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**RECORD-SETTING ANTITRUST LAW ENFORCEMENT:
STIFFER FINES AND LONGER SENTENCES CALL FOR RIGOROUS COMPLIANCE PROGRAMS**

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I. INTRODUCTION

The Antitrust Division of the U.S. Department of Justice (“Antitrust Division”) believes that “[h]olding individuals accountable for their actions is the surest way to deter executives from choosing to collude rather than compete for business,”² and promises to aggressively combat anticompetitive conduct that affects U.S. markets. Indeed, 2013 was another record-setting year for the Antitrust Division. In 2013, the Antitrust Division continued to pursue its largest antitrust investigation, imposed and collected harsher criminal fines, sought stiffer criminal penalties, and obtained the longest criminal sentence ever imposed on an individual for an antitrust violation. In 2013, the Antitrust Division charged or prosecuted 20 corporations (up from 16 in 2012) and 52 individuals (down from 63 in 2012), and matched its 2012 record of \$1.1 billion in criminal fines.

For corporations, these record setting penalties demonstrate that antitrust compliance programs are imperative more now than ever before. Compliance programs provide companies the ability to prevent antitrust violations by teaching employees how to comply with the antitrust laws. If problems already exist, a compliance program may help a company uncover and address those problems. If the issues uncovered are serious enough, a company may have the

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² Press Release, U.S. Dep’t of Justice, G.S. Electech, Inc. Executive Indicted For Role in Bid Rigging and Price Fixing on Automobile Parts Installed in U.S. Cars (Sept. 11, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/300657.pdf.

opportunity to apply for acceptance into the Antitrust Division's Leniency Program, and avoid antitrust fines and prison sentences for its employees and executives.³ Additionally, while the Antitrust Division historically has not credited a compliance program when an antitrust violation already has occurred, as discussed below, the U.S. Sentencing Guidelines state that compliance programs may be taken into account as a mitigating factor potentially reducing the level of a fine.⁴ Moreover, perhaps recent messages from other parts of the Department of Justice regarding credit for compliance will cause the Antitrust Division to reconsider its position on this issue. Regardless, in light of the Antitrust Division's aggressive enforcement efforts, the benefits of a robust compliance program have never been more starkly evident.

II. INVESTIGATIONS AND ENFORCEMENT

A. Antitrust Division's Statistics

The Antitrust Division's enforcement statistics for criminal fines and prison sentences continue to trend upward. Total criminal antitrust fines increased from, for example, \$359 million in 2004 to \$1.1 billion in the Antitrust Division's 2013 fiscal year, which runs from October 1 to September 30. In 2013, the Antitrust Division charged or imposed criminal fines on 20 corporations: 14 in the automotive parts investigation; two in the LIBOR investigation; and four in the real estate and municipal tax lien auctions investigation. The Antitrust Division

³ See U.S. Dep't of Justice, Model Corporate Conditional Leniency Letter (Nov. 19, 2008), *available at* <http://www.justice.gov/atr/public/criminal/239524.pdf>; U.S. Dep't of Justice, Model Individual Conditional Leniency Letter (Nov. 19, 2008), *available at* <http://www.justice.gov/atr/public/criminal/239526.pdf>; see also Scott D. Hammond & Belinda A. Barnett, *Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters*, U.S. DEP'T OF JUSTICE (Nov. 19, 2008), *available at* <http://www.justice.gov/atr/public/criminal/239583.pdf>.

⁴ See United States Sentencing Guidelines ("U.S.S.G.") §8C2.5(f).

also collected more than \$1.1 billion in criminal penalties, matching its 2012 record for criminal antitrust fines.⁵

The average prison sentence for antitrust violations has increased from eight months in the 1990s to 25 months in the last three years.⁶ In 2013, the Antitrust Division charged or prosecuted a total of 52 individuals in antitrust investigations:⁷ 14 in the automotive parts investigation; three in the LIBOR investigation; one in the TFT-LCD panels investigation; two in the coastal water freight transportation investigation; 28 in the real estate and municipal tax liens investigation; three in the municipal bonds investigation; and one in the Environmental Protection Agency (“EPA”) Superfund sites investigation. Notably, in December 2013, a court imposed a five-year prison sentence -- the longest sentence in U.S. history for an antitrust violation. This upward trend in criminal fines and prison sentences may continue in 2014.

B. International Investigations

“Cracking down on international price-fixing cartels that target U.S. businesses and consumers has been, and will continue to be, among the top priorities for the Antitrust Division.”⁸ The Antitrust Division’s vigorous investigation of anticompetitive conduct in the automotive parts industry is evidence of the Antitrust Division’s commitment to this priority.

⁵ See U.S. Dep’t of Justice, Criminal Enforcement Fine and Jail Charts Through Fiscal Year 2013, *available at* <http://www.justice.gov/atr/public/criminal/264101.html>.

⁶ *Id.*; *Antitrust Division 2013 Criminal Enforcement Update*, U.S. DEP’T OF JUSTICE (Spring 2013), *available at* <http://www.justice.gov/atr/public/division-update/2013/criminal-program.html>.

⁷ These numbers do not include the investigations for fraud schemes related to the Ryan Air, and a Florida property management company wire-fraud schemes. See Press Release, U.S. Dep’t of Justice, Former Contractor of a Florida Property Management Company Sentenced to Serve Time in Prison for Wire Fraud (Dec. 16, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/302351.pdf; Press Release, U.S. Dep’t of Justice, Former Airline Executive Sentenced to Prison for Schemes to Defraud Illinois-Based Ryan International Airlines (Sept. 12, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/index.pdf.

⁸ Press Release, U.S. Dep’t of Justice, Two Executives Agree to Plead Guilty For Price Fixing and Bid Rigging on Auto Parts Installed in U.S. Cars (May 21, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/297030.pdf.

The Antitrust Division also has pursued LIBOR manipulation and allegations of TFT-LCD price-fixing, both international investigations that potentially affect U.S. business consumers.

i. Automotive Parts Investigation

According to the Antitrust Division, its current investigation into price-fixing, bid-rigging and other anticompetitive conduct in the automotive parts industry is the largest criminal investigation ever pursued, both in terms of scope and commerce affected.⁹ The Antitrust Division states that its automotive parts investigation spans “international price-fixing conspiracies [that] affected more than \$5 billion in automobile parts sold to U.S. car manufacturers, and more than 25 million cars purchased by American consumers.”¹⁰ The investigation began in 2010 and first became public in 2011, when the Antitrust Division announced a \$200 million corporate fine and prison sentences for several executives of Furukawa Electric Co. Ltd., a Japanese manufacturer of wire harnesses.¹¹ Prior to 2013, nine companies and 12 executives pled guilty and were fined and/or sentenced for their participation in price-fixing and bid-rigging in the automotive parts industry, and agreed to pay over \$790 million in criminal fines.¹² Two other executives who agreed to plead guilty and serve time in prison were awaiting sentencing.¹³

⁹ Jonathan Randles, *U.S. Fines Japan Auto Parts Makers \$740 million for Price-Fixing*, LAW 360, available at <http://www.law360.com/articles/475972>.

¹⁰ Press Release, U.S. Dep’t of Justice, *Nine Automobile Parts Manufacturers and Two Executives Agree to Plead Guilty to Fixing Prices on Automobile Parts Sold to U.S. Car Manufacturers and Installed in U.S. Cars* (Sept. 26, 2013), available at http://www.justice.gov/atr/public/press_releases/2013/300969.pdf.

¹¹ Press Release, U.S. Dep’t of Justice, *Furukawa Electric Co. Ltd. and Three Executives Agree to Plead Guilty to Automobile Parts Price-Fixing and Bid-Rigging Conspiracy* (Sept. 29, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/275503.pdf.

¹² Press Release, U.S. Dep’t of Justice, *Ohio Automobile Parts Supplier Executive Pleads Guilty in Price-Fixing and Bid-Rigging Conspiracy* (Nov. 16, 2012), available at http://www.justice.gov/atr/public/press_releases/2012/288861.pdf.

¹³ *Id.*

In 2013, the Antitrust Division significantly expanded its investigation to include additional auto parts.¹⁴ The expanded investigation covered new companies and yielded additional criminal fines. Fourteen corporations were charged and agreed to pay approximately \$1 billion in criminal fines in 2013.¹⁵ Some of the implicated automotive parts giants and the fines imposed include Hitachi Automotive Systems Ltd (\$195 million); Mitsuba Corporation (\$135 million); Toyo Tire & Rubber Co. Ltd. (\$120 million); Jtekt Corporation (\$103.27 million); NSK Ltd. (\$68.2 million); and Panasonic Corporation (\$45.8 million).¹⁶ Over the entire course of the investigation, 23 corporations have been charged and have agreed to pay over \$1.8 billion in criminal fines.¹⁷

In addition to the corporate fines assessed in 2013, 14 individuals pled or agreed to plead guilty for their roles in the alleged automobile parts price-fixing and bid-rigging scheme.¹⁸ The

¹⁴ Press Release, Nine Automobile Parts Manufacturers, *supra* note 10; Press Release, U.S. Dep't of Justice, Panasonic and Its Subsidiary Sanyo Agree to Plead Guilty in Separate Price-Fixing Conspiracies Involving Automotive Parts and Battery Cells (July 18, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/299495.pdf.

¹⁵ *See* Press Release, U.S. Dep't of Justice, Stanley Electric Co. Ltd. Agrees to Plead Guilty to Price Fixing on Automobile Parts Installed in U.S. Cars (Nov. 27, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/301898.pdf; Press Release, U.S. Dep't of Justice, Toyo Tire & Rubber Co. Ltd. Agrees to Plead Guilty to Price Fixing On Automobile Parts Installed In U.S. Cars (Nov. 26, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/301891.pdf; Press Release, Nine Automobile Parts Manufacturers, *supra* note 10; Press Release, Panasonic and Its Subsidiary, *supra* note 14; Press Release, U.S. Dep't of Justice, Diamond Electric Mfg. Co. Ltd and an Autoliv Inc. Executive Agree to Plead Guilty to Price Fixing on Automobile Parts (July 16, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/299423.pdf; *see also* Press Release, Ohio Automobile Parts Supplier, *supra* note 12.

¹⁶ *See* Press Release, Toyo Tire & Rubber Co. Ltd. Agrees to Plead Guilty, *supra* note 15; Press Release, Nine Automobile Parts Manufacturers, *supra* note 10; Press Release, Panasonic and Its Subsidiary, *supra* note 14.

¹⁷ Press Release, Stanley Electric Co. Ltd., *supra* note 15.

¹⁸ *See id.*; Press Release, U.S. Dep't of Justice, Three Takata Corp. Executives Agree to Plead Guilty to Participating in Global Seatbelt Price Fixing Conspiracy (Nov. 21, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/301807.pdf; Press Release, Ohio Automobile Parts Supplier, *supra* note 12; Press Release, U.S. Dep't of Justice, Panasonic Executive Indicted for Role in Fixing Prices on Automobile Parts Sold to Toyota to be Installed in U.S. Cars (Sept. 24, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/300914.pdf; Press Release, Nine Automobile Parts Manufacturers, *supra* note 10; Press Release, Two Fujikura Ltd. Executives Indicted for Roles in Fixing Prices on Automobile Parts Sold to Subaru to be Installed in U.S. Cars (Sept. 19, 2013), *available at*

executives implicated include former vice presidents, directors, and general managers of marketing divisions.¹⁹ Prison sentences for the sentenced executives range from 12 months and one day to 19 months.²⁰ Including pre-2013 numbers, a total of 26 individuals have been charged for their roles in the alleged automotive parts price-fixing conspiracy.

ii. London Interbank Offered Rate (“LIBOR”)²¹

The investigation into whether financial institutions manipulated the leading benchmark interest rates used in financial products and transactions around the world continued in 2013. The allegations are that defendants falsely inflated or deflated their rates to favor their trading positions, or to appear more creditworthy than they were.²² As many as 20 financial institutions are being investigated by ten authorities around the world.²³ Regulators indicate that as of the second half of 2009, interest rate contracts valued at more than \$450 trillion were outstanding, and presumably affected by this conspiracy.²⁴

In 2012, following multiple criminal settlements with Barclays Bank for \$160 million²⁵ and UBS AG for \$1.2 billion (\$500 million to the Antitrust Division and \$700 million to the

http://www.justice.gov/atr/public/press_releases/2013/300824.pdf; Press Release, Diamond Electric Mfg. Co. Ltd, *supra* note 15; Press Release, Two Executives Agree to Plead Guilty, *supra* note 8.

¹⁹ See Press Release, U.S. Dep’t of Justice, Two Fujikura Ltd. Executives Indicted, *supra* note 18; Press Release, Diamond Electric Mfg. Co. Ltd, *supra* note 15.

²⁰ See Press Release, Three Takata Corp. Executives Agree to Plead, *supra* note 18.

²¹ As used herein, LIBOR loosely refers to four different benchmark interest rates—Euribor and LIBOR for the U.S. dollar, the pound sterling, and the yen.

²² Press Release, U.S. Dep’t of Justice, RBS Securities Japan Limited Agrees to Plead Guilty in Connection With Long-Running Manipulation of LIBOR Benchmark Interest Rates (Feb. 6, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/292421.pdf.

²³ Caroline Binham and Alex Barker, Euribor Fines Reveal Vital Pieces to Scandal’s Puzzle, FINANCIAL TIMES, *available at* <http://www.ft.com/cms/s/0/3546e878-5cff-11e3-81bd-00144feabdc0.html>.

²⁴ Press Release, U.S. Dep’t of Justice, Rabobank Admits Wrongdoing in LIBOR Investigation, Agrees to Pay \$325 Million Criminal Penalty (Oct. 29, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/301368.pdf.

²⁵ Press Release, U.S. Dep’t of Justice, Barclays Bank PLC Admits Misconduct Related to Submissions for the London Interbank Offered Rate and the Euro Interbank Offered Rate and Agrees to Pay \$160 Million

CFTC),²⁶ the Antitrust Division promised it would diligently investigate the LIBOR manipulation facts.²⁷ In 2013, two companies pled or agreed to plead guilty and three individuals were charged for their involvement in this conspiracy.

First, in February 2013, the Antitrust Division entered into its first ever Deferred Prosecution Agreement (“DPA”) and imposed its first fine in the LIBOR investigation.²⁸ The Antitrust Division entered the DPA with the Royal Bank of Scotland, plc, (“RBS plc”) and its wholly-owned subsidiary, RBS Securities Japan Limited (“RBS Japan” collectively with RBS plc, “RBS”). Under the DPA, RBS agreed to pay a fine of \$150 million (\$100 million fine for RBS plc, and \$50 million fine for RBS Japan) and admit its role in the conspiracy to manipulate benchmark interest rates. Additionally, RBS Japan agreed to plead guilty to felony wire fraud. On April 12, 2013, RBS Japan pled guilty and on January 6, 2014, was sentenced and ordered to pay its portion of the fine.²⁹ Together with fines imposed by the CFTC (\$325 million) and by the UK Financial Conduct Authority (“UK FCA”) (\$137 million), RBS’s total criminal penalties in this LIBOR manipulation conspiracy are approximately \$612 million.

Second, in October 2013, Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. (“Rabobank”) entered into a DPA with the Antitrust Division and agreed to pay a \$325 million fine.³⁰ This penalty was the second-largest in the Antitrust Division’s LIBOR investigation. Together with fines imposed by the CFTC (\$475 million), by the UK FCA (\$170 million), and

Penalty (June 27, 2012), *available at* <http://www.justice.gov/opa/pr/2012/June/12-crm-815.html>. The Commodity Futures Trading Commission (“CFTC”) also fined Barclays Bank \$200 million. *Id.*

²⁶ See *Press Release*, U.S. Dep’t of Justice, UBS Securities Japan Co. Ltd. to Plead Guilty to Felony Wire Fraud For Long-Running Manipulation of LIBOR Benchmark Interest Rates (Dec. 19, 2012), *available at* http://www.justice.gov/atr/public/press_releases/2012/290478.pdf.

²⁷ *Id.*

²⁸ *Press Release*, RBS Securities Japan Limited Agrees, *supra* note 22.

²⁹ *Press Release*, U.S. Dep’t of Justice, RBS Securities Japan Limited Sentenced for Manipulation of Yen LIBOR (Jan. 6, 2014), *available at* http://www.justice.gov/atr/public/press_releases/2014/302785.pdf.

³⁰ *Press Release*, Rabobank Admits Wrongdoing in LIBOR Investigation, *supra* note 24.

by the Dutch Openbaar Ministerie (\$96 million), Rabobank's total criminal penalties in this investigation are more than \$1 billion. The Antitrust Division advised other financial institutions to be attentive because the investigation is "far from over."³¹

With respect to implicated individuals, in September 2013, three former employees of the London-based brokerage firm, ICAP, were charged with allegedly conspiring to manipulate the LIBOR.³² The former ICAP employees allegedly conspired to manipulate the rates to benefit their clients and encouraged derivatives traders to submit misleading LIBOR information.

Antitrust enforcement of alleged LIBOR manipulation also is very active in the international realm. In December 2013, the European Commission fined eight financial institutions a total of €1.71 billion (\$2.3 billion).³³ Authorities around the world imposed a total of \$4.07 billion in fines on financial institutions related to the LIBOR investigation in 2013 alone.³⁴ The investigation likely will continue into 2014.

iii. Thin Film Transistor-Liquid Crystal Display ("TFT-LCD") Panels

Some of the largest settlements and convictions in 2012 came from the prosecution of antitrust violations in the TFT-LCD panels industry. Particularly, the jury trial of AU Optronics

³¹ *Id.*

³² Press Release, U.S. Dep't of Justice, ICAP Brokers Face Felony Charges for Alleged Long-Running Manipulation of LIBOR Interest Rates (Sept. 25, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/301029.pdf.

³³ Evan Weinberger, *EU Fines RBS, Citi, 6 Other Banks \$2.3B For Rate-Rigging*, LAW 360, Dec. 4, 2013, *available at* <http://www.law360.com/articles/493137>.

³⁴ *See id.*; Chad Bray & Jack Ewing, *Europe Sets Big Fines in Settling Libor Case*, NEW YORK TIMES, Dec. 4, 2013, *available at* <http://dealbook.nytimes.com/2013/12/04/e-u-imposes-1-7-billion-euros-in-fines-over-rate-rigging-scandal/>; Gaspard Sebag & Aoife White, *Deutsche Bank to RBS Fined by EU for Rate Rigging*, BLOOMBERG NEWS, Dec. 4, 2013, *available at* <http://www.bloomberg.com/news/2013-12-04/deutsche-bank-to-rbs-fined-by-eu-for-rate-rigging.html>; Foo Yun Chee, *EU Commission Fines banks \$2.3 billion for Benchmark Rigging*, REUTERS, Dec. 4, 2013, *available at* <http://www.reuters.com/article/2013/12/04/us-eu-commission-idUSBRE9B309Q20131204>; Mark Scott & Julia Werdigier, *U.S. and British Officials Fine ICAP in Libor Case*, NEW YORK TIMES, Sept. 25, 2013, *available at* <http://dealbook.nytimes.com/2013/09/25/icap-to-pay-87-million-fine-in-libor-fixing-case>.

Corporation of Taiwan (“AU Optronics”) was one of the most notable antitrust enforcement actions of 2012, resulting in two three-year prison sentences and one of the highest fines to an individual corporation in Antitrust Division history (\$500 million).³⁵

Although the LCD investigation is in its final stages, repercussions of this investigation continued to be felt in 2013. In April 2013, following a jury trial, Shiu Lung Leung, an executive of AU Optronics was sentenced to serve 24 months in prison and to pay a \$50,000 criminal fine.³⁶ With this sentence and fine, the Antitrust Division’s TFT-LCD investigation has resulted in criminal fines totaling \$1.39 billion, as well as convictions of 13 executives, with pending charges against seven individuals.³⁷

In October 2013, following a three-week trial, Borlong “Richard” Bai, AU Optronics former Director of Sales for Notebook LCD panels, was acquitted of charges that he conspired to set prices of TFT-LCD panels.³⁸ Bai’s acquittal is the third in this investigation.³⁹

Also in October 2013, the U.S. Court of Appeals for the Ninth Circuit heard oral arguments on the appeals of AU Optronics, its U.S. subsidiary, and two former AU Optronics’ executives.⁴⁰ The defendants argued they did not violate the Sherman Act because the LCD conspiracy occurred entirely in Asia. As of the writing of this paper, a decision on the appeal is pending.

³⁵ Press Release, U.S. Dep’t of Justice, Taiwan-Based AU Optronics Corporation Sentenced to Pay \$500 Million Criminal Fine for Role in LCD Price-Fixing Conspiracy (Sept. 20, 2012), *available at* http://www.justice.gov/atr/public/press_releases/2012/287189.pdf.

³⁶ Press Release, U.S. Dep’t of Justice, AU Optronics Corporation Executive Sentenced for Role in LCD Price-Fixing Conspiracy (April 29, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/296336.pdf.

³⁷ *Id.*

³⁸ *United States v. Bai*, No. 3:09-CR-110 (N.D. Cal. Oct. 10, 2013), ECF No. 1259.

³⁹ Melissa Lipman, *AUO Exec Acquitted In Price-Fixing Case*, LAW 360, Oct. 11, 2013, *available at* <http://www.law360.com/articles/479977/auo-exec-acquitted-in-price-fixing-case>.

⁴⁰ Melissa Lipman, *Competition Cases to Watch in 2014*, LAW 360, Jan. 1, 2014, *available at* <http://www.law360.com/competition/articles/492911>.

B. Domestic Investigation and Enforcement

In addition to continued international enforcement, the Antitrust Division also has been very active in domestic enforcement. Indeed, 2013 domestic enforcement brought the highest prison sentence ever imposed for violation of the antitrust laws.

i. Coastal Water Freight Transportation

In 2013, the Antitrust Division prosecuted two executives of coastal water freight companies for their role in anticompetitive conduct in the Puerto Rico trade lane. Prior to 2013, three carriers on the Puerto Rico trade lane pled guilty and paid fines totaling \$46 million. Also prior to 2013, the longest prison sentence for an antitrust violation had been imposed in the coastal water freight transportation investigation. Peter Baci, a former Sea Star Lines LLC (“Sea Star”) executive, was sentenced to a four year prison sentence in 2009.⁴¹ After Baci’s sentence, an individual in a different case also was sentenced to four years for an antitrust violation.⁴²

In 2013, the Antitrust Division obtained an even longer sentence. The Antitrust Division prosecuted Frank Peake, former president of Sea Star.⁴³ Following a two-week jury trial in early 2013, Peake was found guilty. On December 6, 2013, Peake was sentenced to the

⁴¹ Press Release, U.S. Dep’t of Justice, Former Shipping Executive Sentenced to 48 Months in Jail for His Role in Antitrust Conspiracy (Jan. 30, 2009), *available at* http://www.justice.gov/atr/public/press_releases/2009/242030.pdf.

⁴² See *United States v. Vandebrake*, 771 F. Supp. 2d 961, 1012 (N.D. Iowa 2011) *aff’d*, 679 F.3d 1030 (8th Cir. 2012).

⁴³ U.S. Dep’t of Justice, Division Update Spring 2013, *Division Coastal Shipping Team Wins at Trial*, *available at* <http://www.justice.gov/atr/public/division-update/2013/coastal-shipping.html>.

longest criminal sentence ever imposed in an antitrust case – a five-year term of imprisonment.⁴⁴ Peake also was ordered to pay a \$25,000 criminal fine.⁴⁵

Additionally, in March 2013, Thomas Farmer, the former vice president of price and yield management for Crowley Liner Services, was indicted.⁴⁶ His trial is scheduled in Puerto Rico for May 2014.

ii. **Real Estate and Municipal Tax Lien Auctions**

In 2013, the Antitrust Division continued its investigation and prosecution of bid rigging and fraud at real estate auctions across the United States. In distinct geographic markets, the co-conspirators allegedly agreed not to bid against each other but instead to designate a winning bidder for properties at public real estate foreclosure auctions. These properties allegedly were then awarded to the highest bidding coconspirator in a second private auction. This practice was alleged to reduce the proceeds that would otherwise be used to pay off the mortgage or other debt attached to the foreclosed property. Prior to 2013, 53 individuals and two companies had pled or agreed to plead guilty to participating in real estate and municipal tax lien auctions conspiracies.

In 2013, 28 additional individuals and four companies pled or agreed to plead guilty for participating in the alleged conspiracies. In Alabama, a total of nine individuals and two companies have pled guilty for their participation in bid-rigging or other fraudulent schemes in

⁴⁴ *Id.*

⁴⁵ Press Release, U.S. Dep't of Justice, Former Sea Star Line President Sentenced to Serve Five Years in Prison for Role in Price-Fixing Conspiracy Involving Coastal Freight Services Between the Continental United States and Puerto Rico (Dec. 6, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/302027.pdf.

⁴⁶ *Id.*

the Alabama real estate foreclosure auction industry.⁴⁷ In Northern California, 40 individuals have pled or agreed to plead guilty for their roles in conspiracies to rig bids or commit mail fraud at real estate foreclosure auctions.⁴⁸ In Eastern California, 11 individuals have pled guilty for conspiring with others to rig bids or commit mail fraud when purchasing properties at real estate foreclosure auctions.⁴⁹ In New Jersey, 20 individuals and three entities have been charged and eleven of those individuals have pled guilty to bid rigging or fraud.⁵⁰

On October 22, 2013, the Antitrust Division filed the first charges relating to anticompetitive conduct in the Georgia real estate foreclosure auction industry.⁵¹ On December 30, 2013, the Antitrust Division stated it had uncovered similar schemes around the country and asserted that it “remains committed to eliminating anticompetitive practices at foreclosure auctions.”⁵² As such, it is likely the investigations will continue in 2014.

iii. Municipal Bonds

The Antitrust Division continued its prosecution and investigation of bid rigging and frauds related to bidding for contracts for the investment of municipal bond proceeds and other municipal finance contracts. A total of 20 individuals have been charged in the municipal bonds

⁴⁷ Press Release, U.S. Dep’t of Justice, Former Alabama Real Estate Investor Pleads Guilty to Making False Statement in Connection With Real Estate Foreclosure Auction Investigation (Sept. 16, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/300771.pdf.

⁴⁸ Press Release, U.S. Dep’t of Justice, Two Northern California Real Estate Investors Agree to Plead Guilty to Bid Rigging at Public Real Estate Foreclosure Auctions (Dec. 17, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/302400.pdf.

⁴⁹ Press Release, U.S. Dep’t of Justice, Eastern California Real Estate Investor Pleads Guilty to Bid Rigging and Fraud at Public Real Estate Foreclosure Auctions (Dec. 30, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/302678.pdf.

⁵⁰ Press Release, U.S. Dep’t of Justice, Six Investors Indicted for Their Roles in Bid Rigging Scheme at Municipal Tax Lien Auctions in New Jersey (Nov. 19, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/301767.pdf.

⁵¹ Press Release, U.S. Dep’t of Justice, Georgia Real Estate Investment Company and Owner Plead Guilty to Conspiracies to Rig Bids and Commit Mail Fraud for the Purchase of Real Estate at Public Foreclosure Auctions (Oct. 22, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/301269.pdf.

⁵² *Id.*; Press Release, Eastern California Real Estate Investor Pleads Guilty, *supra* note 49.

investigation, and 19 have pled guilty or been convicted; one individual is currently awaiting trial.⁵³ One corporation, Rubin/Chambers, Dunhill Insurance Services Inc., has also pled guilty for its role in the municipal bonds conspiracy.⁵⁴ Since the inception of this investigation, implicated firms have agreed to pay almost \$745 million in criminal penalties, restitution, and disgorgement.⁵⁵

iv. Environment Protection Agency Superfund

In 2013, the Antitrust Division prosecuted a former project manager, Gordon D. McDonald, for his “central role” in bid-rigging, kickback, and fraud conspiracies related to two EPA Superfund sites in New Jersey.⁵⁶ As part of the alleged conspiracies, McDonald and his coconspirators agreed to rig bids and allocate subcontracts for wastewater treatment supplies and services to one of the Superfund sites.⁵⁷ Following a two-week jury trial, McDonald was found guilty of 10 counts of the indictment, including bid rigging in violation of antitrust laws.⁵⁸ McDonald’s sentencing is scheduled for 2014.⁵⁹ Since the Antitrust Division began its investigation into the EPA Superfund sites conspiracies, a total of eight individuals and three companies have pled guilty to participating in the alleged conspiracies.⁶⁰

⁵³ Press Release, U.S. Dep’t of Justice, Three Former UBS Executives Sentenced to Serve Time in Prison for Frauds Involving Contracts Related to the Investment of Municipal Bond Proceeds (July 24, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/299604.pdf.

⁵⁴ *Id.*

⁵⁵ *Antitrust Division 2013 Criminal Enforcement Update*, U.S. DEP’T OF JUSTICE, *supra* note 6.

⁵⁶ Press Release, U.S. Dep’t of Justice, Former Project Manager Convicted for Role in Conspiracy Schemes Involving Two EPA Superfund Sites in New Jersey (Sept. 30, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/301155.pdf;

⁵⁷ *United States v. McDonald*, No. 2:09-CR-656-JAG (D.N.J. Aug. 31, 2009), ECF No. 1.

⁵⁸ Press Release, Former Project Manager Convicted, *supra* note 56; *United States v. McDonald*, No. 2:09-CR-656-JAG (D.N.J. Sept. 30, 2013), ECF No. 155.

⁵⁹ Press Release, Former Project Manager Convicted, *supra* note 56.

⁶⁰ *Id.*

III. RIGOROUS COMPLIANCE PROGRAMS – PREVENTION, DETECTION, AND MAYBE SOMEDAY...MITIGATION

These record-setting fines and prison sentences demonstrate that now, more than ever before, antitrust compliance should be a top priority for corporations and executives. Any type of robust compliance program – consisting of current and constantly updated policies, regular training, and periodic audits – has three main goals. An effective compliance program should: prevent violations, help a company detect, correct and potentially self-report violations, and allow a company that is facing a violation to demonstrate to regulators that it has been committed to compliance.

A. Preventing Antitrust Problems

The most important goal of an antitrust compliance program is to prevent antitrust problems completely. Teaching employees – specifically those employees who are involved in senior leadership, pricing, sales, marketing, trade association activities, as well as any employees who interact with competitors – how to comply with the antitrust laws can give them the tools to avoid mistakes. Moreover, pointing out the harsh consequences of such violations may deter an employee who might otherwise think about dancing close to the line. Further, ensuring that senior leadership of a company understand violations of antitrust laws, as well as the severe consequences, can help maximize the top-level commitment to compliance necessary to help a compliance program obtain maximum effectiveness.

B. Uncovering Antitrust Problems

Even if all antitrust problems are not avoided, an antitrust compliance program may uncover issues that need to be addressed. Non-criminal antitrust violations can be remedied to avoid civil liability for the company. More importantly, if a company's compliance program uncovers a criminal antitrust violation, the company may consider taking advantage of the

Antitrust Division’s Leniency Program. Under the Antitrust Division’s Leniency Program, a company that is the first to self-report a criminal antitrust violation, and which meets certain requirements, may obtain full immunity from prosecution for itself and its executives and employees.⁶¹ Because the Leniency Program only allows amnesty for the first company to self-report, there is an incentive to find and self-report criminal antitrust violations as soon as they can be discovered. Often, it is shortly after antitrust training, that a company learns of antitrust violations that need to be addressed.

C. Compliance Programs as a Mitigating Factor

Even if a serious antitrust problem is not avoided, and is not reported early enough to obtain amnesty, a compliance program someday may be a mitigating factor in the negotiation of antitrust plea agreements. Under Section 8C2.5(f) of the U.S. Sentencing Guidelines, a company that has an effective compliance program potentially may obtain a reduction in its fine if it promptly reports a problem and no high-level executive participated in the conduct.⁶²

While the Antitrust Division consistently has taken the position that a compliance program will not be credited if an antitrust problem occurred because the program is inherently “ineffective”, outside the Antitrust Division, the Department of Justice has recently sent a strong positive message regarding crediting compliance programs even in the face of a problem. In the 2012 Morgan Stanley/Garth Peterson Foreign Corrupt Practices Act (“FCPA”) case, the

⁶¹ See U.S. Dep’t of Justice, Model Corporate Conditional Leniency Letter (Nov. 19, 2008), *available at* <http://www.justice.gov/atr/public/criminal/239524.pdf>; U.S. Dep’t of Justice, Model Individual Conditional Leniency Letter (Nov. 19, 2008), *available at* <http://www.justice.gov/atr/public/criminal/239526.pdf>; see also Scott D. Hammond & Belinda A. Barnett, *Frequently Asked Questions Regarding the Antitrust Division’s Leniency Program and Model Leniency Letters*, U.S. DEP’T OF JUSTICE (Nov. 19, 2008), *available at* <http://www.justice.gov/atr/public/criminal/239583.pdf>.

⁶² See U.S.S.G. §8C2.5(f)(3)(B)-(C); U.S. Sentencing Commission, Chapter Eight Fine Primer: Determining the Appropriate Fine Under the Organizational Guidelines (March 2013), *available at* http://www.ussc.gov/Legal/Primers/Primer_Organizational_Fines.pdf (noting the involvement of high-level executives is not an absolute bar to the fine reduction).

Department of Justice declined to prosecute Morgan Stanley for a serious FCPA violation because of Morgan Stanley's compliance program. The Department of Justice cited the following reasons for its decision:⁶³

- Morgan Stanley constructed and maintained a system of internal controls (*i.e.*, a compliance program) which provided reasonable assurances that its employees were not bribing government officials;
- Morgan Stanley voluntarily disclosed the incident; and
- Morgan Stanley fully cooperated with the government's investigation.

The government praised and highlighted the following aspects of Morgan Stanley's compliance program:

1. Auditing

- Morgan Stanley's compliance personnel regularly monitored transactions, and randomly audited employees, transactions and business units.

2. Training

- Morgan Stanley frequently provided live and web-based training to its employees on its internal policies, the FCPA and other anti-corruption laws (*e.g.*, between 2002 and 2008, Morgan Stanley provided anti-corruption training to various groups of employees 54 times).

3. Written Compliance Materials

- Morgan Stanley updated its policies on a regular basis to address regulatory developments and specific risks.

⁶³ Press Release, U.S. Dep't of Justice, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (April 25, 2012), *available at* <http://www.justice.gov/opa/pr/2012/April/12-crm-534.html>.

4. Compliance Reminders and Certifications

- Morgan Stanley provided regular FCPA-compliance reminders (*e.g.*, Peterson received at least 35 FCPA reminders between 2002 and 2008).
- Morgan Stanley required its employees to certify their compliance with the FCPA on multiple occasions and to certify their adherence to its Code of Conduct on an annual basis. Morgan Stanley kept those certifications within the permanent employment record of each employee.

5. Due Diligence and Approval Process

- Morgan Stanley conducted extensive due diligence on all new business partners and required its employees to disclose their outside business interests on an annual basis.
- Morgan Stanley imposed a stringent approval process on payments to business partners.⁶⁴

The Department of Justice's decision not to prosecute Morgan Stanley gained a great deal of media attention. Perhaps with this precedent, where a robust compliance program was credited even in the face of a violation, the Antitrust Division will begin reconsidering its position not to consider compliance programs as a basis for reducing fines. Regardless of whether the Antitrust Division reviews and changes its position, the other benefits of a robust compliance program – coupled with the incentive to avoid the penalties discussed above – make compliance programs worth the investment.

⁶⁴ *Id.*

IV. CONCLUSION

The Antitrust Division's record fines and prison sentences in 2013 should put corporations and their employees on notice that antitrust compliance programs are an essential part of doing business. Undoubtedly, the Antitrust Division will continue to vigorously investigate antitrust violations, and history shows that the resulting criminal fines and prison sentences are likely to continue their upward trajectory. It is therefore imperative for corporations to utilize comprehensive antitrust compliance programs to avoid serious antitrust consequences for themselves and their employees.

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