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TECHNOLOGY MAY-RATHON

NEW ANTITRUST HR GUIDANCE: IMPACT FOR TECH COMPANIES

Mark Krotoski, Stacey Anne Mahoney, Sujal Shah, Sabine Smith-Vidal

May 10, 2017

Our Presenters

Stacey Anne Mahoney's practice includes all aspects of antitrust law. In her antitrust litigation practice, she represents clients as plaintiffs and defendants in federal and state courts throughout the US, in cases involving restraints of trade, monopolization, tying, exclusive dealing, price discrimination, false advertising, unfair competition, and related business torts. In her merger practice, Stacey develops and implements domestic and international merger advocacy strategies. She also advises on distribution and pricing issues, as well as joint ventures and other competitor collaborations.

Sujal J. Shah's practice focuses on antitrust litigation and counseling, complex commercial litigation, and appellate matters. He specializes in complex antitrust matters, including class actions, and has represented clients in price-fixing, bid-rigging, tying, exclusive dealing, and monopolization cases. He also has experience representing clients seeking merger approval before the Department of Justice.

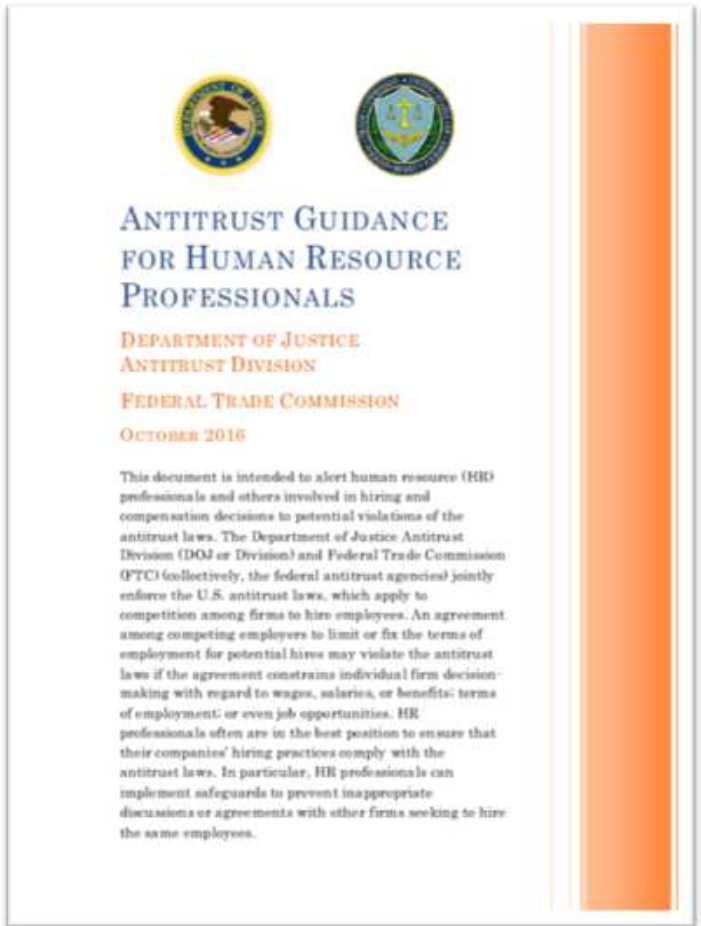
Mark L. Krotoski, former Assistant Chief of the National Criminal Enforcement Section in the DOJ's Antitrust Division, supervising international criminal antitrust cartel investigations and successfully leading trial teams in prosecuting antitrust and obstruction of justice cases involving corporations and executives; in addition to other DOJ leadership positions, he has nearly 20 years of experience as a federal prosecutor.

Sabine Smith-Vidal advises French and international companies on labor and employment issues associated with cross-border transactions, mergers, acquisitions, and corporate restructurings. Working closely with her clients, Sabine assists with the establishment of pension plans, employee savings plans, and social plans. She advises corporations on multijurisdictional employment issues, including trade union law, outsourcing, and individual and collective dismissals.

OVERVIEW OF FTC/DOJ GUIDANCE

Antitrust Guidance for HR Professionals

- Jointly issued by the Federal Trade Commission (FTC) and the United States Department of Justice (DOJ) in October 2016
  - "[I]ntended to alert human resource (HR) professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws."
  - Addresses conduct that can result in criminal antitrust or civil liability
  - Provides notice for the first time that the DOJ will pursue certain employment-related agreements criminally, instead of just civilly, as it has historically done
- www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf, at 1, 2, 4



ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS

DEPARTMENT OF JUSTICE
ANTITRUST DIVISION

FEDERAL TRADE COMMISSION

OCTOBER 2016

This document is intended to alert human resource (HR) professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws. The Department of Justice Antitrust Division (DOJ or Division) and Federal Trade Commission (FTC) (collectively, the federal antitrust agencies) jointly enforce the U.S. antitrust laws, which apply to competition among firms to hire employees. An agreement among competing employers to limit or fix the terms of employment for potential hires may violate the antitrust laws if the agreement constrains individual firm decision-making with regard to wages, salaries, or benefits; terms of employment; or even job opportunities. HR professionals often are in the best position to ensure that their companies' hiring practices comply with the antitrust laws. In particular, HR professionals can implement safeguards to prevent inappropriate discussions or agreements with other firms seeking to hire the same employees.

Historic Backdrop For New Guidance

Federal Antitrust Probe Targets Tech Giants, Sources Say

Source: Apple And Google Agreed Not To Poach Workers

DoJ Confirms And Settles Apple/Google Anti-Poaching Deal. Apple And Adobe Had One Too?!

Apple-Google $415 Million No-Poaching Accord Wins Approval

Historic Backdrop For New Guidance (continued)

- Result of regulatory investigations and enforcements in which regulators found "naked agreements" that reduced the need for the conspiring companies to compete vigorously for employees, *see, e.g.*:
  - *U.S. v. Az. Hosp. & Healthcare Ass'n,* www.justice.gov/atr/case-document/file/487106/download (final judgment)
  - *U.S. v. eBay*, www.justice.gov/atr/case-document/file/494626/download (final judgment)
  - *U.S. v. Lucasfilm Ltd.*, www.justice.gov/atr/case-document/file/501626/download (final judgment)
  - *U.S. v. Abobe Sys., Inc., et al.*, www.justice.gov/atr/case-document/file/483426/download (final judgment)
  - *In the Matter of Good Guys, Inc.*, www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-115/ftc_volume_decision_115_january_-_december_1992pages_670-773.pdf (consent settlement)
  - *FTC v. Council of Fashion Designers of Am.*, *www.ftc.gov/news-events/press-releases/1995/06/council-fashion-designers-america* (press release announcing settlement)

Antitrust Guidance for HR Professionals
Key Points

- Companies and HR Professionals (and others who hire employees or set compensation) will face increased FTC/DOJ scrutiny if they agree with competitors:
  - Not to solicit or hire each other's employees, OR
  - To "fix" salaries, or other aspects of compensation, whether at a specific level or within a range
- **"Naked agreements"** are ***per se* illegal** and will be enforced **criminally** by DOJ
- Agreements that are part of a larger collaborative business relationship between companies are tested under a **"rule of reason"** and subject to civil liability

Antitrust Guidance for HR Professionals
Key Points (continued)

- **"Competitors"**: "compete to hire or retain employees ... regardless of whether the firms make the same products or compete to provide the same services"
  - *E.g.*, *U.S. v. Adobe Sys., Inc. et al.*

- **"Compensation"**: Broadly defined and includes anything that is a measure of value in exchange for work:
  - Compensation mix (salary vs. variable)
  - Health care benefits
  - Fringe benefits (*e.g.*, gym membership, flex work)

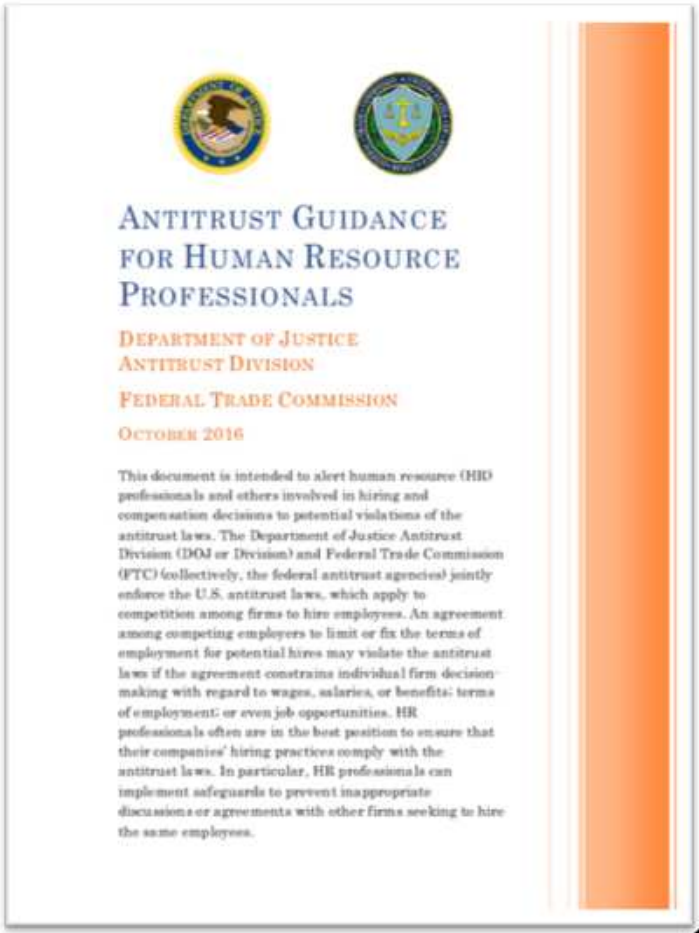
Antitrust Guidance for HR Professionals
Key Points (continued)

- Agreements may be written or unwritten, formal or informal, express or implicit
  - Often established through circumstantial evidence, including information sharing
    - Agreements may be found even if information is shared through a third party (*e.g.*, trade association)
- One-way communications, *i.e.*, invitations to collude, can violate the law (FTC Act § 5):
  - "[M]erely inviting a competitor to enter into an illegal agreement may be an antitrust violation – even if the invitation does not result in an agreement to fix wages or . . . limit competition."
  - "Be aware that private communications among competitors may violate [the law] if (1) the explicit or implicit communication to a competitor (2) sets forth proposed terms of coordination (3) which, if accepted, would constitute a per se antitrust violation."

US DOJ CRIMINALIZES WAGE-FIXING & NO-POACHING AGREEMENTS

Criminalizing Wage-Fixing & No-Poaching Agreements

- **DOJ and FTC Joint Announcement**
  - **DOJ** for the first time will **criminally investigate and prosecute employers**, including individual employees, who enter into certain "naked" wage-fixing and no-poaching agreements
- ***Per se* unlawful**
  - Naked wage-fixing
    - Agreement "about employee salary or other terms of compensation, either at a specific level or within a range"
  - No-poaching agreements
    - Agreement "to refuse to solicit or hire that other company's employees"



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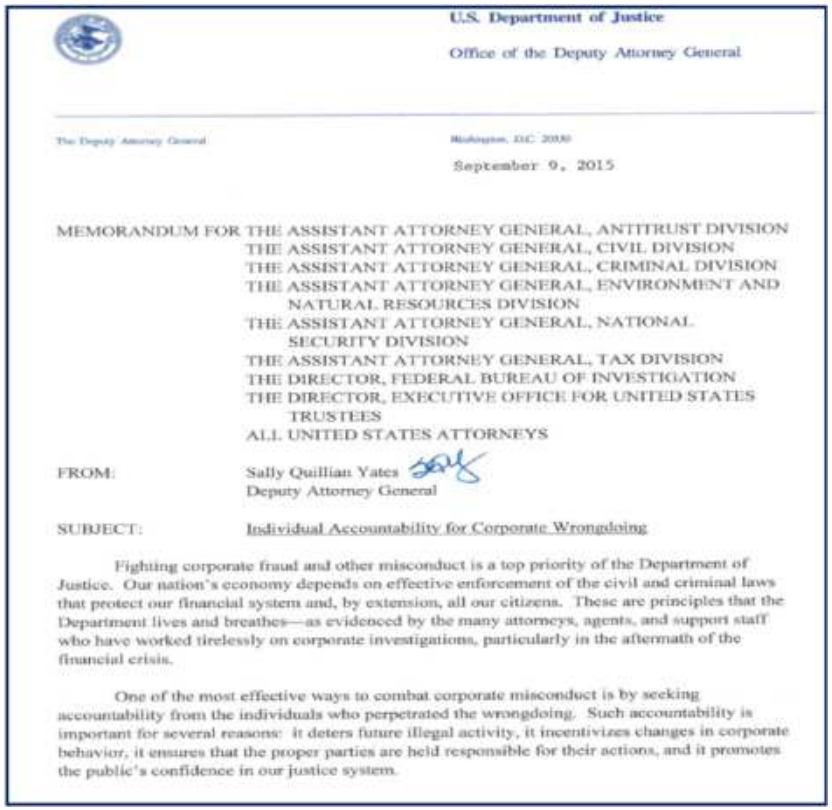
Individual Accountability

- **Deputy Attorney General Sally Yates Memo**
  - Parallels other recent DOJ efforts to focus on individual accountability in both criminal and civil cases



U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

September 9, 2015

MEMORANDUM FOR THE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION
THE ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION
THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION
THE ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION
THE ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION
THE ASSISTANT ATTORNEY GENERAL, TAX DIVISION
THE DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
THE DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES
ALL UNITED STATES ATTORNEYS

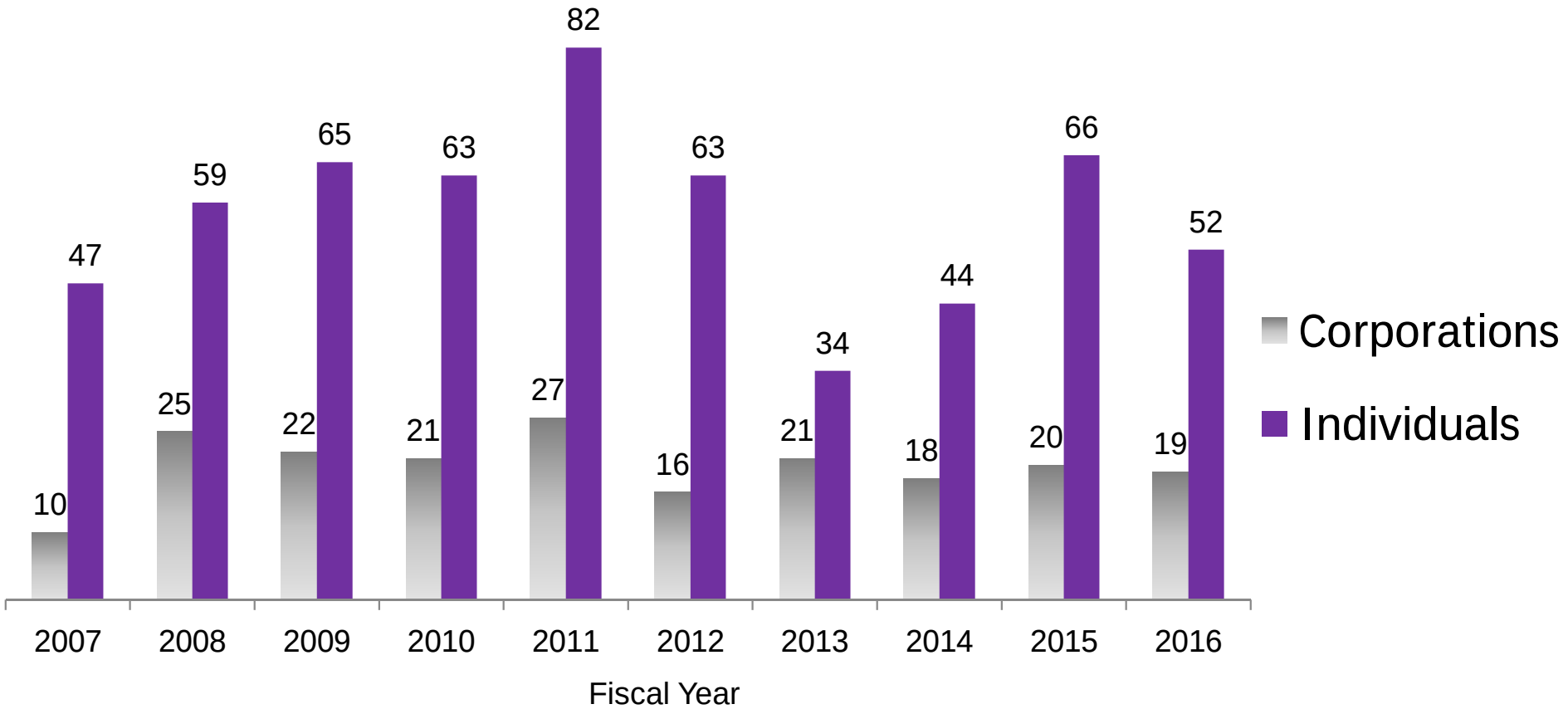
FROM: Sally Quillian Yates
Deputy Attorney General

SUBJECT: Individual Accountability for Corporate Wrongdoing

Fighting corporate fraud and other misconduct is a top priority of the Department of Justice. Our nation's economy depends on effective enforcement of the civil and criminal laws that protect our financial system and, by extension, all our citizens. These are principles that the Department lives and breathes—as evidenced by the many attorneys, agents, and support staff who have worked tirelessly on corporate investigations, particularly in the aftermath of the financial crisis.

One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system.

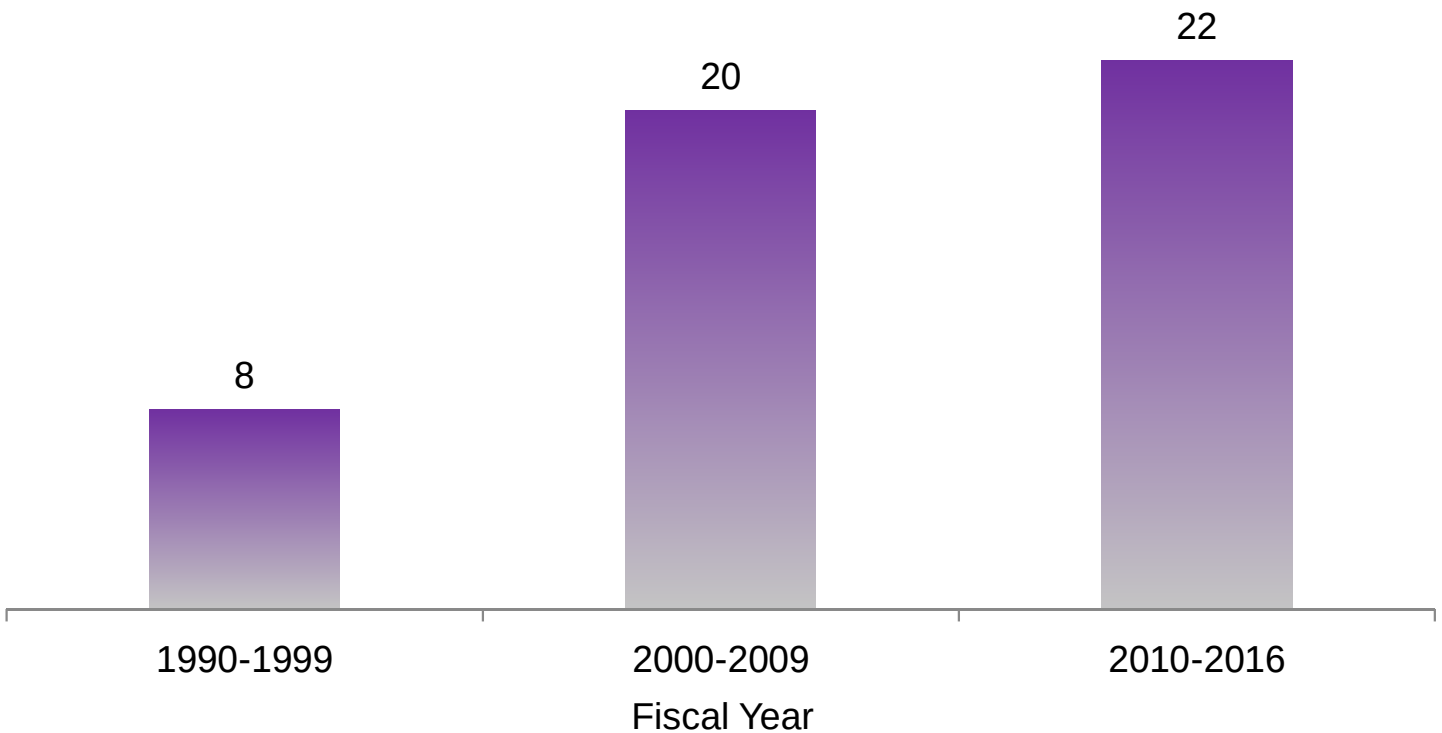
Corporations & Individuals Charged



Note: All totals reflected on this page are for the DOJ fiscal years at issue, whereas the fines and penalties we summarize elsewhere in the report are on a calendar-year basis.

Source: https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts

Average Prison Sentence in Months



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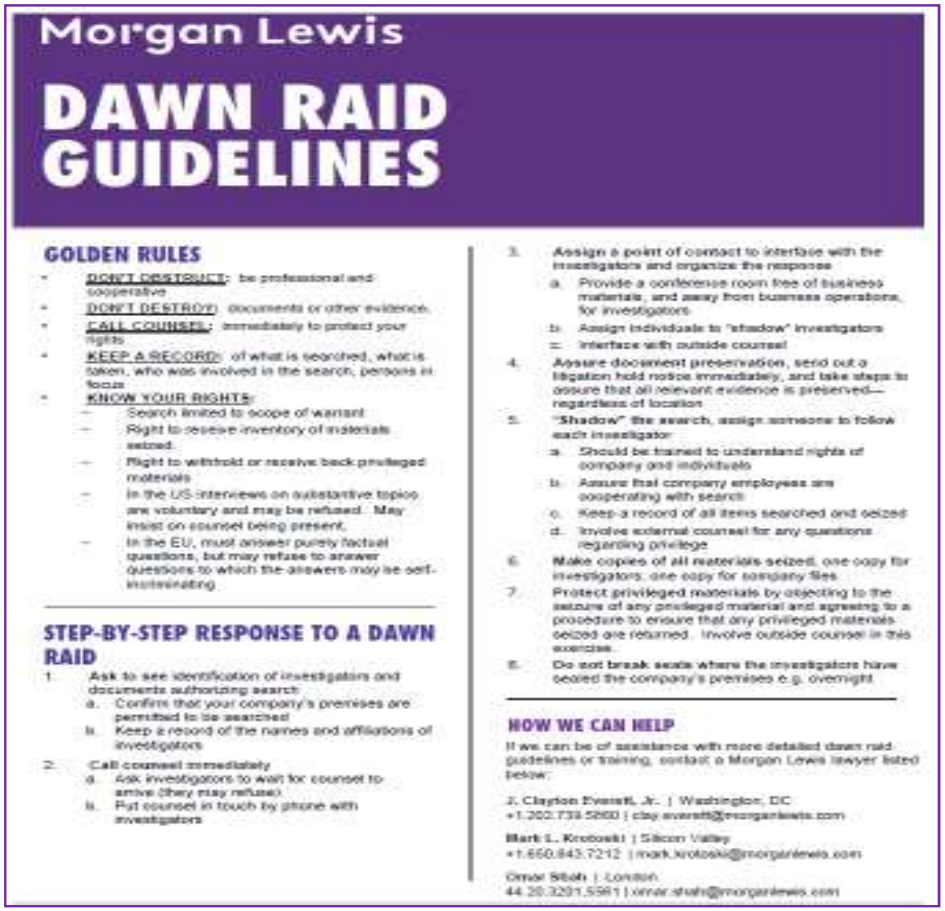
Dawn Raids

- "Dawn raids" involve the legal authority to search and seize documents, electronic media, and other tangible materials as part of a cartel investigation
- Dawn raids often involve the execution of search warrants and occur during the early morning hours
- In recent international investigations, dawn raids are coordinated among global enforcers and are executed at or around the same time



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DAWN RAID GUIDELINES

GOLDEN RULES

- DON'T OBSTRUCT: be professional and cooperative
- DON'T DESTROY: documents or other evidence.
- CALL COUNSEL: immediately to protect your rights
- KEEP A RECORD: of what is searched, what is taken, who was involved in the search, persons in focus
- KNOW YOUR RIGHTS:
  - Search limited to scope of warrant
  - Right to receive inventory of materials seized
  - Right to withhold or receive back privileged materials
  - In the US interviews on substantive topics are voluntary and may be refused. May insist on counsel being present.
  - In the EU, must answer purely factual questions, but may refuse to answer questions to which the answers may be self-incriminating

STEP-BY-STEP RESPONSE TO A DAWN RAID

1. Ask to see identification of investigators and documents authorizing search
   a. Confirm that your company's premises are permitted to be searched
   b. Keep a record of the names and affiliations of investigators
2. Call counsel immediately
   a. Ask investigators to wait for counsel to arrive (they may refuse)
   b. Put counsel in touch by phone with investigators
3. Assign a point of contact to interface with the investigators and organize the response
   a. Provide a conference room free of business materials, and away from business operations, for investigators
   b. Assign individuals to "shadow" investigators
   c. Interface with outside counsel
4. Assure document preservation, send out a litigation hold notice immediately, and take steps to assure that all relevant evidence is preserved—regardless of location
5. "Shadow" the search, assign someone to follow each investigator
   a. Should be trained to understand rights of company and individuals
   b. Assure that company employees are cooperating with search
   c. Keep a record of all items searched and seized
   d. Involve external counsel for any questions regarding privilege
6. Make copies of all materials seized, one copy for investigators, one copy for company files
7. Protect privileged materials by objecting to the seizure of any privileged material and agreeing to a procedure to ensure that any privileged materials seized are returned. Involve outside counsel in this exercise.
8. Do not break seals where the investigators have sealed the company's premises e.g. overnight

HOW WE CAN HELP

If we can be of assistance with more detailed dawn raid guidelines or training, contact a Morgan Lewis lawyer listed below:

J. Clayton Everett, Jr. | Washington, DC
+1.202.739.5860 | clay.everett@morganlewis.com

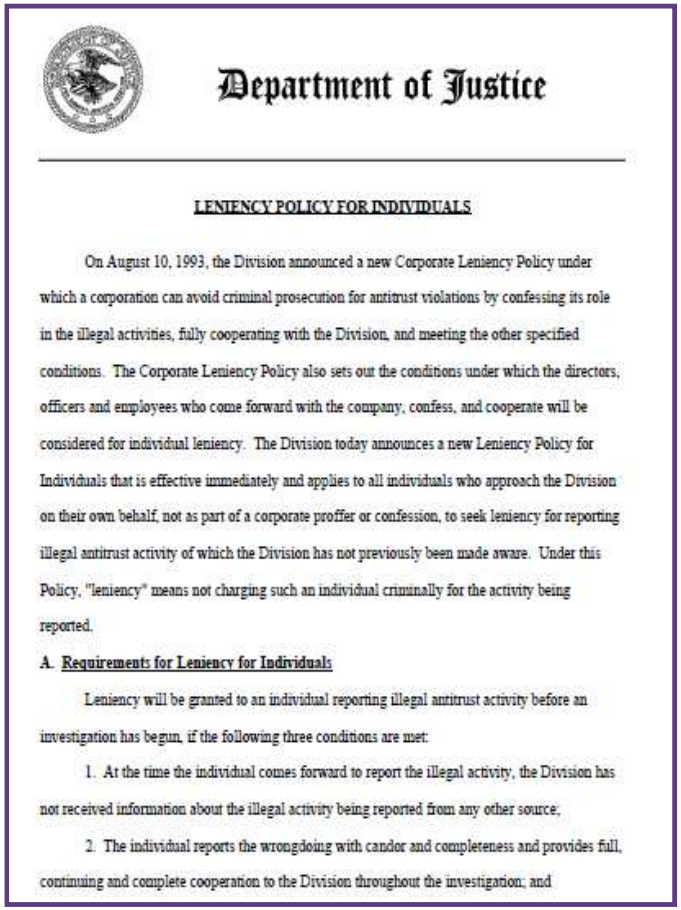
Mark L. Krotoski | Silicon Valley
+1.650.843.7212 | mark.krotoski@morganlewis.com

Omar Shah | London
44.20.3201.5581 | omar.shah@morganlewis.com

HOW THE LENIENCY PROGRAM WORKS

Leniency Program

- **Leniency Program**
  - 1978: Established
  - 1993: Corporate Leniency Program Modified
  - 1994: Individual Leniency Program
- **Benefits**
  - No criminal convictions for company, executives or employees
  - No criminal fine but must make restitution
  - No prison
  - De-treble civil damages
    - Under ACPERA, single damages and no joint & several liability



Department of Justice

LENIENCY POLICY FOR INDIVIDUALS

On August 10, 1993, the Division announced a new Corporate Leniency Policy under which a corporation can avoid criminal prosecution for antitrust violations by confessing its role in the illegal activities, fully cooperating with the Division, and meeting the other specified conditions. The Corporate Leniency Policy also sets out the conditions under which the directors, officers and employees who come forward with the company, confess, and cooperate will be considered for individual leniency. The Division today announces a new Leniency Policy for Individuals that is effective immediately and applies to all individuals who approach the Division on their own behalf, not as part of a corporate proffer or confession, to seek leniency for reporting illegal antitrust activity of which the Division has not previously been made aware. Under this Policy, "leniency" means not charging such an individual criminally for the activity being reported.

A. Requirements for Leniency for Individuals

Leniency will be granted to an individual reporting illegal antitrust activity before an investigation has begun, if the following three conditions are met:

1. At the time the individual comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;

2. The individual reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; and

Jurisdictions with Cartel Immunity/Leniency Programs

- Albania
- Algeria
- Australia
- Austria
- Belgium
- Bosnia & Herzegovina
- Botswana
- Brazil
- Bulgaria
- Canada
- Chile
- China
- Colombia
- Croatia
- Czech Republic
- Cyprus
- Denmark
- Egypt
- El Salvador
- Estonia
- Finland
- France
- Germany
- Greece
- Hong Kong
- Hungary
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- Pakistan
- Peru
- Poland
- Portugal
- Romania
- Russia
- Singapore
- Slovak Republic
- Slovenia
- South Africa
- South Korea
- Spain
- Sweden
- Switzerland
- Swaziland
- Taiwan
- Tunisia
- Turkey
- Ukraine
- United Kingdom
- United States
- Zambia

65 countries offer leniency or criminal cartel immunity programs

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Securing a Marker

- **Requesting a Marker**
  - Identify client to US DOJ
    - Note: Limited option for anonymous marker
  - Report that uncovered evidence indicates client has engaged in criminal antitrust violation
  - Disclose general nature of conduct discovered, and
  - Identify industry specifically enough to allow Division to determine if leniency already granted and to protect marker
- **Finite Period**
  - 30 day initial period is common
  - "Good-faith effort to complete its application in a timely manner"
- **Perfecting the Marker**
  - Conditional and Final Leniency

Six Conditions

- Leniency for corporation **reporting illegal activity** if six conditions are met:
  - At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source
  - The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity
  - The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation
  - The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials
  - Where possible, the corporation makes restitution to injured parties
  - The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity

Leniency Plus Option

"Leniency Plus"

8. ***If a company is under investigation for one antitrust conspiracy but is too late to obtain leniency for that conspiracy, can it receive additional credit for substantial assistance in its plea agreement for that conspiracy by reporting its involvement in a separate antitrust conspiracy?***

Yes. Many of the Division's investigations result from evidence developed during an investigation of a completely separate conspiracy. This pattern has led the Division to take a proactive approach to attracting leniency applications by encouraging subjects and targets of investigations to consider whether they may qualify for leniency in other markets where they compete. For example, consider the following hypothetical fact pattern:

Role of Compliance Program

- **DOJ Focus on Effective Internal Compliance Program**
  - **Prevention**: Prevent conduct that could lead to significant criminal and civil liability and damage to business reputation
  - **Detection**: Early detection of potential conduct allowing company to correct and potentially apply for leniency protection
  - **Mitigation**: In the event of prosecution, may provide basis for mitigating criminal fine and/or probation period

2016 Year-End Global Cartel Report

- Review key global trends
- Monitor recent fines and penalties
- Focus on key industries subject to cartel enforcement
- Identify new developments
- **Subscribe:**
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2016 GLOBAL CARTEL ENFORCEMENT REPORT

AUTHORITIES LAUNCHED NEW CRIMINAL PROBES, OBTAINED GUILTY PLEAS FROM COMPANIES AND EXECUTIVES AND IMPOSED HEFTY FINES AS AGGRESSIVE ENFORCEMENT CONTINUED

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** The Report and this presentation were compiled using publicly available sources only.*

CIVIL ENFORCEMENT

Civil Enforcement

- DOJ and FTC have the authority to pursue antitrust violations **civilly**
  - Business agreements containing HR restrictions will generally be analyzed under a rule of reason, which determines whether the ancillary restriction is reasonable in light of the industry and purported procompetitive benefits of the ongoing business relationship
  - Information sharing can form the evidentiary basis for civil liability if it is deemed to be the mechanism by which the alleged co-conspirators form and/or monitor the underlying agreement, *see, e.g.*:
    - *U.S. v. Utah Soc. for Healthcare Human Resources Admin.*, https://www.justice.gov/atr/case-document/file/628496/download (final judgment)
    - Statements of Antitrust Enforcement in Healthcare, www.justice.gov/sites/default/files/atr/legacy/2007/08/15/1791.pdf
- www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf, at 2, 4-5

Civil Liability If Restrictions Are Not "Reasonable"

- Anti-competitive HR agreements that are **ancillary** to an ongoing business relationship (*i.e.*, part of a larger legitimate collaboration between employers) will be evaluated under a "rule of reason" and subject to civil liability only
  - Most agreements with HR restrictions fall within this category
- Whether an ancillary restriction is "reasonable" will be assessed based on industry standards and the purported procompetitive benefit of the restraint to the ongoing business relationship
  - In general, restrictions should serve a legitimate business purpose and be narrowly tailored to facilitate success of the underlying business venture
- The Guidance does NOT affect a company's ability, acting on its own, to make decisions regarding recruiting, hiring and compensating employees, nor does it affect a company's ability to enter into and enforce non-solicitation or non-competition agreements with its own employees

Non-Solicit / No-Hire Agreements

- Analyzing the **"Reasonableness"** of Non-Solicitation/No-Hire Clauses
  - Are they closely tied to the underlying business relationship and limited in scope and duration?
    - **Scope** – In general, limit to employees associated with the underlying business venture or those who became known to the other party through that business venture
    - **Duration** – In general, limit to term of underlying agreement/arrangement
  - Non-solicitation agreements should **expressly allow**:
    - Each party is allowed to engage in general advertising, accept applications and hire the other company's employees (even those in scope in non-solicit clause) who apply through the normal career/application channels (without solicitation)
    - The solicitation and hiring of the other company's employees who are NOT associated with the underlying project (not in scope)
  - "Do not solicit or hire" letter sent to another company can be deemed to be an illegal effort to enter into a prohibited anticompetitive agreement
    - May be subject to **criminal liability**

Information Sharing

- Guidance relates to restrictions on sharing "compensation" information because it can have the anticompetitive effect of fixing wages, etc.
  - Benchmarking on HR topics not related to compensation (*e.g.*, background check practices, drug testing, education requirements) does not raise antitrust issues
- Information sharing, formal or informal, can facilitate companies entering into illegal agreements
  - *"Even if an individual [HR professional] does not agree explicitly to fix compensation or other terms of employment, exchanging competitively sensitive information could serve as evidence of an implicit illegal agreement."*
- Avoid sharing sensitive information with other companies
  - *"[T]he company and its employees should take care not to communicate the company's policies to other companies competing to hire the same types of employees, nor ask another company to go along."*

Information Sharing Guidelines

- Follow certain **guidelines** to reduce risk
  - Do not share compensation and benefits policies directly with other companies with whom you compete for employees
  - Share only historical information
    - Past compensation information has already been used/paid so cannot easily form the basis for future agreement
    - Future and predictive information has the ability to facilitate anticompetitive agreements

Sharing Information Through Third Parties

- Employers do not avoid antitrust violations by exchanging information through a third party
  - Information shared through third parties is tested under a "rule of reason"
    - Is there a likelihood that the information being shared could have an anticompetitive impact for a group of employees?
    - Is the information being shared in a way that could be used to create or provide evidence of an illegal agreement?
  - The mere receipt of survey results (even if a company does not contribute) could be used as evidence of an illegal agreement if the company's actions suggest an anticompetitive use of that information or result in an anticompetitive effect

Sharing Information Through Third Parties (continued)

- Information exchanges should be designed and executed to reduce the risk of antitrust violations:
  - A neutral third party should manage the exchange
  - The information exchanged should be "historical" rather than current or future
  - Shared data should not be attributable to any individual contributing company
    - Information should be aggregated and/or anonymized in a manner to protect the identity of the contributing organizations
    - There should be enough contributing organizations (*i.e.*, actual respondents, not just the number that received the survey) to prevent recipients of the data from being reasonably able to link, even imperfectly, data to one or more individual contributor(s)
      - Generally speaking, surveys should include 5 or more respondents AND no contributor's data should represent more than 25% of a weighted statistic

Roundtables, Conferences and Informal Discussions Do's and Don'ts

- Avoid discussions with other companies and presentations that contain information about
  - Specific salaries or other compensation components OR
  - Any future plans regarding same, regardless of whether they have been formalized or remain as mere possibilities
- In the event such information is shared, immediately execute a **"noisy withdrawal"** from the roundtable, conversation or meeting

Survey and Benchmarking
Do's and Don'ts

- Can share historical data about compensation, *e.g.*, salary, benefits, etc. with a third party to be used in aggregated, anonymized reporting

- Can receive and consider trend analyses, based on historical data, provided by third party data aggregators

- Cannot receive salary or compensation data about specific competitors

General Guidelines

DO	DON'T
• Report to the legal department immediately any agreements with another company, whether formal or informal, regarding restrictions on hiring, soliciting, employee wages, or other aspects of compensation. • Reject and report to the legal department immediately any offer by a representative from another company to agree to any of the foregoing. • Continue business-as-usual unilaterally to negotiate and enter into appropriate non-compete agreements and salary terms with new and continuing employees. • Consult with counsel prior to entering into a non-solicit or no hire agreement with another company with which your company has an ongoing business relationship in order to evaluate the reasonableness of that restraint and contemporaneously document its procompetitive benefits. • Consult with counsel prior to engaging in any information sharing activities with another company regarding any aspect of employee compensation, including but not limited to, wages and benefits. • Provide antitrust training regarding the Guidance to HR personnel and incorporate the Guidance into antitrust compliance documentation.	• Agree with another company about each other's employee salaries or other aspects of compensation. • Agree with another company to restrict untargeted advertising for open employment positions. • Disregard information about the existence of such agreement(s); time is of the essence in remediation efforts. • Unless it is a reasonable ancillary restraint to an ongoing legal business relationship (*e.g.*, vendor or customer relationship, joint venture, or M&A deal) AND you have consulted with the legal department to craft the restraint narrowly consistent with the goals of that ongoing relationship: ➢ Agree with another company to refuse to solicit or hire, or otherwise to not compete vigorously for, each other's employees. ➢ Share information with another company about employees' wages or other aspects of compensation.

A TASTE OF EUROPE

General Principles

- Agreements among competitors to avoid workforce competition have been found to be in violation of competition laws (or against the public interests in Europe)

- Even when there is no formal agreement between competitors, the simple exchange of information regarding HR data could entail significant liability for companies

- Current competition law regime of many European Countries would allow the recognition of liability for undertakings which enter into forms of agreements or information exchange to avoid competition

Non-Poaching Agreements

- The European Commission allows certain "non-solicit/non-hire" covenants between companies where they are "directly related and necessary to the implementation of concentration" (Kingfisher – Grosslabor – 12 April 1999)
- However, the enforceability of such agreements is generally challenged by courts
  - A Dutch Court held, for example, that a non-solicit agreement among 15 hospitals violated Dutch competition laws as it has not only the purpose but also the result of restricting competition between anaesthesiologists doctors (Court of Hertogenbosh – 5 April 2010)
  - The French Supreme Court found that a non-solicitation agreement between Reuters Financial Software and Sophis – two competitors – restricted the Constitutional principle of freedom of occupation and was therefore against public policy (Cour de Cassation – 2nd March 2011)
  - Same approach in the UK, as early as 1959, when a Court held that an agreement among two competitors that entail a non-solicitation of each other's employees was a restraint on trade

Agreements on Wage-Fixing

- One type of wage-fixing agreements which is **exempted** from competition law in most European Union Countries is **"collective bargaining agreements"**
  - They generally cover specific sectors of activity (Steel industry, Banks, Pharmaceutical industry) at the national level
  - They include regulations regarding wages and fix minimum wages per category of employees
  - These regulations must be complied with by all companies which enter into their scope
- Apart from collective agreements, agreements between competitors on wage-fixing are not allowed
  - The French Competition Council fined several temporary employment companies for engaging in a wage-fixing scheme (decision of 25 June 1997)
  - The above-mentioned decision from the Dutch Court regarding agreements between 15 hospitals also concerned the commitment not to pay supplemental wages to their anaesthesiologists. The hospitals argued that their practice was based on their collective agreement but the Court disagreed

HR Information Exchange

- In several European Countries, the Courts have considered the legal implications of HR information exchanges
  - The European Court of Justice held that competition laws had been breached in the T-Mobile case (Case C-8/08 2009) where discussions between five Dutch mobile telecommunications operators allowed these competing firms to exchange information that led to collusion on the reduction of dealers remunerations
  - The Turkish Competition Court determined that through meetings, private schools have exchanged information on the salary of teachers and school fees. That was considered as restrictive in spite of lack of an agreement between the schools

Conclusion

- There is a consensus among European Courts in condemning agreements on non-solicitation of employees, wage fixing or exchange of HR information
- Such condemnations resulted in the imposition of fines from antitrust authorities
- The individuals that suffered from such restrictions have also been able to obtain damages

THANK YOU

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