potential grand jury witnesses may be detained upon entering the US. These individuals may be interviewed about the subject matter of investigation, served with a corporate or individual subpoena for testimony before the grand jury or for corporate or individual documents located outside the US, or detained, and possibly imprisoned, until a grand jury appearance is arranged. In a number of cases, the DoJ has secured testimony of key foreign witnesses who have been intercepted by INS border watches. For example, in the Egyptian wastewater treatment investigation, involving bid rigging on water treatment construction contracts in Cairo funded by the US Agency for International Development, a foreign executive was intercepted while entering the US, was taken before a grand jury, and his cooperation significantly aided the DoJ's investigation.

In a civil investigation, the Division utilises CIDs as its discovery tool. CIDs may require production of documents (including computer records and electronic data), oral testimony or answers to interrogatories. Notably, unlike grand jury subpoenas, CIDs may be served upon individuals and organisations while they are outside of the US (15 USC 1312). Anyone who withholds, misrepresents, conceals or destroys documentary material demanded by a CID is guilty of a criminal offence, punishable by up to a US\$5,000 fine or up to five years' imprisonment, or both.

At a deposition pursuant to a CID, a witness may refuse to answer only on the grounds of a legal privilege or based on his or her Fifth Amendment right against self-incrimination (15 USC 1312(i)(2)). As with testimony before the grand jury, a witness who refuses to testify at deposition pursuant to the Fifth Amendment may be compelled to testify under a grant of immunity.

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**International cooperation**


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**9 Inter-agency cooperation**

Is there inter-agency cooperation? If so, what is the legal basis for, and extent of, cooperation?

The DoJ has several types of cooperation arrangements with foreign antitrust enforcement authorities. These range from informal, cases specific arrangements to cooperation agreements to treaties.

The DoJ's successes in fighting international cartels have resulted in large part from case-specific arrangements, in which foreign governments have assisted in specific instances in locating and contacting witnesses, executing search warrants and searches for documents and have shared information and coordinated enforcement actions. Since the beginning of 2000, foreign authorities from a number of different countries have executed search warrants at the DoJ's request in its international cartel investigations. For example, in the Egyptian wastewater treatment investigation, over 100 German police officers assisted in executing simultaneous search warrants on multiple companies all across Germany.

In October 2001, the DoJ and the Federal Trade Commission joined forces with agencies from other jurisdictions to create the International Competition Network (ICN). The ICN is a global network of competition authorities that provides support for new antitrust agencies and promotes greater convergence among antitrust authorities on sound competition principles for enforcing their laws and building strong competition cultures in their countries. In April 2004, the ICN created a cartel working group to address the challenges of domestic and international anti-cartel enforcement. Antitrust agencies meet at ICN cartel workshops where they cooperate to develop general legal frameworks and enforcement techniques for presentation to the full ICN.

The US has bilateral antitrust agreements in place with Australia, Brazil, Canada, the EU, Germany, Israel, Japan and Mexico. These agreements are 'soft' agreements that do not override applicable national laws of either party. In particular, soft agreements do not permit the sharing of confidential information that could not otherwise be disseminated pursuant to national laws.

Pursuant to the International Antitrust Enforcement Assistance Act (IAEAA), the US signed an agreement with Australia that permits the two nations' antitrust enforcement agencies to share confidential information on both criminal and civil matters. This agreement is considered a 'hard' agreement because it not only overrides otherwise applicable national laws but is binding on each country.

Mutual legal assistance treaties (MLATs) are not antitrust-specific but may be used in criminal antitrust investigations. Like the bilateral agreement with Australia under the IAEAA, MLATs are 'hard' agreements. The US has more than 50 MLATs in force. In addition to these bilateral arrangements, the DoJ has been working with the Organisation for Economic Cooperation and Development (OECD) toward building a multilateral consensus among its 30 member states on a wide range of antitrust and competition matters. For example, in 1998, the OECD ministers endorsed a DoJ Recommendation on Hard-Core Cartels that encourages OECD member countries to enact and enforce laws prohibiting hard-core cartels and to enter into agreements with other countries to permit sharing of evidence with foreign antitrust authorities to the extent permitted by national laws.

In 2001, the DoJ adopted a policy of placing indicted fugitives on Interpol's 'red notice' list, which is an international 'wanted' notice. A red notice serves in many of the 188 Interpol member nations as a request that the subject be arrested with a view towards extradition. A number of fugitives have been apprehended though Interpol red notices and the DoJ is pursuing their extradition to the US.

On a domestic basis, the DoJ has a memorandum of understanding with the INS, which establishes a protocol under which the DoJ

may petition the INS to pre-adjudicate the immigration status of a cooperating foreign witness before that witness enters into a plea agreement or pleads to a crime. Whereas an individual convicted of a violation of the Sherman Act would generally be excluded or deported from the US by the INS, as a result of this protocol, the foreign witness receives written assurance in the plea agreement that the INS will defer or waive deportation or grant parole. This procedure makes it more likely that a foreign witness will cooperate, as with this waiver he or she may continue or resume business travel in the US. As noted in question 8, the DoJ also works closely with the INS on border watches.

The DoJ also closely cooperates with the FBI in connection with such tasks as interviewing witnesses and executing search warrants. In addition, FBI agents may be assigned to work from DoJ field offices.

**10 Interplay between jurisdictions**

How does the interplay between jurisdictions affect the investigation, prosecution and punishment of cartel activity in the jurisdiction?

In most instances, the DoJ needs the cooperation of foreign antitrust agencies in order to effectively investigate and prosecute an international cartel. Without such cooperation, the Division may be unable to gather essential evidence or gain access to witnesses located outside its borders. Most of the DoJ's successful international cartel prosecutions might not have been possible without the cooperation of foreign enforcement agencies.

**11 Adjudication**

How is a cartel matter adjudicated?

Cartel cases are adjudicated in federal district courts of general jurisdiction. There is no specialised forum for cartel cases.

**12 Appeal process**

What is the appeal process?

The appeal process is the same as with any federal case. That is, the case may be appealed to the appropriate circuit court and, if unsuccessful in the circuit court, an appellant may petition the Supreme Court of the United States for a writ of certiorari. The federal government, however, may not appeal a verdict of acquittal. This is based on the constitutional protection against double jeopardy.

**13 Burden of proof**

With which party is the burden of proof?

In a criminal case, the government bears the burden of proof beyond a reasonable doubt. In a civil case, the government bears the burden of proof on most issues by a preponderance of the evidence.

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**Sanctions**


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**14 Criminal sanctions**

What criminal sanctions are there for cartel activity? Are there maximum and minimum sanctions?

Criminal sanctions for cartel activity include fines and imprisonment. On 22 June 2004, President George W Bush signed into law the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (15 USC 1, note). The 2004 Act increased the maximum criminal fine for companies violating the Sherman Act from US\$10 million to US\$100 million, making antitrust fines one of the most severe under US criminal laws. Under a 1991 amendment to the Federal Sentencing

Guidelines, however, this cap may not apply and a defendant may face a fine up to twice the total gain to the conspirators or twice the total loss to the victims, whichever is greater. This provision of the Guidelines is based on a federal statute allowing greater damages where a defendant 'derives pecuniary gain from the offense' or the offence causes another party pecuniary loss (see 18 USC 3571(d)).

Corporations may also be sentenced to a term of probation ranging from one to five years as a result of a conviction under section 1 (see US Sentencing Commission, Sentencing Guidelines (USSG) 8D1.1, 1.2 (November 2009)).

The 2004 Act increased the maximum individual fine from US\$350,000 to US\$1 million, and individuals may also be fined the greater of twice the total gain to the individual or twice the total loss to the victims under the USSG. The new legislation also increased the maximum term of imprisonment from three to 10 years.

Most sentences in criminal antitrust cases have been imposed pursuant to the provisions of the Federal Sentencing Guidelines (see generally USSG chapter 8 and 2R1.1 (November 2009)). The criminal sentencing guidelines are not mandatory. However, courts are required to consider them as well as statutory factors when imposing penalties (see question 20).

Between 1999 and 2008, more than 340 individuals were sentenced and of those, more than 200 were sentenced to serve prison terms, in cases prosecuted by the Division. In 2007, prison sentences for cartel offences reached an all-time high. Defendants prosecuted by the Division were sentenced to serve over 31,000 days in 2007, more than twice the time imposed in any previous year. In 2007, 87 per cent of defendants charged by the Division were imprisoned, with an average sentence of 31 months. Though the aggregate length of sentences dropped significantly in 2008, the total of more than 14,000 days' imprisonment imposed in 2008 exceeded all but 2007.

#### 15 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

An individual or entity that is convicted of price fixing will be automatically debarred from dealing with the federal government and may be debarred from dealing with state governments. Convicted individuals, because they are felons, may lose certain privileges of US citizenship, such as the right to vote. Defendants in a civil suit may be enjoined from performing or continuing certain activity, and the Division may seek equitable relief that is reasonable and necessary to stop the illegal practices in the complaint, prevent their renewal, and restore competition to the state it would have been in absent a violation (Division Manual, IV-8 to IV-9, IV-56).

#### 16 Civil and administrative sanctions

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

Congress has empowered the DoJ to subject cartel activity to both civil and criminal sanctions under section 1 of the Sherman Act, and the government may choose whether to bring a civil or criminal action, or both. The Division's current policy is to bring criminal actions in cases involving price fixing and bid rigging unless the case law is unsettled or unclear, there are novel issues of law or fact, there is confusion surrounding past prosecutorial decisions, or the subjects of the investigation were not aware of or did not appreciate their actions (Division Manual at III-20). Most cartel cases are brought as criminal cases.

#### 17 Private damage claims and class actions

Are private damage claims or class actions possible?

Private treble damage actions, usually in the form of class actions brought by representatives of affected customers, may be brought under the Clayton Antitrust Act of 1914, and ordinarily follow from any public announcement that the Division is investigating a purported cartel. Such actions are virtually certain upon a plea agreement or conviction, given that a guilty plea in a criminal case is prima facie evidence of a defendant's liability in a subsequent civil case (see 15 USC 16(a) (1994)). Such private actions can be particularly costly to a defendant, as private plaintiffs are not only entitled to treble damages with pre-judgment interest, but defendants are jointly and severally liable and may not seek contribution from other participants in the scheme (see 15 USC 15; *Texas Industries Inc v Radcliff Materials*, 451 US 630, 639-46 (1981)).

Actions by direct purchasers are most often brought in federal district court. Indirect purchasers do not have standing under federal law to sue for damages resulting from a Sherman Act violation as a result of the Supreme Court's decision in *Illinois Brick v Illinois*, 431 US 720 (1977). However, there are provisions in various state antitrust and consumer fraud statutes that allow indirect purchasers to bring claims under those states' laws for overcharges resulting from price-fixing conspiracies (see, for example, NY Gen Bus 340 (McKinney 2000) (New York State's indirect purchaser statute)). It is therefore possible that a single defendant will be sued by direct purchasers in federal court and by indirect purchasers in state court, resulting in potentially overlapping liability in multiple forums.

#### 18 Recent fines and penalties

What recent fines or other penalties are noteworthy? What is the history of fines? How many times have fines been levied? What is the maximum fine possible and how are fines calculated? What is the history of criminal sanctions against individuals?

Criminal fines have increased dramatically in the past 10 years. The highest amount of any fine prior to 1997 was approximately US\$42 million. In the 1997 fiscal year, the Division collected more than US\$205 million in fines, almost 500 per cent more than the fines collected in any previous year in the history of the Division. In the past 10 years, the Division collected more than US\$4 billion in fines. In 2008, the Division obtained over US\$675 million in criminal fines, the second-largest total in its history, and in the first six months of the 2009 fiscal year, it has obtained close to US\$1 billion in corporate fines. This dramatic increase in fines is due in large part to the fact that the cartels prosecuted have been significantly larger than previous cartels, in both the volume of affected commerce and the degree of harm caused to American consumers. In fact, in some international cartels, the volume of affected commerce is more than US\$1 billion per year. For example, in 2007, the Division prosecuted British Airways and Korean Air for cartel conduct in the air transportation industry and the combined cargo and passenger revenue of these industry leaders was over US\$15 billion annually. The Division continued its prosecution of cartel conduct in the air transportation industry in 2008 and 2009, obtaining an additional 11 fines of over US\$10 million each. In over half of the DoJ's investigations, the volume of commerce affected has been more than US\$100 million over the term of the conspiracy.

The Division has a 'transparent' policy on calculating fines under the Sentencing Guidelines. Specifically, it has set forth both hypothetical cases in which it calculates fines, and it has published the actual fine calculation worksheets that it submitted to the Federal Court in particular cases at the time of sentencing (see Scott D Hammond, Deputy Assistant General Counsel for Criminal Enforcement, Division, 'A Review of Recent Cases and Developments in the Division's Criminal

Enforcement Program', speech before 2002 ABA Section of Antitrust Law, 7 March 2002) (attaching fine calculation worksheet for Mitsubishi Corporation's US\$134 million fine for aiding and abetting the conspiracy between UCAR International, of which it owned a 50 per cent share, and others in the graphite electrodes industry).

Corporate fines of US\$10 million or more have become commonplace, and have been imposed on more than 72 corporate defendants, including 17 fines of US\$100 million or more. A US\$500 million fine imposed in 1999 was the largest criminal fine ever imposed in the US under any criminal statute. Of note in 2008 and 2009 were fines imposed on airlines involved in fixing prices for air cargo shipments, including a US\$350 million fine imposed on Air France-KLM, following the imposition of US\$300 million fines on Korean Air Lines and British Airways in 2007, and the five fines over US\$10 million imposed on companies that participated in fixing prices of LCD panels, including the second-largest fine ever imposed by the Division, a US\$400 million fine on LG.

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## Sanctions

### 19 Sentencing guidelines

Do sentencing guidelines exist?

There are Federal Sentencing Guidelines that have been modified in relevant part by the Sentencing Reform Act (18 USC 3571).

With respect to the Sentencing Guidelines' application to organisations, culpability considerations may be adjusted upward or downward on the basis of aggravating or mitigating factors. For example, the 'culpability score' may be lowered if the organisation self-reports the violation, cooperates with an investigation or accepts full responsibility for its criminal conduct (USSG 8C2.5(g)).

Similarly, for an individual, the base offence level will be adjusted depending on whether that individual played an aggravating or mitigating role in the offence (see USSG 3B1.1, 3B1.2).

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### 20 Sentencing guidelines and the adjudicator

Are sentencing guidelines binding on the adjudicator?

The Sentencing Guidelines are not binding on the sentencing judge. The Supreme Court in *United States v Booker*, 543 US 220, 246 (2005) held that while a sentencing court must consider the ranges provided in the Guidelines, they are merely advisory and the court is permitted to tailor the sentence based on aggravating or mitigating factors (see 18 USC 3553).

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### 21 Leniency and immunity programmes

Is there a leniency or immunity programme?

The Division has both a corporate leniency policy (also known as the 'amnesty programme') and an individual leniency policy. The DoJ issued its corporate leniency policy on 10 August 1993. It issued its leniency policy for individuals on 11 August 1994. The policies are available on the Division website at [www.justice.gov/atr/public/criminal/leniency.htm](http://www.justice.gov/atr/public/criminal/leniency.htm).

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### 22 Elements of a leniency or immunity programme

What are the basic elements of a leniency or immunity programme?

The corporate leniency policy has three basic parts. First, if the Division has not yet begun an investigation, a corporation can automatically receive amnesty if:

- it is 'first in the door', that is, no other corporation has reported the activity to the Division;
- it promptly terminated its part in the activity after discovering it;

- it cooperates fully;
- the act was a corporate act;
- it makes restitution to injured parties, where possible; and
- it was not the 'ringleader' of the activity (see Corporate Leniency Policy at 1-2).

The 2004 Act increased the appeal of the amnesty programme by limiting the damages that a successful applicant will be liable for in a follow-on private antitrust action. Companies qualifying for amnesty may only be required to pay actual damages attributable to their own conduct, plus costs and attorneys' fees, to the victims of the cartel rather than treble damages based upon joint and several liability. In order to receive this benefit, however, the company must cooperate fully in the private plaintiff's efforts to seek compensation from the other members of the conspiracy by providing a full account of the facts and all relevant documents.

Second, a corporation may receive amnesty at the discretion of the Division ('alternative amnesty') even if it reports illegal antitrust activity after an investigation has begun, so long as the Division does not yet have sufficient evidence to convict it. To qualify for post-investigation leniency for a corporate act, a corporation must be the first to come forward, have promptly terminated its part in the activity after discovering it, cooperate fully, and make restitution to injured parties, where possible. The Division must also determine that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it and the timing of when the confessing corporation comes forward (see Corporate Leniency Policy at 2-3 (identifying seven specific preconditions to a grant of alternative amnesty)).

Third, current corporate directors, officers and employees will receive automatic amnesty if the corporation qualifies for the same, and they admit their wrongdoing and cooperate with the investigation. Amnesty is not available to corporate 'ringleaders' (see Corporate Leniency Policy at 3-4).

Under the individual leniency policy, an individual may obtain leniency if: (i) when he or she comes to the Division, the Division has no prior information about the alleged illegal activity; (ii) the individual reports the illegal activity completely and continues to cooperate with the Division; and (iii) he or she was not the ringleader of the illegal activity. The Division may also exercise its prosecutorial discretion to grant immunity on a case-by-case basis (see Leniency Policy for Individuals at 1-2).

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### 23 First in

What is the importance of being 'first in' to cooperate?

As noted in question 22, being first in to cooperate with the Division is of paramount importance because amnesty is generally not available unless a corporation or individual is the first in. While the first amnesty applicant typically pays no criminal fines and its culpable executives are spared criminal exposure, no such accommodations are granted to subsequent applicants. The DoJ's investigation into alleged price fixing in fine art auctions between Christie's International and Sotheby's Holdings from 2000 to 2002 starkly illustrates the advantages of being first in the door. There, Christie's applied for and was granted amnesty pursuant to the Division's corporate leniency programme. Christie's paid no criminal fines and none of its executives at the time was indicted. (Christie's former chairman and member of its board of directors, Anthony J Tennant, was indicted, but, as a UK subject, declined to submit to the jurisdiction of the US courts. The DoJ's leniency programme does not extend to former directors or employees of the amnesty applicant except at the discretion of the Division.)

Sotheby's, the second in the door, was subjected to both a substantial criminal fine and indictments of two former high-ranking

executives. In fact, as a direct result of Christie's cooperation with the DoJ under the leniency programme, Sotheby's decided to plead guilty to fixing the prices of auction commission rates charged to sellers and paid a US\$45 million fine. In addition, a former Sotheby's executive and the former chairman were indicted for price fixing. Diana Brooks, former CEO, pleaded guilty to price fixing. Alfred Taubman, former chairman of the board, pleaded not guilty to charges of price fixing, was tried, and convicted. Ms Brooks, who cooperated in the investigation and testified against Mr Taubman at his trial, was sentenced to six months' house arrest, a US\$350,000 fine, three years' probation and 1,000 hours of community service. Mr Taubman was sentenced to one year in prison and a US\$7.5 million fine.

If a company knows it will self-report but is not yet ready to do so, it can take advantage of the Division's 'marker system,' whereby it may mark its position as first in while its corporate counsel investigates the potential violation and the information necessary to submit a full leniency application. By identifying itself, the general nature of its conduct, and its industry, a company can assure that a lengthy internal investigation will not deprive it of first-in status (see Scott D Hammond, Deputy Assistant General Counsel for Criminal Enforcement, Division, 'Recent Developments Relating to the Antitrust Division's Corporate Leniency Program', address to the ABA's Criminal Justice Section, 23rd Annual National Institute on White Collar Crime (5 March 2009) at 1-2).

#### 24 Going in second

What is the importance of going in second? Is there an 'immunity plus' or 'amnesty plus' option?

The Division announced in 1999 that the corporate leniency policy had been extended to include an 'amnesty plus' provision, pursuant to which a corporation subject to a first investigation may bring evidence of illegal activity in a second market to the Division in exchange for leniency on that conduct and a reduction in the fine resulting from the first investigation (see Gary R Spratling, Deputy Assistant Attorney General, Division, 'Making Companies an Offer They Shouldn't Refuse: The Division's Corporate Leniency Policy – An Update', address before the Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust at 6-7 (16 February 1999)). For example, in the monochloroacetic acid (MCAA) investigation, the Dutch chemical company Akzo Nobel Chemicals appears to have benefited from amnesty plus. Akzo agreed to plead guilty and pay a US\$12 million fine for its participation in the MCAA cartel. The plea agreement recognised that the agreed-upon fine was lower than that recommended in the Sentencing Guidelines not only because Akzo provided 'substantial assistance' in the MCAA investigation, but also because it assisted in the DoJ's investigations 'in other chemical industries' (see *United States v Akzo Nobel Chemicals*, No. CR 01-0242 (SI), USDC, ND Cal, plea agreement at 10, filed 20 July 2001). Accordingly, it appears that Akzo's fine in the primary MCAA investigation was reduced, at least in part, as a result of its assistance in other investigations in other markets.

In contrast, if a company that is subject to investigation knows of illegal activity in a second market and elects not to participate in amnesty plus, it may be subject to the potentially harsh consequences of the 'penalty plus' policy. If the DoJ successfully prosecutes a second offence that a company failed to report under amnesty plus, it will recommend in appropriate circumstances that the sentencing court consider the company's (and any culpable executive's) failure to report the conduct voluntarily as an aggravating factor under the Sentencing Guidelines. As opposed to the leniency given under amnesty plus, a company's failure to voluntarily report a violation under amnesty plus may result in a fine as high as 80 per cent or more of the volume of commerce affected by the second offence. For an individual, a failure to report under amnesty plus may mean that the individual serves a lengthy prison sentence rather than avoiding incarceration.

#### 25 Approaching the authorities

What is the best time to approach the authorities when seeking leniency or immunity?

The best time to approach the Division is as soon as practicable. Clearly, a corporation or individual is always in a better position to negotiate while the DoJ needs help in mounting its case rather than when it is near the end of its investigation, and eligibility for the leniency programme is largely conditioned on being the first in. However, prior to approaching the Division, a corporation, for example, should already have begun an internal investigation, in which implicated corporate employees are fully cooperating, so that it has sufficient evidence to present to the Division in support of an application for a marker and ultimately a full amnesty application. In addition, corporate management must be supportive of the decision to seek leniency.

#### 26 Confidentiality

What confidentiality is afforded to the leniency or immunity applicant and any other cooperating party?

The Division's policy is to treat as confidential both the identity of the amnesty applicant and any information obtained from that applicant. Although the Court of Appeals for the District of Columbia ruled in 2008 that amnesty agreements could be obtained by a party that requests them under the Freedom of Information Act (FOIA), it found that, consistent with its policy, the Division could redact identifying or confidential information (*Stolt-Nielsen Transportation Group v United States*, 534 F.3d 728 (DC Cir 2008)). As a result of that case, the Division released 100 settlement agreements dated from 1993 through 2005 to Stolt-Nielsen after redacting all identifying information (such as name, date, industry and geographical location).

The Division has recognised maintaining the force and integrity of its corporate leniency policy means it must not disclose the identity or information obtained from amnesty applicants to foreign authorities without prior agreement from that applicant. This is an important inducement for firms to seek amnesty because a growing number of foreign enforcement authorities are increasingly scrutinising international cartels (see Gary R Spratling, Deputy Assistant Attorney General, Division, 'Negotiating the Waters of International Cartel Prosecutions: Division Policies Relating to Plea Agreements in International Cases', address to the ABA's Criminal Justice Section, 13th Annual National Inst on White Collar Crime (4 March 1999) at 10-12).

The DoJ has frequently obtained waivers to share information with another jurisdiction where the applicant has also sought and obtained leniency or amnesty from that jurisdiction.

#### 27 Successful leniency or immunity applicant

What is needed to be a successful leniency or immunity applicant?

The conditions that an amnesty applicant must meet to be successful are identified in question 23. The applicant does not have to meet evidentiary standards when presenting its application; however, the applicant must present enough substantial and direct evidence to enable the Division to effectively evaluate the application.

#### 28 Plea bargains

Does the enforcement agency have the authority to enter into a 'plea bargain' or a binding resolution to resolve liability and penalty for alleged cartel activity?

In contrast to other leniency regimes, the US leniency regime does not provide for a reduction in fines or penalties or other incentives for the cooperating cartel participants that lost the race to obtain full immunity. However, the Division uses negotiated plea agreements to

obtain that cooperation in exchange for a lesser sentence. These agreements are routinely entered into in most cartel investigations. Over the past 20 years, more than 90 per cent of the corporate defendants charged with an antitrust offence have entered into plea agreements with the Division.

Under these plea agreements, the Division obtains cooperation in exchange for recommendations of lesser fines or sentences. There are two types of plea agreements with defendants charged with Sherman Act offences: type 'B' agreements and type 'C' agreements. Under FRCP 11(c)(1)(B), the Division recommends, or agrees not to oppose a defendant's request, that a particular sentence or sentencing range is appropriate, or that a particular provision of the Sentencing Guidelines does not apply. While this agreement is not binding upon the court, type 'B' agreements are binding upon the defendants as long as the Division makes a sentencing recommendation consistent with the agreement. Under FRCP 11(c)(1)(C), however, the Division and the defendant may jointly agree that a specific sentence or sentencing range is appropriate, and if the court accepts the agreement, that sentencing recommendation is binding upon the court. In the last decade, the Division has succeeded in having courts routinely approve these type 'C' agreements.

The DoJ's Principles of Federal Prosecution provide general guidance as to the considerations the Division will weigh in agreeing to enter into a plea agreement. These include the defendant's willingness to cooperate in the investigation or prosecution, the nature and seriousness of the offence or offences charged, the likelihood of obtaining a conviction at trial and the public interest in having the case tried rather than disposed of by a guilty plea. As of August 2008, the DoJ will not, absent certain circumstances, take into consideration whether the defendant waived attorney-client or work-product privilege, advanced attorneys' fees to employees, or sanctioned or retained its employees (Press Release, DoJ, 'Justice Department Revises Charging Guidelines for Prosecuting Corporate Fraud' (28 August 2008)).

In order to enter a plea, the defendant must be willing to plead guilty to the charged conduct at arraignment and make a factual admission of guilt. Plea agreements must be in writing. The Division has developed standard model corporate and individual plea agreements for Sherman Act offences. These models are available at [www.usdoj.gov/atr/public/criminal.htm](http://www.usdoj.gov/atr/public/criminal.htm).

The Division routinely 'carves out' certain individuals from corporate plea agreements such as culpable employees or employees who refuse to cooperate with the investigation. It may list these carved out individuals by name in the agreement.

When the Division enters into plea agreements that require a foreign national to travel to the US for interviews or testimony in order to cooperate, it routinely agrees not to take any action to arrest, detain or serve the individual with process or prevent the individual from departing.

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### 29 Corporate defendant and employees

What is the effect of leniency or immunity granted to a corporate defendant on its employees?

As noted in question 22, current employees of a corporate defendant that is granted leniency are also granted leniency as long as those employees are not corporate 'ringleaders'.

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### 30 Cooperation

What guarantee of leniency or immunity exists if a party cooperates?

If the Division decides to grant a corporation or individual leniency, it sends an 'amnesty letter'. This letter is made conditional on the applicant performing certain obligations over a period of time, such as cooperating with the investigation and making restitution, and though it has only done so once, the Division may revoke such

conditional amnesty if the applicant does not satisfy the conditions of the letter (see question 32). After all of the obligations have been met (typically, after the matter has been concluded), the Division issues a final amnesty letter confirming that the application has been accepted. An accepted amnesty application is binding on the Division.

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### 31 Dealing with the enforcement agency

What are the practical steps in dealing with the enforcement agency?

A request for immunity is typically made in person by counsel to Division staff. Counsel may act on behalf of both a corporation and its employees as long as there is no conflict of interest between them (see questions 32 and 33). Counsel must make a proffer of the evidence that the corporation or individual seeking amnesty will provide. If the Division is interested, it will invite a corporate representative or an individual to an interview with Division attorneys. Such interviews are conducted with limited immunity.

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### 32 Ongoing policy assessments and reviews

Are there any ongoing or proposed leniency and immunity policy assessments or policy reviews?

2007 marked the end of the *Stolt-Nielsen* litigation. In this case, the Division revoked the conditional amnesty agreement it had signed with Stolt-Nielsen and decided to pursue an indictment against it. The Division alleged that Stolt-Nielsen had continued its anti-competitive behaviour for a longer period of time that it had admitted when it sought amnesty. The Third Circuit allowed the action to proceed, and in September 2006, a federal grand jury in Philadelphia issued an indictment against Stolt-Nielsen and two of its subsidiaries for their role in the cartel. In November 2007, the US District Court for the Eastern District of Pennsylvania dismissed the indictment and ruled that the Division had failed to produce any credible evidence that Stolt-Nielsen's participation in the conspiracy continued past the time when it sought leniency. (See *United States v Stolt-Nielsen SA*, 524 F. Supp. 2d 609 (ED Pa 2007).) The Division stated in December 2007 that it would not appeal that judgment.

The Division representatives publicly stated that this defeat would not cause them to change their leniency policies but may lead them to revise the language of their model conditional leniency agreement. On 19 November 2008, the Division released updated versions of the corporate and individual leniency letters and a document that addressed 'Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters'. While the FAQs purportedly restate existing policy, as discussed in prior speeches by Division staff, they provide a comprehensive resource for questions about the leniency process and will be updated periodically. These documents are available at [www.justice.gov/atr/public/criminal/leniency.htm](http://www.justice.gov/atr/public/criminal/leniency.htm).

As discussed in question 2, members of Congress are also considering the efficacy of ACPERA's damages limitation, and it is unclear whether Congress will renew, change, or allow the Act to expire in 2010.

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### Defending a case

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#### 33 Representation

May counsel represent employees under investigation as well as the corporation? Do individuals require independent legal advice or can counsel represent corporation employees? When should a present or past employee be advised to seek independent legal advice?

Counsel can represent both a corporation and its employees as long as there is no conflict of interest between the company and the employees. Typically, prior to conducting preliminary fact interviews of employees,

**Update and trends**

Cartel enforcement continues to be vigorous and cooperation with other competition agencies in investigating international cartels continues to be central to this enforcement priority. The Division leadership under the administration of President Barack Obama has maintained prosecution of cartels as one of the Division's highest priorities.

In 2008 and 2009, the Division continued its prosecution of conspiracies to fix the price of air cargo shipments. Following the US\$300 million fines imposed on Korean Airlines and British Airways in 2007 for fixing cargo prices and fees charged to passengers for fuel, the Division obtained guilty pleas from, among others, Air France-KLM, Cargolux Airlines, and Japan Airlines for US\$350, US\$119, and US\$110 million respectively. The Division also successfully negotiated pleas for prison sentences for numerous air cargo executives, including individuals from British Airways, SAS Cargo Group, Qantas, and Martinair Holland.

Also in 2008 and 2009, the Division coordinated an investigation of price fixing in the liquid crystal display (LCD) panel market with enforcement officials in Europe and Asia. These enforcement efforts

yielded settlement agreements with LG for US\$400 million – the second-largest fine imposed in Division history – and with Sharp for US\$120 million, and have resulted in nine executives being charged thus far.

In light of the economic instability brought on by the financial crisis and the enactment of the American Recovery and Reinvestment Act of 2009, which provides funds to stimulate economic recovery, the Division has launched the Antitrust Division Recovery Initiative. Under this Initiative the Division is training individuals in the investigative arms of agencies receiving stimulus funding to prevent fraud and abuse, and detect whether stimulus fund recipients are engaging in collusive or fraudulent activity. Assistant Attorney General Christine Varney has expressed the Division's concern that in a time of economic instability, the markets will be particularly vulnerable to collusion and fraud, and has thus stepped up the Division's efforts to train procurement officials (Christine Varney, Assistant Attorney General, Division, 'Vigorous Antitrust Enforcement In This Challenging Era', remarks to the United States Chamber of Commerce (12 May 2009) at 13-14).

counsel for the corporation informs each employee that he or she represents the corporation and not the employees as individuals. Counsel further informs employees that if they have any concerns about their involvement in the alleged activity, they should consider separate representation. Many employees confer with separate counsel.

The Division is normally less than enthusiastic about corporate counsel representing multiple parties. Indeed, during grand jury investigations, the Division often raises concerns about conflicts of interest when corporate counsel also represents employees, and may insist on a letter from the employee stating that the employee understands the potential conflict of interest and, nevertheless, wishes to be represented by corporate counsel. In some circumstances, the Division, based on the Supreme Court's holding in *Wheat v United States*, 486 US 153 (1988) that a court may prohibit counsel from representing two co-defendants, may issue a 'Wheat' letter seeking to disqualify counsel from representing the corporation where he or she also represents an employee that will be called as a government witness.

**34 Multiple corporate defendants**

May counsel represent multiple corporate defendants?

Given the leniency policy, which may result in a race to be the first to the Division's door, representation of multiple corporate defendants

almost always creates an immediate conflict of interest between corporate defendants, such that dual representation is not permitted.

**35 Payment of legal costs**

May a corporation pay the legal costs of and penalties imposed on its employees?

If the corporation's charter permits indemnification – and most do – it can agree to indemnify corporate employees for legal fees incurred as a result of separate representation (see, for example, Del Code Ann Tit 8, 145 (1998) (indemnification of officers, directors, employees and agents)). A corporation may not, however, indemnify an individual for fines paid as a result of illegal activity.

**36 Getting the fine down**

What is the optimal way in which to get the fine down?

The best way to obtain lenient treatment and reduce any applicable fine is to be the 'first in' to cooperate, engage in continuing cooperation with the Division and accept full responsibility for the activities in question.

*\*The authors recognise the significant contribution of Joshua L Stern of their firm.*

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