MAYER·BROWN

Energy in the Crosshairs

Hart-Scott-Rodino Act Pre-Merger Notification Changes and Antitrust Enforcement Trends

November 17, 2011

www.mayerbrown.com

Key Changes to Hart-Scott-Rodino Pre-Merger Notification Form

- New requirement that firms provide information regarding the minority holdings of "associates" that are neither parents nor subsidiaries of the filing party.
  - This change is designed specifically to capture more information about **master limited partnerships** and private equity groups.
- Changes to the documents that filing parties are required to produce under item 4 of the HSR form.
- Changes to required revenue reporting by North American Industry Classification System (NAICS).

Item 6(c): Introducing "Associates"

- The Federal Trade Commission and Department of Justice recognize that Master Limited Partnerships (MLPs) have become commonplace in the oil and natural gas sector and are attempting to capture more information regarding them in the pre-merger notification process.
- Old HSR Rules – MLP1 held natural gas pipeline assets, was managed by general partner (GP) that managed other MLPs holding competing assets – MLP1 could acquire additional competing assets without disclosing the other assets managed by GP.
- New Item 6(c)(ii) now requires MLP1 to report on its relationship with GP and GP's management of competing assets.
- According to the Federal Trade Commission, this change was designed "to provide very useful information to the [government] in transactions involving the intricate structures that often characterize Master Limited Partnerships."

Item 6(c): Introducing Associates

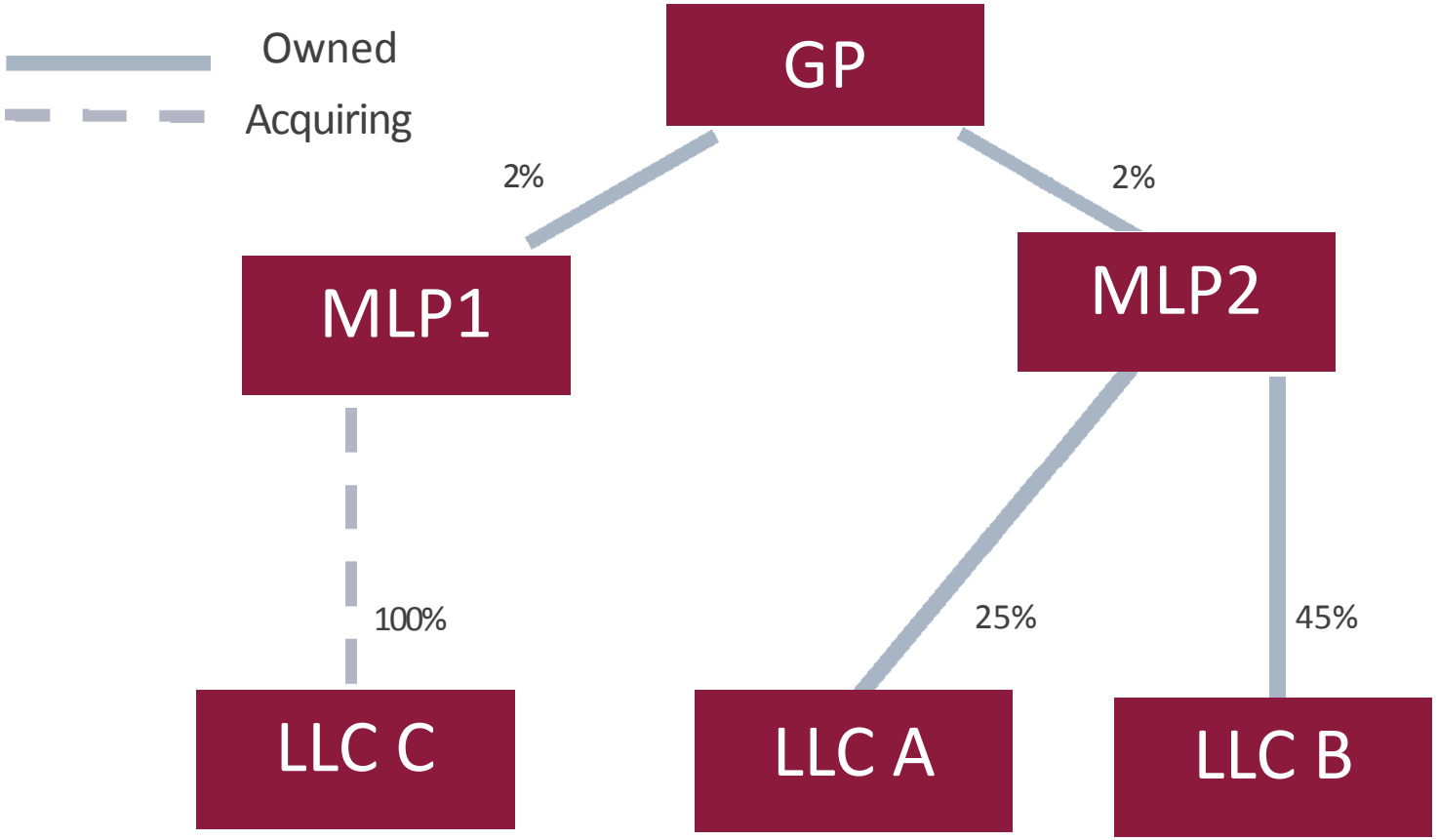
- Old HSR Form Item 6(c) required the acquiring person and acquired entity each to report all minority voting securities interests held in corporate issuers controlled by another person.
- Item 6(c) now is divided into two parts:
  - Item 6(c)(i) requires:
    - The acquiring person to list each entity in which it (a) holds a 5 percent or greater, but less than 50 percent, equity interest, either through voting securities or interests in non-corporate entities, and (b) that derives revenues in the same NAICS industry code as the acquired entity or acquired assets.
    - The acquired entity to provide similar information regarding its minority holdings that have a NAICS code overlap with the acquiring person.
  - Item 6(c)(ii), which applies only to the acquiring person, introduces the new concept of an “associate.”

Associates: Required Information and Effect on Oil and Natural Gas Transactions

- An associate is “an entity that is not an affiliate [parent or subsidiary] of an acquiring person but that: (A) has the right, directly or indirectly, to manage the operations or investment decisions of an acquiring entity (a ‘managing entity’); or (B) has its operations or investment decisions directly or indirectly managed by the acquiring firm; or (C) directly or indirectly controls, or is controlled by, or is under common control (has a common parent) with a managing entity; or (D) directly or indirectly manages, is managed by, or is under common operational or investment management with a managing entity.”
- Item 6(c)(ii) requires an acquiring person to identify for each of its associates any holding of 5 percent or greater but less than 50 percent of the voting securities or non-corporate interests held in the acquired entity, or in any entity that derived revenues in the most recent year from the same 6-digit NAICS code as the acquired entity or acquired assets.
- Item 7(b)(ii) requires the acquiring person to list each associate that, directly or through an investment, derives revenues in the same NAICS code as the acquired entity or assets and, if different from the associate (e.g., an entity in which the associate holds a minority interest), the entity actually deriving those revenues.

Associates: An Example

EXAMPLE FOR ITEMS 6(c)(ii) AND 7(b)(ii)



GP manages and holds 2% interests in MLP 1 and MLP 2. MLP 2 holds minority interests in LLC A (25%) and LLC B (45%). MLP 1, which is its own UPE, is acquiring 100% of LLC C and must report the acquisition under the HSR Act. LLC A, B and C all own pipelines and report revenue under the same 6-digit NAICS code.

Result: Item 6(c)(ii) – MLP 1 must identify GP and MLP 2 as Associates, report MLP 2's percentage holdings in LLC A and B, and identify the overlapping NAICS code or industry. Item 7(b)(ii) -- MLP 1 must list GP and MLP 2 as Associates, and LLCs A and B as entities that actually derived revenues in the overlapping NAICS codes.

Changes to Documents that Must Be Produced with HSR Form

- Item 4(c):
  - Requires filing parties to produce documents produced by or for officers or directors analyzing the acquisition with respect to market shares, competition, competitors, markets, and potential for sales growth into product or geographic markets.
- New Item 4(d)
  - The new HSR form now contains Items 4(d)(i), 4(d)(ii), and 4(d)(iii)
    - 4(d)(i) – requires a filing party to provide all Confidential Information Memoranda (CIM) prepared by or for officers or directors of the Ultimate Parent Entity of the Acquiring or Acquired firm; if there is no CIM, must provide documents given to buyer serving a "similar function."
    - 4(d)(ii) – requires a filing party to provide all studies, surveys, and reports prepared by investment bankers, consultants, or other third-party advisors for officers or directors which analyze the same subject matter as covered in item 4(c) – includes documents created both by engaged advisors and advisors seeking engagements, even if not hired ("pitch books").
    - 4(d)(iii) – requires a filing party to provide all studies, surveys, analyses and reports analyzing synergies and/or efficiencies of the deal prepared by or for any officer or director.

Item 5: Changes in Revenue Reporting

- Welcome Changes
  - New Item 5(a) – limits reporting to revenues for the filing person's most recent fiscal year.
  - The new HSR form no longer requires revenue reporting using a 2002 base year. Therefore, companies no longer need to collect and aggregate historical sales data, as previously required by Item 5.
- New Requirements
  - The new Item 5(a) requires filing companies to report revenue by NAICS code for products manufactured outside the United States that are sold directly to U.S. customers.
  - May impact energy industry companies that manufacture products outside the U.S. and sell them into the U.S.

Managing Increased HSR Reporting Requirements

- Associate Relationships – companies planning to engage in acquisitions that may require reporting these relationships -- consider compiling a list of these ahead of any particular acquisition or HSR filing so the information is readily available when you need it.
- Item 4(c)/4(d) documents:
  - Instruct employees to create only those documents required to analyze, decide whether to do deal.
  - Create CIM so there is certainty re what to submit under 4(d)(i).
  - Instruct third party advisors only to create documents upon request
  - Have all 4(c)/4(d) documents reviewed by counsel in draft to avoid creating documents that include anticompetitive language that can result in closer government scrutiny (e.g., “if we do this deal we’ll dominate market,” “after this deal we can raise prices,” “high entry barriers mean no new competition”).

Energy Industry Scrutiny by Antitrust Agencies

- Energy Industry is Closely Watched
  - Consolidated Appropriations Act of 2008 directs FTC to submit a report to the Committees on Appropriations summarizing its activities dealing with the oil and natural gas industries.
    - Mergers & acquisitions and other transactions
    - Pricing behavior
    - Other potential anticompetitive actions

Energy Industry Scrutiny by Antitrust Agencies

- "The Commission's significant activities involving petroleum and natural gas during the first half of calendar 2011 demonstrate clearly that the FTC considers the protection of American consumers from potentially anticompetitive practices in the energy sector to be one of its major responsibilities."
  - 48 premerger reviews involving oil and natural gas sector under Hart-Scott-Rodino in 2010 (up from 24 in 2008)
  - Mergers III division of FTC primarily devoted to oil and natural gas industries
  - Gasoline and Diesel Price Monitoring Project

Energy Industry Scrutiny by Antitrust Agencies

- Recent FTC Challenges to Proposed Acquisitions in the Energy Sector
  - Irving Oil Ltd./ExxonMobil Corp.
    - Proposed acquisition of ExxonMobil's terminal and pipeline assets in South Portland and Bangor/Prescott Bay areas of Maine
    - On May 26, 2011, parties entered into consent decree that required Irving to divest 50% of South Portland terminal and give up acquisition of Bangor terminal and intrastate pipeline
  - McGraw-Hill Cos., Inc./Oil Price Information Serv., LLC
    - Proposed acquisition of Oil Price Information Service by McGraw-Hill
    - On February 16, 2011, the parties abandoned the deal and the FTC closed its investigation

FTC Merger Litigation Strategy

- The FTC has begun using a combination of an argument for lowering the standard to obtain preliminary injunction in federal court and threat of prolonged administrative proceedings to pressure parties to abandon transactions the agency decides to challenge
- Unlike DOJ, where entire merger challenge (PI and trial) is litigated in federal court – the FTC can choose trial on the merits before an FTC administrative law judge (ALJ)
- *FTC v. CCC Holdings, Inc.* – FTC argued to court in preliminary injunction proceeding that under Section 13(b) of the FTC Act it only needs to show a probability the transaction is anticompetitive, and that it raises such serious issues that further investigation and deliberation by FTC is appropriate
  - Idea court should defer to FTC administrative process with respect to merits of merger challenge
  - US District Court for the District of Columbia agreed – parties abandoned transaction
  - Same argument was ultimately accepted by the D.C. Circuit in *Whole Foods*

FTC Adjudication Procedures

- April 2009 – FTC adopted changes to its Rules that would expedite adjudicative proceedings
- Past: Generally, adjudicative proceedings brought by FTC only after preliminary injunction issued by federal court
- Changes include, *inter alia*,
  - Parallel preliminary injunction and adjudicatory proceedings
  - Tighter timetables (including less time to answer a complaint: 210 hours for a hearing, unless Commission allows otherwise)
  - Commissioners acting as ALJs
  - Commission authority over dispositive pretrial motions

Concerns Raised by FTC Procedures

- 2009 revisions attempted to address concerns that FTC administrative process takes too long for parties to continue with deal if they prevail
- However, the changed raise new concerns:
  - Bias of Commissioner serving as ALJ
  - Commission presiding over outcome-determinative proceedings (discovery and dispositive motions) is unfair
  - Expediting procedures gives FTC staff time advantages over merging parties
  - Burden of two parallel proceedings (motion for preliminary injunction in federal court and trial on the merits before ALJ) puts additional pressure on merging parties to abandon transaction (*see, e.g.*, Inova/Price William Health System, Inc.; Old Castle Architectural, Inc.; CCC Holdings)

FTC Merger Litigation Strategy

- How can merging parties respond?
- Proactive approach to agency regarding addressing potential issues
  - FTC litigation strategy gives agency staff more leverage by reducing likelihood agency will have to win on merits in court
  - Increases importance of persuading staff up front not to challenge deal and/or to minimize staff concerns
  - Transaction raising serious issues – prepare to meet with agency staff early in process with fully developed arguments and analysis
- Careful analysis early in deal process to identify potential issues, assess risks
  - Retain and involve antitrust counsel early in process
  - Consider retaining antitrust economist early in process to assist with analysis
  - Compare issues in deal to those in prior transactions

Energy Industry Scrutiny by the Antitrust Agencies

- Antitrust Division, Department of Justice
  - Transportation, Energy, and Agriculture Section
    - Investigates and enforces antitrust laws in the transportation, energy, and agriculture sectors
  - Recent enforcement:
    - Baker Hughes, Inc./BJ Servs. Co.
      - Merger between two of the four providers of vessel stimulation services to oil and natural gas companies in the Gulf of Mexico.
      - Divestiture of two vessels and associated facilities (*e.g.*, a dock and mooring facilities)
    - Schlumberger Ltd./Smith Int'l, Inc.
      - Merger between two leading players in oil field products and services sector.
      - DoJ made a second request inquiry into merger on April 5, 2010.
      - On July 27, 2010, DOJ cleared the merger without any conditions

Energy Industry Scrutiny by Antitrust Agencies

- Despite vigorous enforcement – higher gasoline prices have led to claims that lax merger enforcement resulted in too much concentration, collusion
- Such claims have resulted in FTC conducting various studies and instituting a program to monitor gasoline prices, *e.g.*,
  - In April 2011 the FTC launched an investigation into whether oil producers, refiners, transporters, marketers, and traders engaged in anticompetitive or manipulative practices related to the wholesale price of crude oil or petroleum products.
  - FTC Chairman Jon Leibowitz reported on investigation to Senate in June 20, 2011 letter.
- These investigations have not resulted in any findings of anticompetitive behavior

Market Manipulation Rule

- FTC tasked with examining and identifying market manipulation in the petroleum sector and taking action where necessary
  - Pursuant to Section 811 of the Energy Independence and Security Act of 2007
  - Targets “any manipulative or deceptive device or contrivance” “in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale”
  - Final rule became effective on November 4, 2009

FTC Final Rule Regarding Market Manipulation in the Petroleum Industry

- Final rule prohibits market manipulation in the petroleum industry
- Specifically, the final rule prohibits any person, directly or indirectly, in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale, from
  - A) knowingly engaging in any act, practice, or course of business – including making any untrue statement of material fact – that operates or would operate as fraud or deceit upon any person; or
  - B) intentionally failing to state a material fact that under the circumstances renders a statement made by such person misleading, provided that such omission distorts or is likely to distort condition for any such product
- Penalties
  - Anyone violating the rule faces civil penalties of up to $1 million per violation per day, in addition to any relief available to the Commission under the FTC Act

FTC Final Rule Regarding Manipulation in the Petroleum Industry

- Additional Developments
  - In April 2011 the FTC and Commodity Futures Trading Commission signed a memorandum of understanding to facilitate sharing non-public information regarding on-going investigations
    - FTC Chairman Jon Leibowitz: "With gasoline prices on the rise, we are committed to doing all we can to ensure the petroleum markets are competitive. . . . [T]his MOU improves the ability of the FTC and CFTC to take action if and when we find market manipulation."
  - Also in April 2011, Attorney General Holder announced the creation of an Oil and Gas Price Fraud Working Group
    - Includes representatives from the Department of Justice, National Association of Attorneys General, CFTC, FTC, Dept. of Treasury, Federal Reserve, SEC, Dept. of Agriculture, and Dept. of Energy

Energy Industry Scrutiny by Antitrust Agencies

- Gasoline and Diesel Price Monitoring Project
  - Project underway since 2002 to monitor the wholesale and retail prices of gasoline in order to help detect potential anticompetitive conduct and determine if investigation is warranted
  - Tracks retail gasoline and diesel prices in approximately 260 cities and wholesale prices in 20 major urban areas
  - FTC Bureau of Economics takes relevant information and determines whether prices each week are anomalous in context of historical data
  - May trigger an investigation

Managing Agency Scrutiny of Prices

- Document reasons for pricing changes that may attract government scrutiny
- Confer with counsel before engaging in transactions or making changes that could be viewed as manipulation or evidence of collusion
- Institute and enforce an antitrust/manipulation compliance policy to reduce risk of investigation or liability
  - Under policy – require relevant employees to review FTC Guide to Complying with Petroleum Market Manipulation Regulations, www.ftc.gov/os/2009/11/091113mmrguide.pdf.

Energy Industry Scrutiny - Summary

- The oil and natural gas industry has been closely scrutinized by the FTC; DOJ is bringing enforcement actions as well
- The Obama Administration has established a track record of scrutinizing industry transactions and behavior closely
- Areas of interest include merger review, potential gasoline price manipulation and possible collusion
- Important to manage these risks to avoid unwanted and unwarranted government intrusion into your business

MAYER·BROWN

Anti-Corruption Risks in the Energy Industry

How to Minimize Risk, Maximize Compliance and Avoid Enforcement

November 2011

Anti-Corruption Risks in the Energy Industry

Michael Volkov, *Partner*
(202) 263-3288
mvolkov@mayerbrown.com

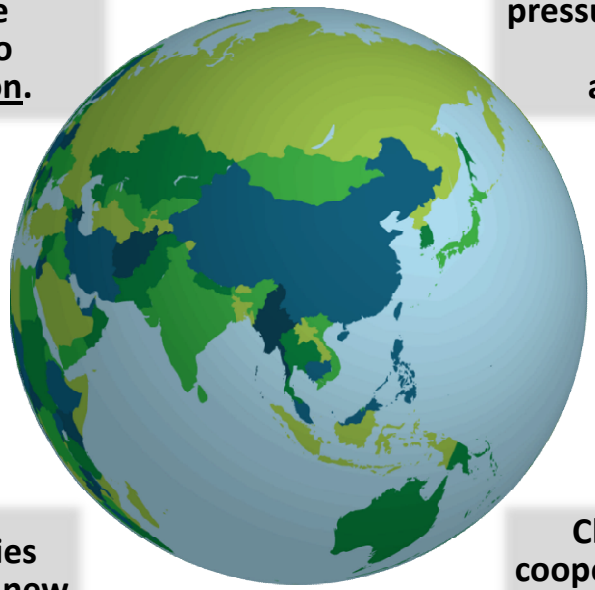
Mark Compton, *Partner*
+44 (0)20 3130 3388
mcompton@mayerbrown.com

Anti-Corruption Enforcement

GLOBAL enforcement is on the rise.

In the past three years, US prosecutors have enforced the FCPA to the tune of $3.6 billion.

In response to international pressure, Canada its increasing enforcement of its anti-corruption law.



The UK Bribery Act became effective on July 1, 2011.

Germany, Spain and other EU countries are increasing enforcement.

Asia and Latin American countries have been slower to enact tough, new anti-corruption laws and begin aggressive enforcement programs.

China and the US are increasing cooperation and beginning to establish a framework for information sharing and enforcement; China enacted its own foreign bribery law.

Risk of anti-corruption multi-jurisdictional, "piggy-back" actions is growing.

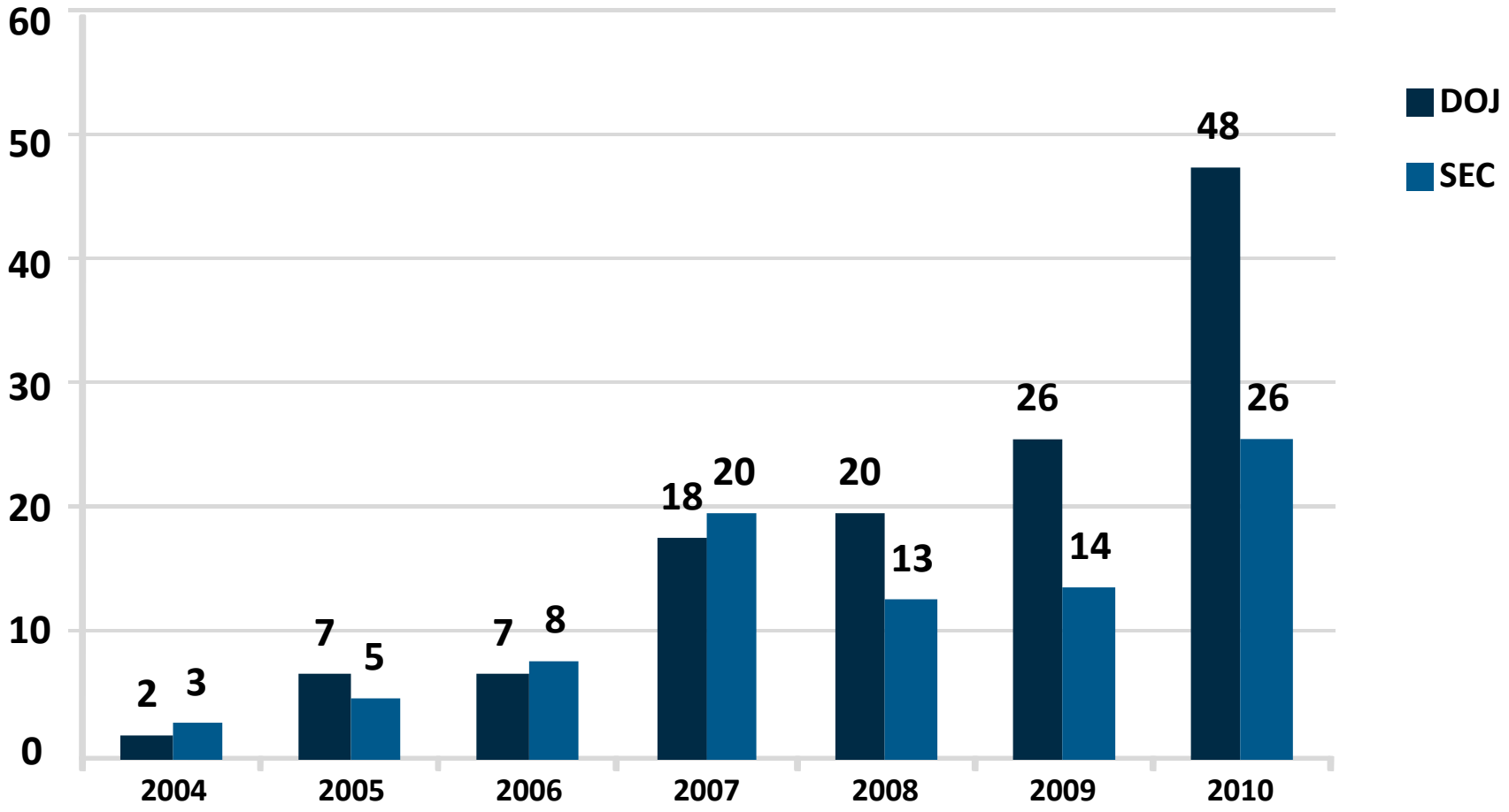
Enforcement Trends

Aggressive FCPA enforcement has resulted in corporate mega-fines:

- For 2010, fines total over $1.6 billion
  - more than half of all federal criminal fines collected.
- Fueled by voluntary disclosures and industry-wide investigations
  - oil, pharmaceuticals and medical devices, military and law enforcement equipment, and telecommunications.
- FBI has dedicated FCPA squad which is using aggressive investigative tactics *- consensual recordings, ambush interviews, undercover officers, informants, search warrants and wiretaps.*
- SEC Dodd-Frank whistleblower bounty program will increase number of credible complaints, investigations and prosecutions.

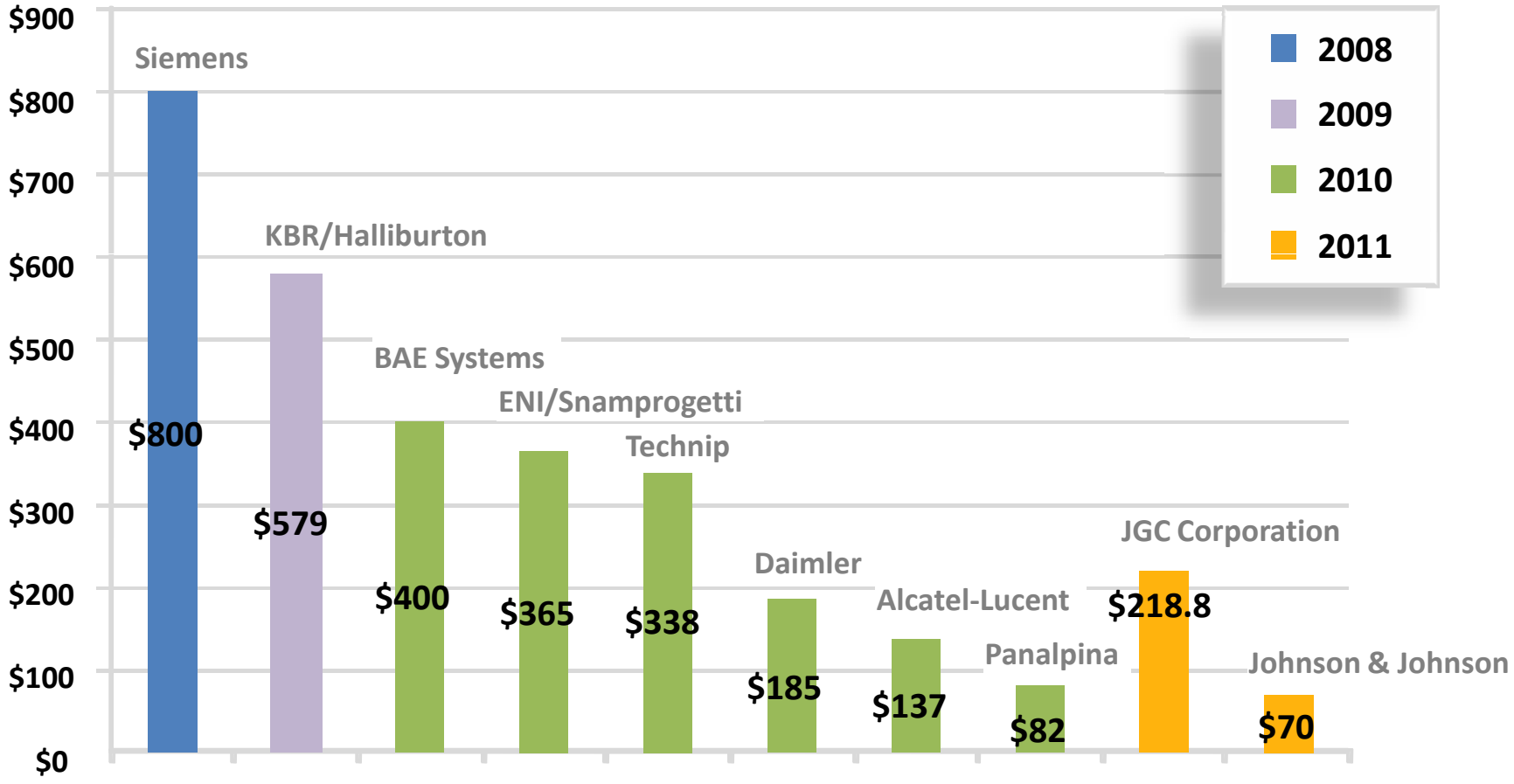
FCPA Enforcement at a Glance: Increase in Actions

2010 witnessed an 85% increase in FCPA enforcement actions over 2009, which itself was a record year.

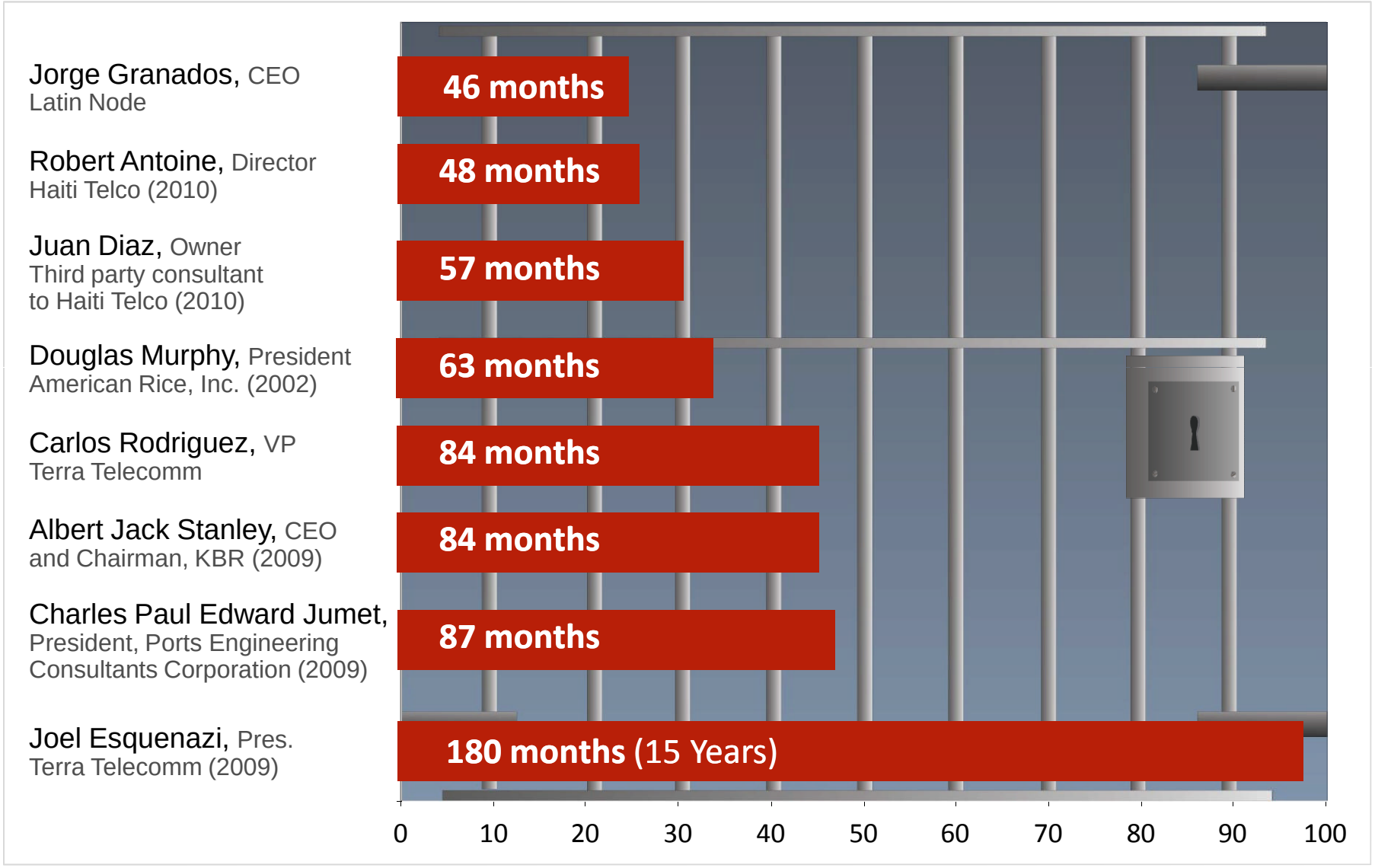


FCPA Enforcement at a Glance: Blockbusters

Eight of the top ten monetary settlements in FCPA history were reached in 2010.

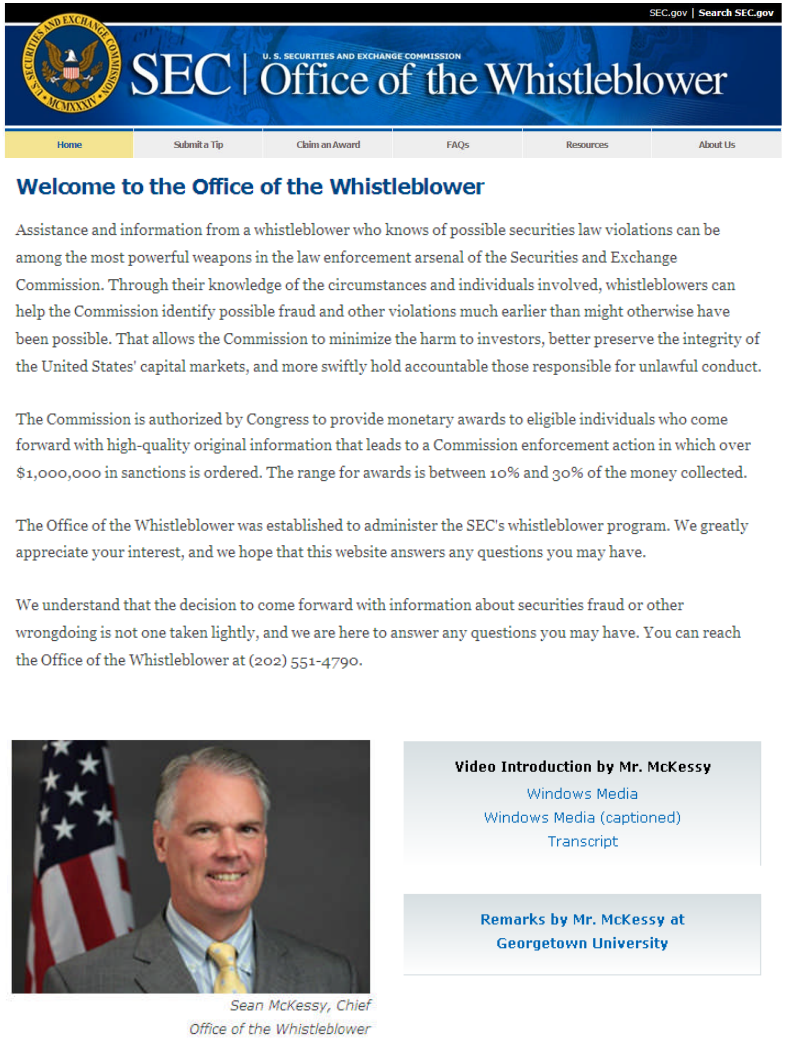


FCPA Enforcement at a Glance: Prison Sentences



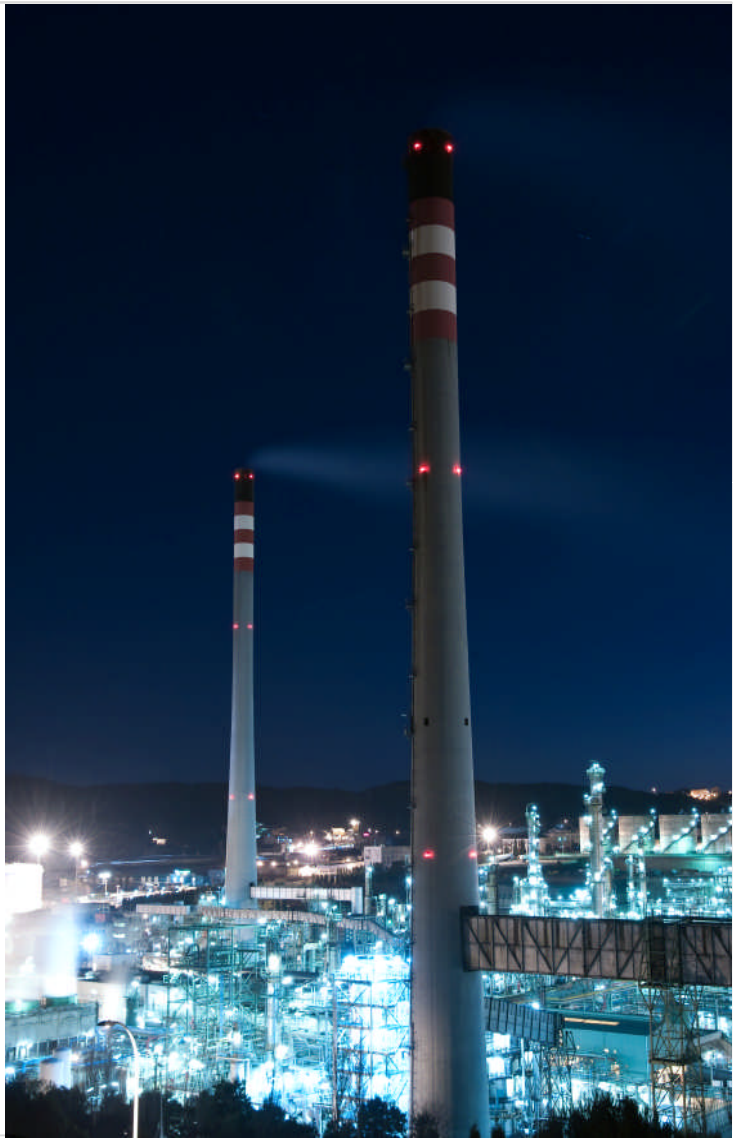
FCPA: Whistleblower Bounty

- Whistleblower Bounty program offers rewards of 10 to 30 percent of any settlement over $1 million. SEC's Whistleblower Office opened on 8/12/2011.
- SEC regulations have been adopted (pending appeal).
- SEC estimates it will receive 30,000 complaints a year; 1-2 credible complaints each day.
- With certain exceptions, whistleblowers must first file complaint internally with company and wait for 120 days before filing with SEC.
- Companies will increase self-reporting to pre-empt whistleblowers.



General Risk Factors for Corruption in the Energy Industry

- Governments play a significant role in the industry:
  - Concessions and auctions;
  - Regulation, licensing and permitting.
- Resources are often located in undeveloped countries which have weak political and social institutions.
- Oil and gas industries have history of corruption and are very lucrative.
- New energy sources are heavily subsidized by governments and ripe for corruption.



Specific Risks in the Oil and Gas Industry

- The oil and gas industry is – and has been -- the focus of enforcement agencies.
- Industry operates in countries known for corruption risks.
- Many foreign governments are involved in oil and gas industry through state-owned enterprises and joint ventures.
- Oil and gas industry relies on network of third-party agents and consultants who assist companies in local countries.

Anti-Corruption Enforcement in the Oil & Gas Industry

UK Enforcement

- UK now categorised as having "active enforcement" of the OECD Anti-Bribery Convention.
  (Transparency International Progress Report – Enforcement of the OECD Anti-Bribery Convention 2010.)
- UK ranked a strong second to the US.
  (TRACE's Global Enforcement Report 2011.)
- Cases involving overseas corruption: two in 2008; two in 2009; four in 2010; and five (so far) in 2011.
- SFO currently have 50 corruption cases under investigation or prosecution.

Some Recent UK Cases – Under Previous Laws

David Mabey, Richard Forsyth and Richard Gledhill of Mabey & Johnson Limited (02/11)

After Mabey & Johnson's conviction in 2009, two of its directors and its sales manager were prosecuted for providing kickbacks to the Iraqi government of Saddam Hussein.

- The individuals were ordered to pay fines of between £75-£125k and were sentenced to between 8 months – 2 years imprisonment as well as being disqualified as directors.

MW Kellogg Ltd (02/11)

Kellogg received share dividends payable from revenues generated by corrupt activities of its parent company and others. Kellogg self-reported its concerns to the SFO.

- Matter settled by a civil recovery order requiring payment of a sum just in excess of £7million and representing share dividends received and accrued interest. Kellogg also ordered to pay the SFO's costs.

Some Recent UK Cases – Under Previous Laws

DePuy International Limited (04/11)
part of the Johnson & Johnson group of companies.

Following an internal investigation in 2006, Johnson & Johnson reported its findings to the US Department of Justice and the SEC. In 2007, following a referral from the DOJ, the SFO launched its investigation into the English company.

- In April 2011, DePuy International was ordered to pay £4.829m (plus prosecution costs) in a Civil Recovery Order in recognition of unlawful conduct relating to the sale of orthopaedic products in Greece between 1998 and 2006. Criminal and civil sanctions also imposed on the parent company in the US and the Greek authorities froze assets located in Greece.

Mark Jessop (04/11)

Between 1996 and 2003 he sold medical goods to the Iraqi market through various companies.

- Sentenced in April 2011 to 24 weeks' imprisonment after he admitted kickbacks to Saddam Hussein's government and other arrangements involving illegal payments in return for receiving information on tenders. Also ordered to pay £150k compensation to the Development Fund for Iraq plus prosecution costs.

Some Recent UK Cases – Under Previous Laws

Macmillan Publishers Limited (07/11)

An agent attempted to pay a bribe in connection with a World Bank funded tender to supply educational materials in Southern Sudan. Macmillan did not win the tender and the World Bank passed information to the UK authorities and search warrants were executed. Further investigations focused on operations in Rwanda, Uganda and Zambia. Results of these investigations presented to the SFO and World Bank established that Macmillan may have received revenue generated by unlawful conduct. This was quantified at in excess of £11million.

- Matter resolved by way of a civil recovery order for that amount; Monitor also appointed and Macmillan ordered to pay SFO's costs. Macmillan also debarred from World Bank funded tender business for a minimum of three years.

UK - SFO's Approach To Dealing With Overseas Corruption

- The SFO has made overseas corruption offences a priority.
- In July 2009, the SFO issued a guide on its approach to dealing with overseas corruption – encouraged self reporting.
- The aim of the SFO is to settle self referral cases civilly but this may not always be possible (e.g. if board members are involved in the corrupt activities.)
- Self reporting to the SFO does not remove the liability of a corporate or a professional adviser to make any report required by UK law or the laws of another jurisdiction.
- Scope of any internal investigation will be agreed with the SFO – SFO take a "proportionate" approach – investigation carried out at expense of the corporate and by its own advisers.
- Outcome of investigation discussed with the SFO who will determine whether the case merits civil fines as opposed to criminal sanctions.

Enforcement In The UK – Self Reporting Pros And Cons

Advantages:

- May face only civil fines rather than criminal sanctions;
- Agree scope of internal investigation;
- Manage issues and publicity;
- Be seen to have acted responsibly;
- If no conviction for corruption offence, may avoid the mandatory debarment provisions under Article 45 of the EU Public Sector Procurement Directive 2004.

Disadvantages:

- SFO may still apply criminal sanctions (triggering mandatory debarment);
- Ultimate outcome not certain, e.g. Court may increase the "agreed" fine;
- Potential criminal penalties for senior management personally, including imprisonment.

UK Courts' Approach

- Plea agreements can be entered into, but not an agreement as to criminal sentencing.
- UK courts should primarily impose criminal fines.
- Such fines should be of amounts comparable to those imposed in cartel cases and for corruption in the US, and may be measured in the tens of millions in serious cases.
- Suggested in Innospec that it will be rarely appropriate for serious corruption by a company to be dealt with solely be means of a civil penalty, with no criminal sanctions applied.
- Global settlement agreements where regulators agree to divide total penalties –beyond the power of the SFO?
- The court has also criticised the use of monitors as part of the total penalty, regarding this as unnecessarily costly in some cases.

UK Money Laundering Legislation

- UK anti-money laundering legislation is very broad with wide extraterritorial effect.
- Bribery will effectively involve money laundering.
- Additional and harsher criminal penalties – 14 years in prison + a fine.
- SFO has track record of using POCA confiscation powers even before the Bribery Act.

UK Money Laundering Legislation

Civil Recovery Orders - No Need To Prove Criminal Activity

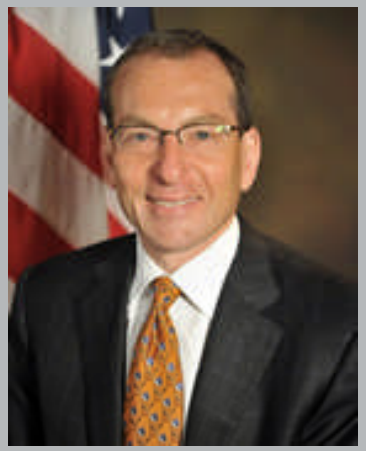
- The settlement in MW Kellogg (16.02.11) recovered £7 million of dividends representing profits from corrupt contracts of MWK's parent company. SFO press release said:

> *"The SFO recognised that MWKL took no part in the criminal activity which generated the funds. The funds due to MWKL are share dividends payable from profits and revenues generated by contracts obtained by bribery and corruption undertaken by MWKL's parent company and others."*

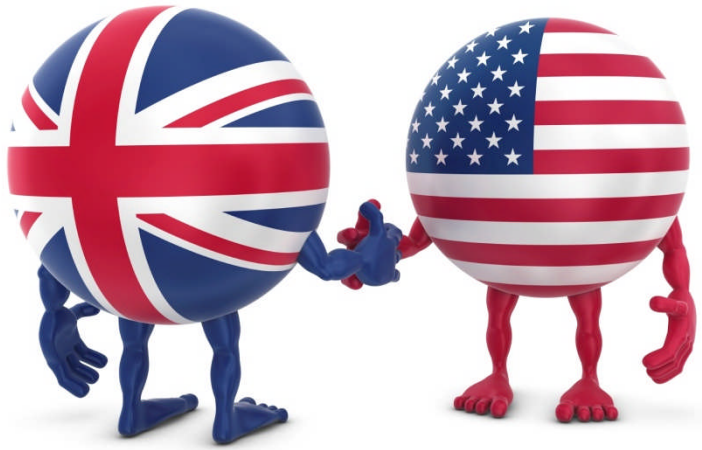
FCPA: Partnerships

"Partnerships like the one we have with the Serious Fraud Office are critical to our transnational approach to combating foreign bribery, and we intend increasingly to rely on our foreign partners in future cases."

— Lanny Breuer, Assistant Attorney General, Nov. 4, 2010



SFO
Serious Fraud Office
www.sfo.gov.uk



THE UNITED STATES
DEPARTMENT *of*
JUSTICE

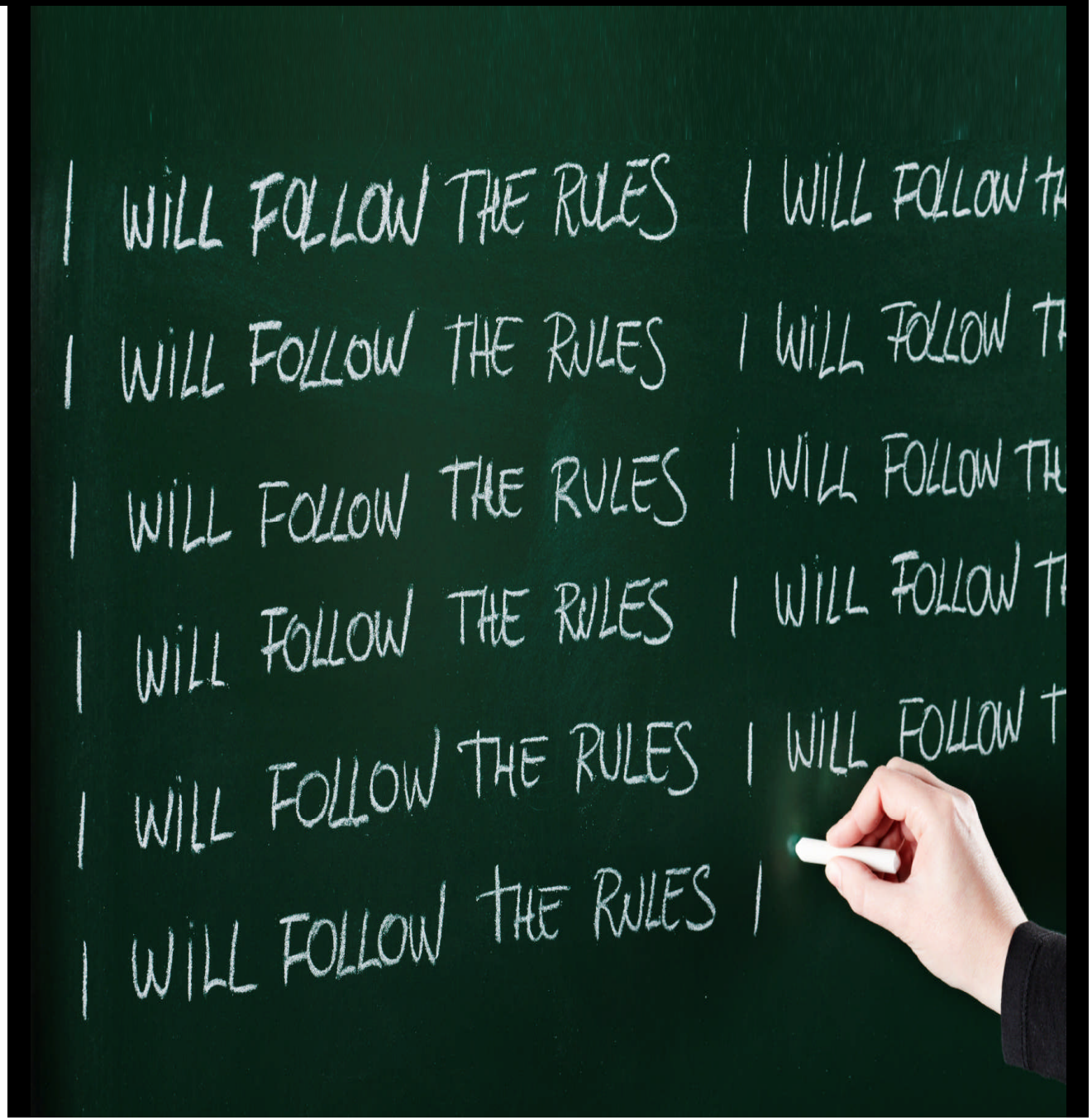
FCPA v. UKBA: Offenses and Defenses

FCPA	UK Bribery Act
Bribery of foreign government officials (including state enterprise employees, political parties, party officials, political candidates, public international organization employees)	Bribery of public and private sector individuals – includes a discrete offence of bribing a foreign public official which technically requires no corrupt intent
Only penalizes those making bribes	Accepting bribes is also punishable
Prosecutes active participation in bribery, though internal controls requirement is independent of any bribery activity	No accounting offence in the Bribery Act but Companies Act 2006 includes an offence of failing to keep adequate accounting records
Consideration of compliance programs at prosecution and sentencing stages	"Adequate procedures" is the only potential defense available against failing to prevent bribery
Statutory exception for "facilitation payments" narrowly defined	Facilitation payments only permitted if local written law so permits
Reasonable and bona fide expenditure on travel, lodging and entertainment expenses permitted if directly related to promotion of product or service or to performance of government contract	No express exception for corporate hospitality but Guidance advises that "reasonable and proportionate" hospitality is permissible

FCPA v. UKBA: Territorial Effect and Punishment

FCPA	UK Bribery Act
Conduct within the US by anyone	Conduct (including omissions) within the UK by anyone
Conduct outside of the US if by an issuer of US Securities or a "domestic concern" (e.g. a company organized under US law or having its principal place of business in the US) – or anyone acting on its behalf; foreign persons who commit an act in the United States in furtherance of a subject act are also covered	Conduct (including omissions) outside of the UK by persons (natural and legal) with a close connection to the UK, if that conduct would form an offence if committed in the UK. If a commercial organization "carries on a business or part of a business in the UK" then may be prosecuted for "failing to prevent" bribery even if the bribery occurs entirely outside of the UK
Up to 5 years prison sentence for bribery, 20 years for accounting offences	Up to 10 years prison sentence – accounting offences may be prosecuted under other Statutes
Criminal fine for entities up to $2m for bribery or $25m for violation of accounting provisions, or twice the benefit sought, and debarment; for individuals, fines of up to $100,000 (bribery) or $5 million (accounting offences)	Unlimited fine; additionally Serious Crime Prevention Orders, Confiscation Orders, Winding up proceedings, debarment, director disqualification and regulatory/disciplinary action
Civil penalties up to $10,000 per bribery violation or $500,000 per corporate accountancy violation	Civil Recovery Orders – no criminal conviction required (lower threshold of proof)

Compliance Programs



How to Solve Specific Anti-Corruption Compliance Problems?

There is a solution which minimizes risk in response to every problem

- The ultimate decision whether to go forward in the face of some risks depends on risk sensitivity versus benefit to the business.
- Some key principles and strategies are:
  - Building a record of good faith consideration of issues with documentation. Such a solution will negate any inference of criminal intent.
  - Good faith attempts to comply based on adherence to procedures and reasonable interpretations of the law.
- Acquire all of the facts concerning the issue.
- Document your inquiry and reasoning for your action.

Designing an Anti-Corruption Program

- Risk-based - identify and assess the risks: one size does not fit all (even within a single business.)
- Establish policies to address risks.
- Communicate and implement policies internally:
  - tone from the top;
  - measures to ensure buy-in.
- Policies should be appropriate to:
  - the nature of the risks faced;
  - the size of your business and the availability of resources.
- Document your procedures and policies.
- Include a process for due diligence on third parties.
- Communicate procedures to associated persons and counterparties.
- Periodic, risk-based review of approved third parties.
- Periodic review and revision of procedures.
- Contractual protections.

Buying into an Anti-Corruption Violation

An acquiring company can be held liable for FCPA violations committed by a target company prior to the acquisition:

- **Alliance One:** $4.2 million fine and $10 million disgorgement for pre-acquisition FCPA violations.
- **Saipem:** $240 million fine for conduct of an acquired subsidiary of ENI, Snamprogetti, where the FCPA violations occurred over 2 years prior to the acquisition.

NOTE: Not only may liability be inherited for a company's past action, but a firm may be liable for ***ongoing*** corruption ***even if there is no direct evidence that the company or its officers knew of the corrupt acts.***

Due Diligence of Target Companies

Basic Risk Assessment
(countries of operation, industry, extent of foreign government interactions)

Overall Compliance Structure

Prior History of Bribery or Internal Investigations

Internal Controls

Use of Third Party Intermediaries

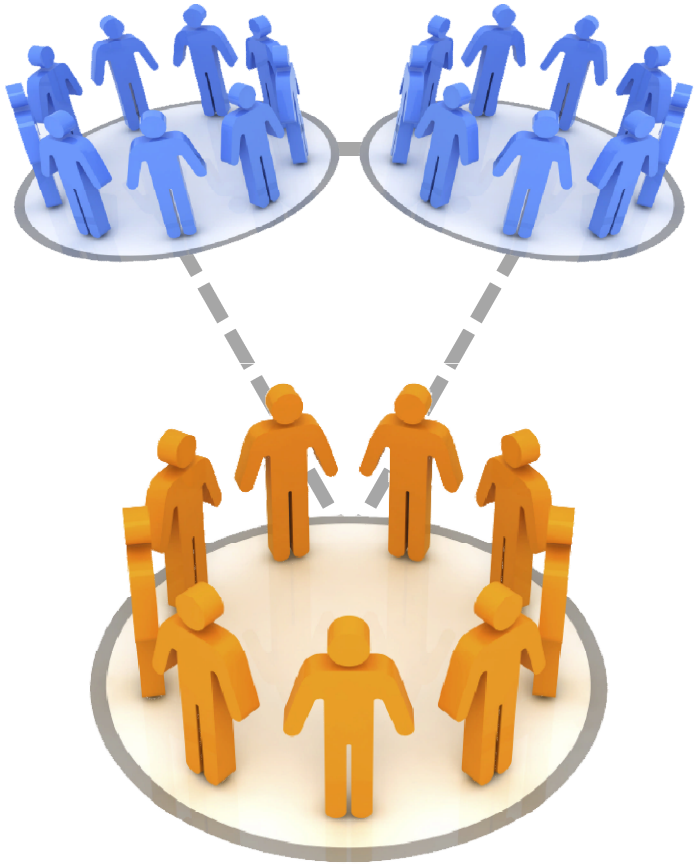
Anti-Corruption Training

Employee Discipline/Hot-Line Reporting

Assessment and Review Procedures

Anti-Corruption Process For Third Parties

- Conducting adequate risk-based due diligence;
- Ensuring there is a good business case;
- Ensuring appropriate contractual protections are in place;
- Ensuring your agent has good books and records;
- Conducting face-to-face training on your policies;
- Having appropriate approval, oversight and monitoring processes.



The Business Case

- What is the link to corporate and business strategy?
- Who made the business case?
- Is the agent/contractor really necessary:
  - What services do you require?
  - Why not use your own employees?
  - Why this agent/contractor in particular?
  - How was the agent/contractor introduced to you?
  - Is there external pressure to use the agent?

Contact Information

Michael Volkov, *Partner*
(202) 263-3288
mvolkov@mayerbrown.com

Mark Compton, *Partner*
+44 (0)20 3130 3388
mcompton@mayerbrown.com

MAYER·BROWN

Energy in the Crosshairs

EU Merger Control

Gillian Sproul
Partner, Mayer Brown International

T: +44 (0) 20 3130 3313
gsproul@mayerbrown.com

Houston
17 November 2011

Issues

- Getting clearance – 4 issues
  - Identifying when a filing might be needed
  - Identifying (and making) all relevant filings
  - Getting clearances through within the deal timetable
  - Identifying and resolving substantive issues

Identifying when a filing might be required

- Consider acquisitions below 100%
  - 50%+ acquired – yes
  - 25%+ acquired – most likely, unless other factors weaken decisive influence
  - 10%+ acquired – yes in UK if acquired by a competitor; European Commission considering this too
- Consider joint ventures
  - Full function – yes in EU and most EU states
  - Any type – yes in some other jurisdictions (China)

Identifying all relevant jurisdictions (outside the US)

- EU
- Rest of world:
  - India
  - China
  - Russia
  - Brazil

Competition Commission of India

MOFCOM
WWW.MOFCOM.GOV.CN

Federal Antimonopoly Service of the Russian Federation

Conselho Administrativo de Defesa Econômica
cade

- Check where acquirer and target generated revenues in their last complete financial year – good idea for acquisitive companies to keep up to date record of counties/revenues
- Mayer Brown computer programme
- Not filing – risks of unwinding and penalties

MAYER·BROWN

EU merger regime

MAYER·BROWN

European Commission: a 'one stop shop' for mergers?

- EU Merger Regulation (EUMR) turnover thresholds - complex
- **Rule of thumb** – EUMR could apply where
  - EEA-wide turnover of over €100 million each (NB EEA = EU + Norway, Iceland, Liechtenstein) and
  - Combined worldwide turnover of over €2,500 million
- **Legal uncertainty** - references from Commission to Member States and from Member States to Commission – important to conduct proper legal assessment in advance

Getting the deal through on time

- Majority of merger regimes are **mandatory**
  - Deal must be filed and cleared before clearance
  - Need to co-ordinate with merger timetable especially where public takeover timetable also applies
  - No 'gun jumping'
  - Penalties becoming increasingly severe
- **EU process**
  - Phase I – 25-35 working days (but long pre-notification period possible)
  - Phase II – minimum 90 working days; can be up to 120 working days
  - Appeals to European courts

MAYER·BROWN

Identifying and resolving competition issues

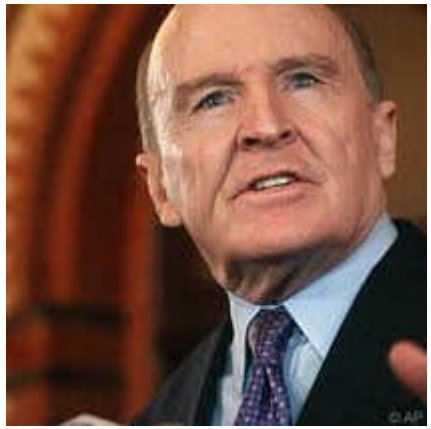
- Few deals blocked – only 20 out of over 4,500
- **Competition concerns** likely:
  - Acquisition of a competing business
  - Joint venture with a competitor
  - Acquirer has a strong market position upstream/downstream
- Potentially significant costs / delays
- Look at divestment early and consider pre-packaging

Oil & Gas Mergers

- Many cases involving oil majors
- Detailed review, extensive divestments
  - *BP / Amoco* (1998): horizontal / vertical overlaps
  - *Totalfina / Elf Aquitaine* (2000): heavy divestments
  - *OMV / MOL* (2008): withdrawn
- Joint ventures: Statoil / In Salah (2003); Lukoil / Conoco-Philips (2004)
- Private equity: Blackstone, First Reserve, PBF (2010)
- Related markets: Phibro (2009); Schlumberger / Smith (2010); WellDynamics (2001)

Two further issues

Prof. Mario Monti



Mr Jack Welch

- Submitting company documents: highly sensitive area

Conclusions

- **Processes and principles** in EU and rest of world may differ significantly from US
- **Check jurisdictions** early – and assess risks of a change in jurisdiction in the EU
- Purchaser should make deal **conditional** on clearances in relevant jurisdictions - protection from having to complete without mandatory clearance - condition should refer to clearance terms satisfactory to purchaser, allowing room for manoeuvre
- **Plan timetable** carefully - be prepared for a long pre-notification period
- Have a realistic **longstop date**
- **Potential competition issues** – decide in advance how they might be resolved – pre-agreed divestments?
- **Gun-jumping** – avoid it
- **Documentation** – avoid creating hostages to fortune in documentation

Questions

MAYER·BROWN

MAYER·BROWN

Managing Antitrust Risks in the Energy Industry

Steering Clear of Antitrust Traps and Cartel Accusations

November 17, 2011

www.mayerbrown.com

Why Energy? Why Now?

- Why is the Energy Industry Scrutinized?
  - Some specialized, concentrated industry sectors
  - The industry benefits from, and often utilizes, lawful, pro-competitive) collaboration to work

- **Why Now – US?**
  - Energy Has Never Received an Antitrust Pass
  - Political considerations?
  - Active FTC and DOJ
  - Success attracts (unwanted) attention

- **Why Now – EU?**
  - European Commission focus on price
  - Motoring groups – antitrust complaint to Commission, May 2011

The Key Risk to Manage: Competitor Contacts

- Competitor dealings with each other are the single greatest focus of U.S. and EU antitrust/competition law
- Why?
  - Antitrust/competition laws are designed to preserve the benefits of competition in a market economy
  - Competition leads to higher output, lower prices, more innovation, better service, greater efficiency
  - If competitors agree to limit competition in any of these areas, consumers and ultimately the U.S. economy suffer

Case Study: Marine Hose Industry

- Marine hose = flexible rubber hose used to transport oil between tankers and storage facilities and buoys.
- Small industry
- In May 2007, eight foreign executives attending an industry conference in the U.S. were arrested

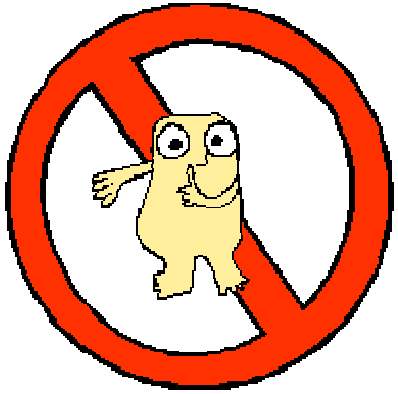
- The DOJ Antitrust Division used its wiretap authority to investigate the conspiracy.
  - First time using this authority
  - Turned in by amnesty applicant
  - Allegedly organized by a consultant
  - Simultaneous with the arrests, searches were conducted in the United States and in Europe.

Case Study: Marine Hose Industry

- Nine executives and four companies have now pleaded guilty
- Over $200 million in criminal penalties and fines
  - $173 million in Europe alone
- Some of the executives went to prison on sentences of up to 30 months
- 3 UK citizens – one was a consultant to the companies involved
  - Plea bargain in US
  - Extradited to UK – guilty pleas
  - Prison sentences – reduced on appeal (30,24 and 20 months)
  - Fines of 2 x $100,000; 1x $75,000)
  - Disqualified as directors for 5-7 years

Why Doesn't the Law Simply Ban All Competitor Contacts?

- Courts and government enforcement agencies recognize that, in a large and diverse economy, competitors may collaborate in ways that benefit society
  - Mergers and joint ventures can increase output or lower costs
  - Trade associations can advance product or worker safety or work for more sensible laws and regulations (but a particular risk area)
  - Buying and selling between competitors
- Where are the lines?
  - Sometimes a matter of common sense
  - Other times more difficult to see



What Is Cartel Conduct?

- Cartel is one way of saying "hard core," the most blatant violation of law with the most serious penalties attached
- Agreements between competitors that involve:

  - Pricing
  - Bid-rigging
  - Not competing
  - Market allocation ("you take east, I'll take west")
  - Customer allocation
  - Not entering a business
  - Limiting production/output

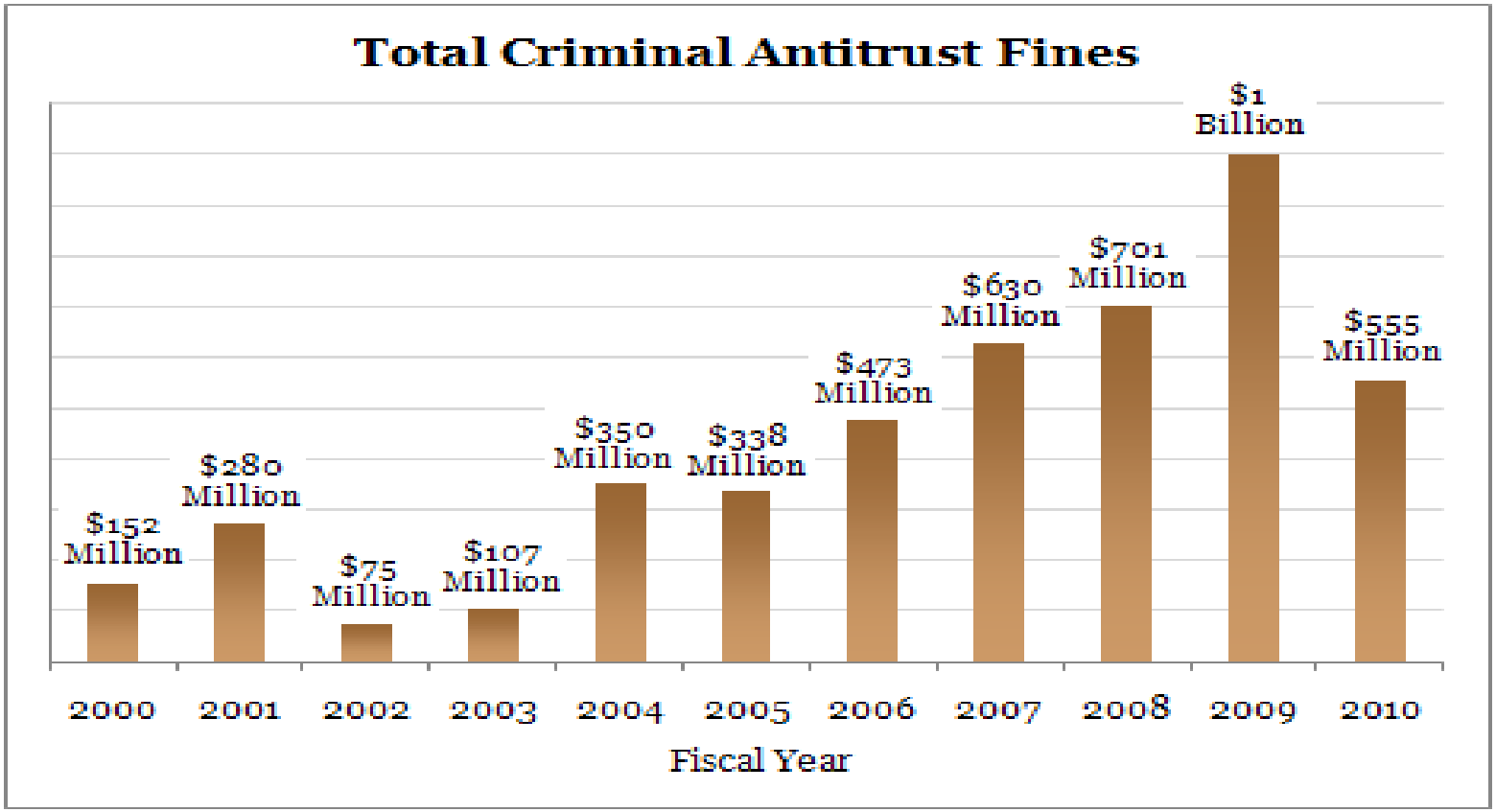
- We are not focusing today on distribution policies, exclusive deals, or unilateral decisions as to what prices to charge customers

Why Do We Care About Cartel Conduct?

- Huge penalties for violations —corporations and individuals
- US:
  - Individuals: up to 10 years in prison and $1M, or double the gain/loss
  - Entities: up to $100M, or double the gain/loss
  - Private Lawsuits: treble damages, plus attorneys' fees and costs
- Outside the U.S.:
  - Cartels are outlawed in most countries
  - Criminal penalties in:
    - Europe: United Kingdom, France, Ireland, Hungary
    - Asia: South Korea, Japan
    - Australia
    - Israel
    - North America: U.S., Canada, Mexico
  - Director disqualification - UK

Why Do We Care About Cartel Conduct?

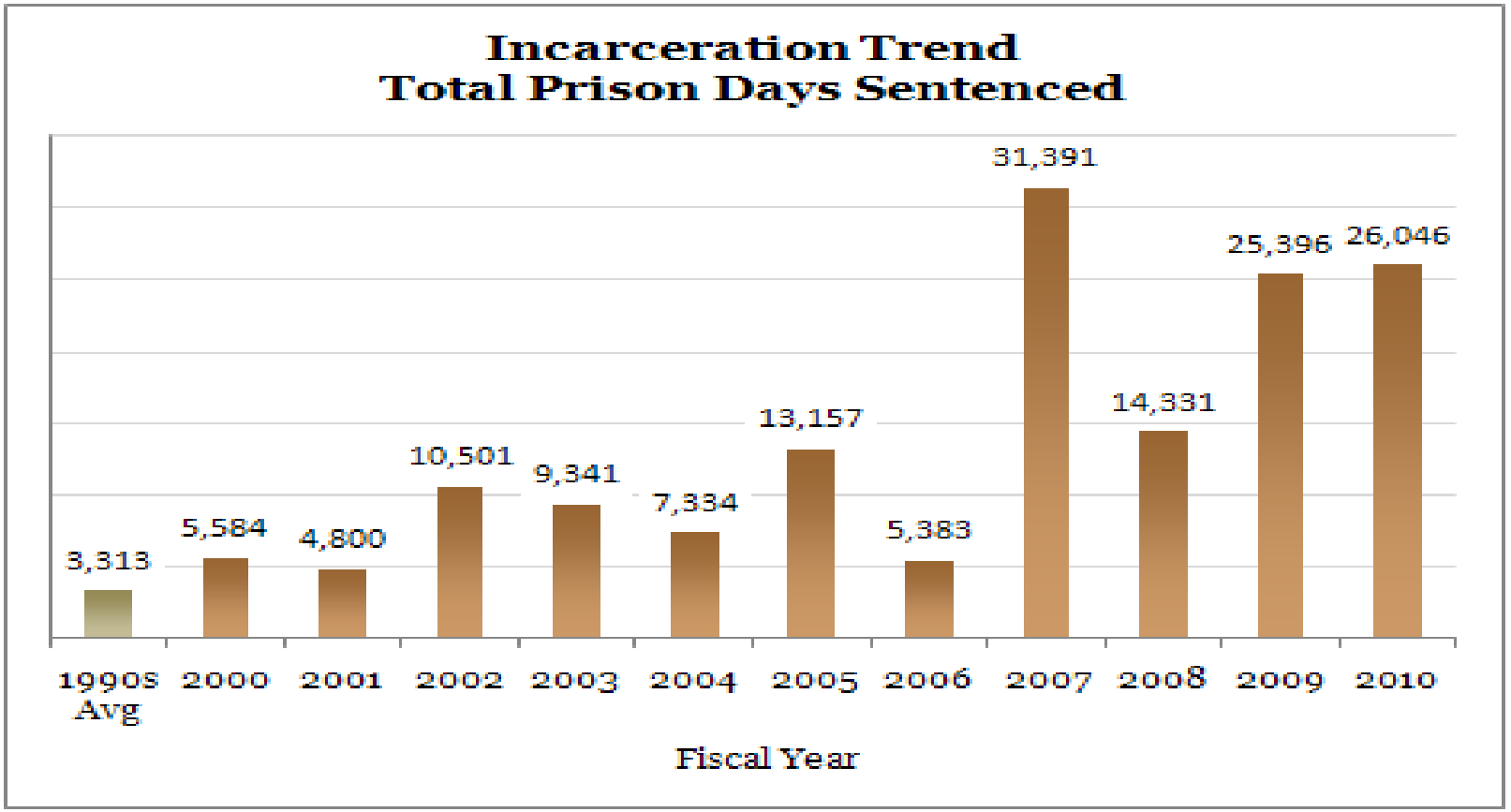
- Criminal fines are increasing in the US



Source: DOJ Antitrust Division Annual Report

Why Do We Care About Cartel Conduct?

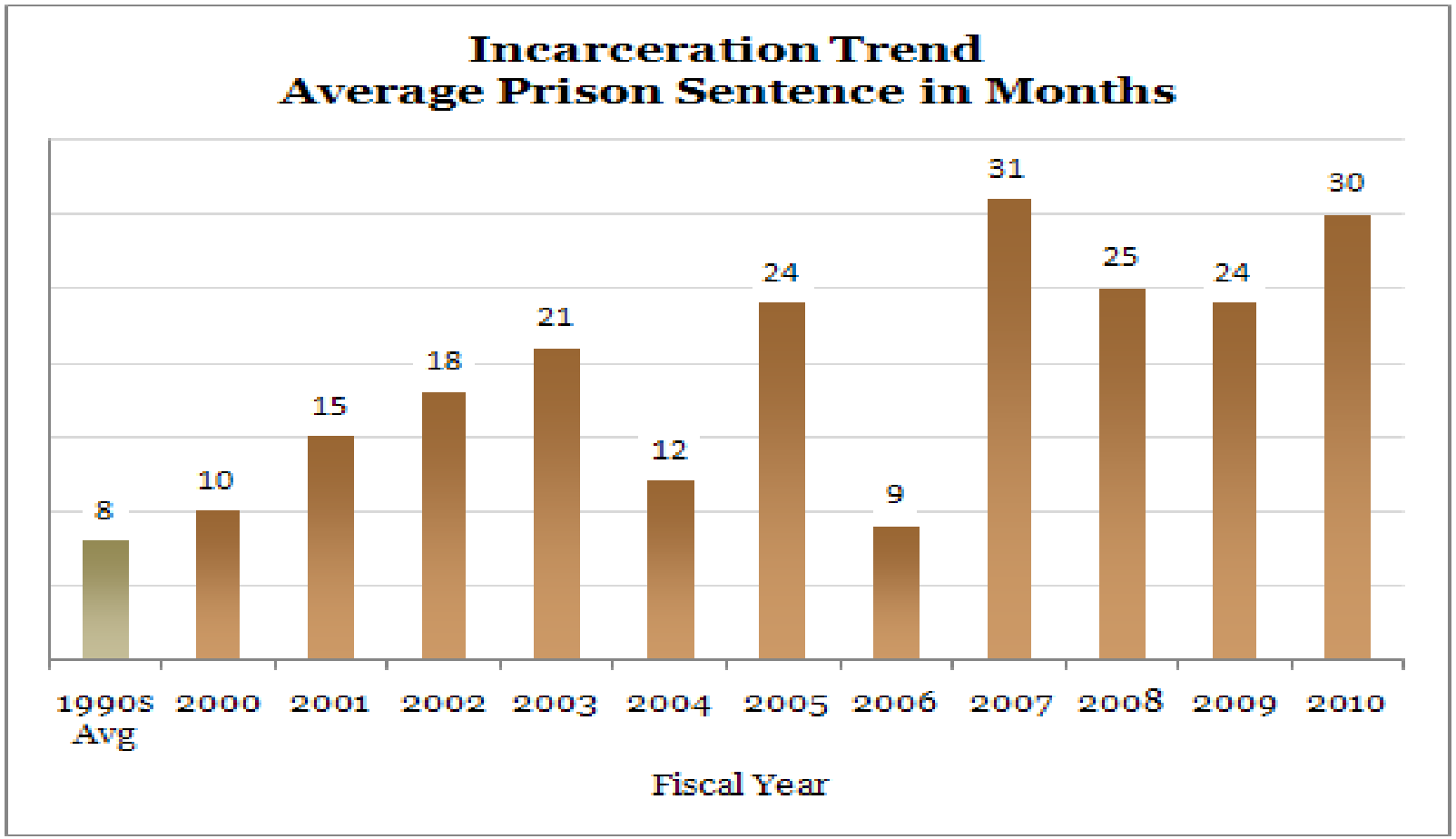
- Total jail time in the US is increasing



Source: DOJ Antitrust Division Annual Report

Why Do We Care About Cartel Conduct?

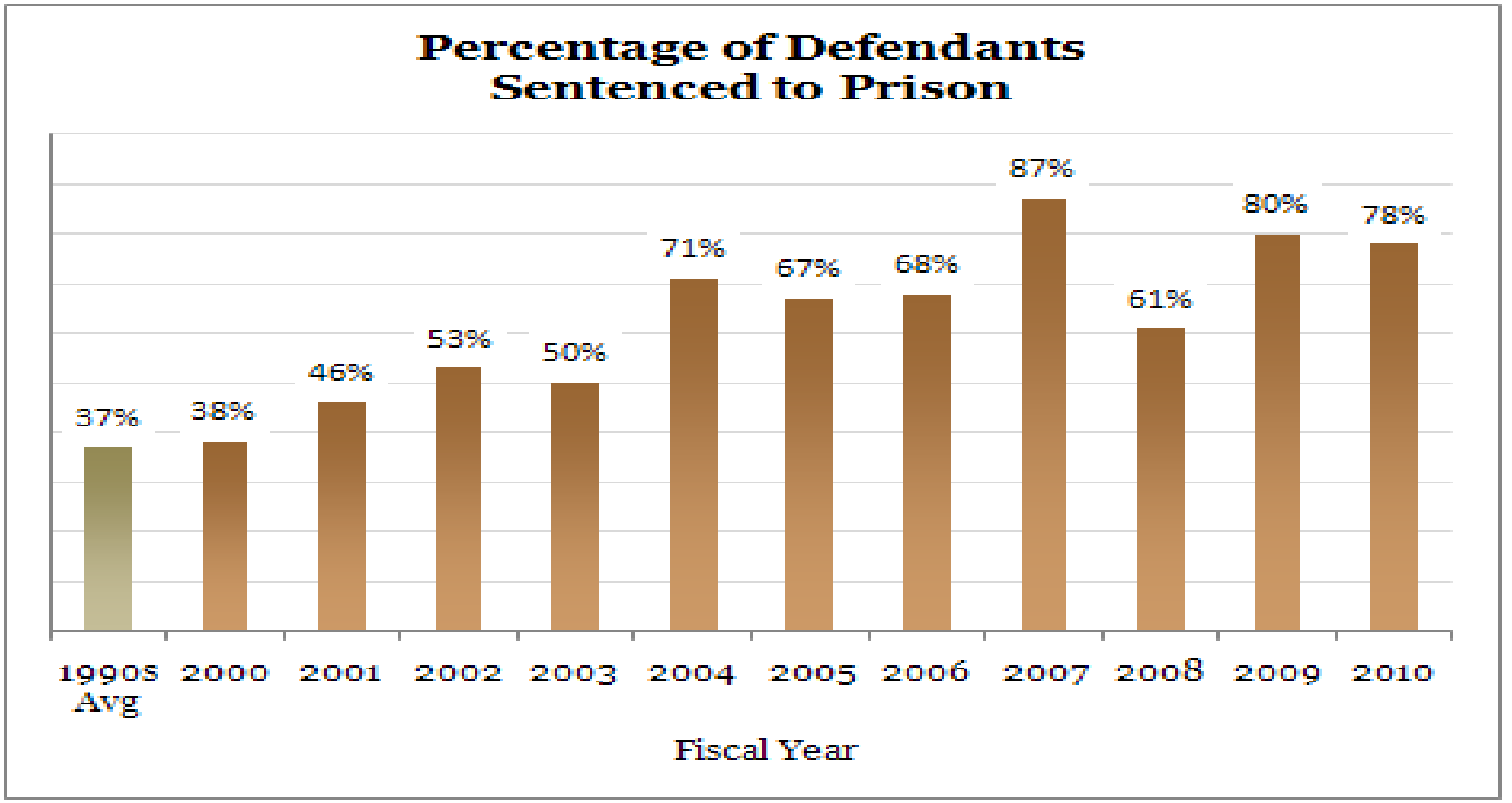
- Average jail time in the US is increasing



Source: DOJ Antitrust Division Annual Report

Why Do We Care About Cartel Conduct?

- Individuals are going to jail in the US more frequently



Source: DOJ Antitrust Division Annual Report

Why Do We Care About Cartel Conduct?

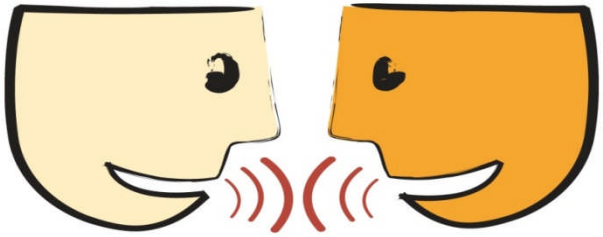
- Criminal penalties: slower start
- Ireland:
  - Heating oil cartel 2006 – 17 individuals and companies convicted
  - Car dealer price fixing
- UK:
  - Provisions in force 2003 - only two prosecutions in 8 years – marine hose (US-led); failed BA prosecutions
  - Abandonment of criminal investigations in truck market
  - Government trying to remove dishonesty element to make conviction easier – resistance
  - Resources improved
- Civil penalties (EU)
  - 2007: EURO 3.313 bn
  - 2008: EURO 2.270 bn
  - 2009: EURO 1,541 bn
  - 2010: EURO 2.869 bn
- Energy cases:
  - Dutch Bitumen, 2006: €266.7m
    - Shell: €108m
  - Spanish Bitumen, 2007: €183m
    - Repsol and Cepsa both over €80m.
    - BP would have been €66m BUT 100% discount
- Level of fines increasing in Eu and Member States
- Reductions on appeal

MAYER·BROWN

Characteristics of Industry Most Susceptible to Cartel Conduct

- Most common attributes
  - Commodity products or interchangeable specialty products
  - Market is highly concentrated (few competitors)
  - Challenging economic climate
  - Head-to-head competition
  - Opportunities for competitors to communicate through cooperative ventures, trade associations, or the like
- Are there sectors of the energy industry that meet this description?

Communicating With Competitors



- Valid communications
  - –arranging business relationships
    - *e.g.*, customer-supplier, technology licensing, acquisitions, divestitures
  - – ongoing joint ventures and teaming arrangements
  - – benchmarking, trade association, and standard setting organizations – most of the time

Communicating With Competitors

Prohibited communications:

- Prices or any terms and conditions of sales to third parties
- Costs of competitive products
- Bid strategy
- Customers or markets
- Marketing, capacity, production activities or plans
- Product research or development plans

Meeting With a Competitor:

- Executives should know the following
  - Need legitimate business reason
  - Prepare written agenda (have Legal Department review)
  - Stick to agenda
  - Attendees: only personnel directly involved in matter
  - No one-on-one meetings without lawyer/legal approval
  - If improper discussions, put refusal to participate on record and leave
  - Report discussions to the Legal Department

Trade Association Meetings

- Stick to non-competitively sensitive information
  - No statements on future competitive actions
  - No discussion of future pricing, proposed or actual bids, share of sales, production capacity, sales quotas, costs, discounts or promotions, terms of sale, identity of customers

- Attendees must make their own, independent business decisions
  - No suggested courses of action for attendees
  - No endorsements of companies or products
  - No threats or retaliation against any company
  - No statements regarding future competitive actions
- No expressions of animosity towards any company, organization, industry
- Assume the whole world is watching
- Control the trade association directors!

Public Announcements: Avoiding The Signaling Problem

- Signaling refers to the ability of companies to reach agreements through public statements
  - "We will support industry efforts to reduce production"
  - "We will support industry price increases"
  - Statements of strictly unilateral intent may cause problems
- May be valid reasons to make public statements about future plans
- Focus on your company, not its competitors
  - Don't discuss how an announcement may impact competitors

Gathering Competitive Information: Avoiding The Conduit Problem

- The law does not permit you to do indirectly what it does not permit you to do directly
- Cannot use customers, suppliers, consultants, other third parties, or trade associations to "broker" or facilitate an unlawful agreement
- ABC/hub-and-spoke cartels
  - UK cases
  - Increase suspicion when competitor communications found in a company's files

Gathering Competitive Information

Avoid potentially troublesome exchanges and appearance issues:

- ***Proper*** Sources
  - Public Documents
  - Suppliers
  - Customers
  - Industry Experts/Consultants

- ***Improper*** Sources
  - Competitors
  - Third parties communicating on behalf of competitor
  - Other conduits for exchange of information
  - Price/bidding verification with competitors

Language and Documents

- Perception is as important as reality and email is subject to misinterpretation
  - What would your mother say?
  - What would the Assistant Attorney General for Antitrust say?
  - How would it look published in the newpapers?
- Why are you emailing your competitor anyway?
- Some tips
  - Write clearly and accurately
  - Don't sensationalize
  - Don't raise legal issues (except to a lawyer)
  - Follow record retention program

- *"Ian ... This is a great initiative that you and Neil have instigated!!! However, a word to the wise, never put anything in writing, it's highly illegal and could bite you right in the arse!!! Suggest you phone Lesley and tell her to trash? Talk to Dave. Mike"*

Language and Documents: "The Problematic Email"

From: Motivated Employee
Sent: Sunday, November 29, 2009 11:54 AM
To: Boss
Subject: Competitor Price Increase

I just learned from Competitor X that it intends to raise prices 10 percent. They will be anticipating our response. We should talk about whether we want to support this effort.

-- Motivated

Language and Documents: Describing Competitors

- To eliminate misunderstandings, certain words should be avoided when writing or discussing the competition:
  - Destroy
  - Monopolize
  - Dominate
  - Crush
  - Eliminate
  - Squash
  - Conquer
  - Dominate

How Investigations Get Started: Leniency & Amnesty Plus

- Leniency/amnesty Applicants Dominate Investigations
  - Ringleaders can seek amnesty all over the world
- Guilty Pleas generate new investigations
  - Parties offering pleas have incentives to point the finger at others in the industry
  - Required part of plea and in an effort to please the government
  - Competitors have every incentive to try to trap you
- Other Common Sources for antitrust Investigations
  - Disgruntled employees – incentives for whistleblowers in eg UK
  - Searching the web
  - Customer complaints
  - Documents that come to light in other investigations (i.e., merger review)

What Do You Do If Government Comes Knocking in the US?

- Call an expert
- What to tell executives
  - Know your rights, including a right to a lawyer and a right to choose not to participate

- Do not try to convince the government officials of your innocence or lack of liability
- Do not give permission to search Company premises (however, the government may have authorization to search certain areas)

What Do You Do If European Commission Comes Knocking?

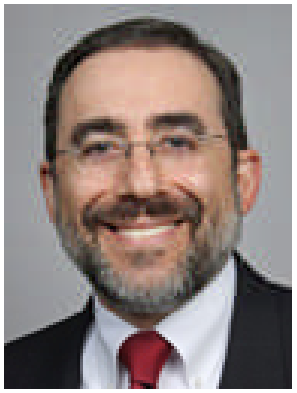
- Be prepared with a dawn raid system
- Call an expert
- What to tell executives

- Investigation is of the company, not individuals (criminal prosecutions are national only)
- Co-operate – penalties if not
- No option but to permit search of premises, interview
- Inspectors may
  - Review all electronic and hard copy documents, including personal diaries recording work appointments, texts etc
  - Image hard drives
  - Search employees' homes

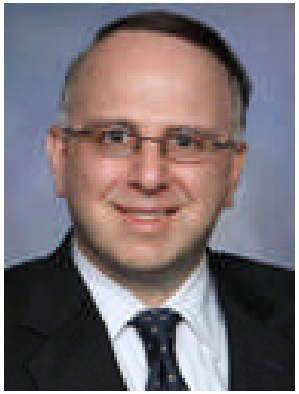
Compliance Training

- Focus on compliance
  - Reactive or pro-active?
  - Avoid risks before they arise
  - Better value over long term
- Relevant Areas
  - Mergers
  - Antitrust – especially competitor contact
    - Dos and don'ts regarding anti-competitive behaviour
    - Workshops with relevant staff
  - Distribution

Please feel free to contact us: We're here to help



Scott P. Perlman
Partner
sperlman@mayerbrown.com
Washington DC
Ph: +1 202 263 3201
Fax: +1 202 263 5201



John Roberti
Partner
jroberti@mayerbrown.com
Washington DC
Ph: +1 202 263 3428
Fax: +1 202 762 4228

Gillian Sproul
Partner
gsproul@mayerbrown.com
London
Ph: +44 20 3130 3313
Fax: +44 20 3130 8951