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**Presenters: Clay Everett, Mark Krotoski, and Omar Shah**
**February 6, 2017**

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# Our Presenters

**J. Clayton "Clay" Everett, Jr.** has represented corporate and individual defendants in dozens of international cartel investigations and related litigation. He has acted as global coordinating counsel in multijurisdictional cartel investigations, secured leniency for multiple clients and declinations for others, and defeated follow-on damages claims on successful motions to dismiss, motions for summary judgment and oppositions to class certification.

**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 investigating and prosecuting antitrust and obstruction of justice cases involving corporations and executives. His experience includes every phase of the cartel enforcement process. In addition to other DOJ leadership positions, he has nearly 20 years of experience as a federal prosecutor.

**Omar Shah** represents clients in complex global cartel and anticorruption investigations and civil proceedings for damages for breach of antitrust laws. His practice involves representing clients before UK, EU, and other competition authorities, courts, and tribunals and in commercial and regulatory litigation proceedings, including judicial reviews.

# 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
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  select “Cartel” on the list of topics

*Access the full 2016 Global Cartel Enforcement Report at*:
https://www.morganlewis.com/services/antitrust-competition

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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

Several significant developments occurred in cartel enforcement in 2016. New record fines were imposed by enforcement authorities in the European Union and the United Kingdom. EU and India fines exceeded $1 billion. Fines of more than $100 million were imposed in the European Union, Germany, Italy, South Africa, Spain, Ukraine, and the United States.

Several investigations produced their first criminal guilty pleas in 2016. In December, the US Department of Justice (DOJ) brought its first charges in the generic drugs investigation as two executives agreed to plead guilty. In the seafood packaging investigation, the first charges were also filed by the DOJ in December against two senior vice presidents who both agreed to plead guilty. Based on public statements by the DOJ, both of these investigations are expected to grow over the coming months.

There were also several significant firsts in cartel enforcement in 2016:

- The DOJ's Antitrust Division (DOJ) announced that it will open criminal investigations and prosecute employers, including individual employees, who enter into certain "naked" wage-fixing and no-poaching agreements.
- Australia's Competition and Consumer Commission (ACCC) filed its first criminal cases against a corporation under the cartel provisions of the Competition and Consumer Act. Australia's first two corporate criminal antitrust cases arose from the ongoing global investigation of roll-on roll-off shipping.
- Spain's National Authority on Markets and Competition (CNMC) fined executives in an antitrust investigation

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

# Overview

- Key Firsts
- Cartel Fines
- Dawn Raids
- Industries Under Scrutiny
- Europe Trends
- DOJ Criminalizes Wage-Fixing
- Leniency
- Extradition
- Criminalization Trend
- Extraterritorial Issues
- Compliance

# KEY FIRSTS

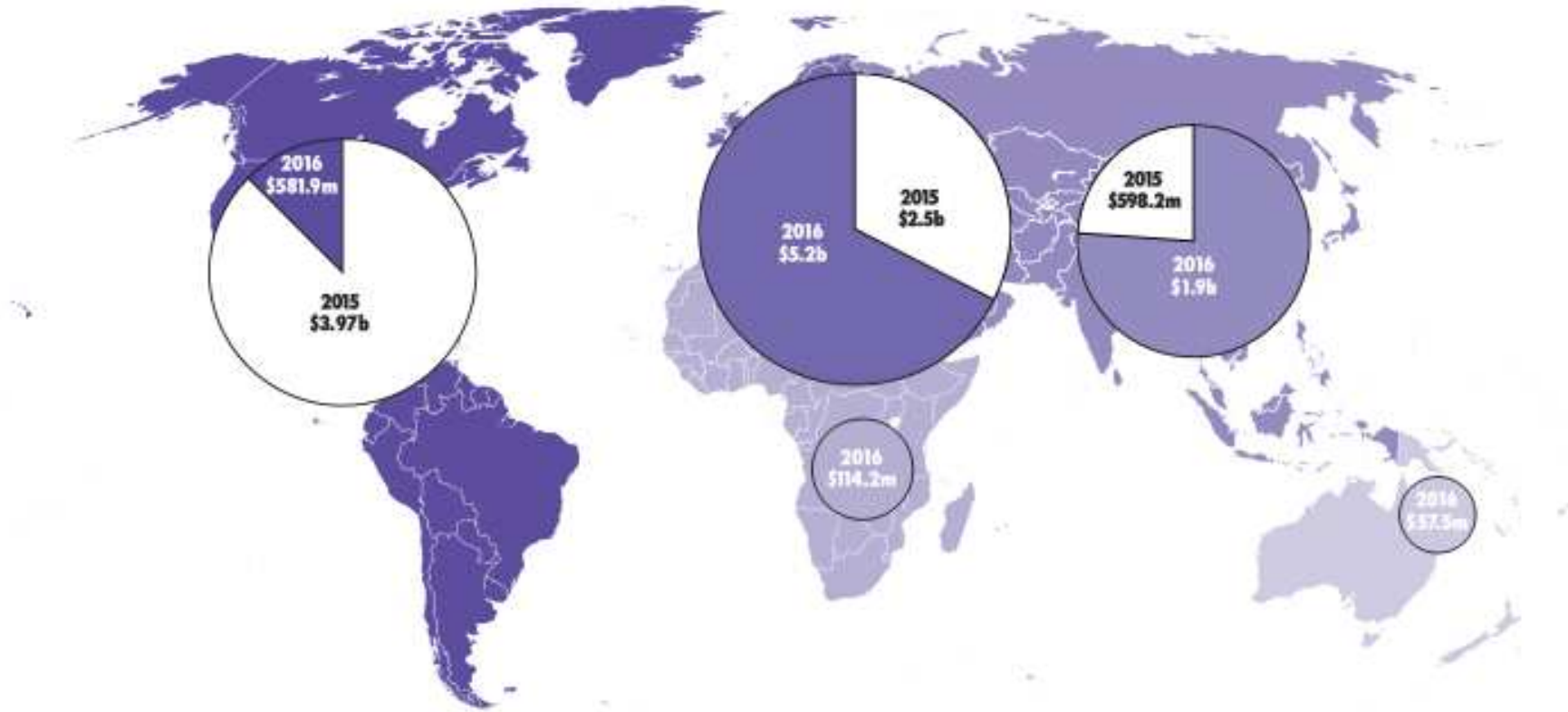
# 2016 Key Firsts

- DOJ will prosecute employers and individual employees who enter into certain “naked” wage-fixing and no-poaching agreements
- Australia’s Competition and Consumer Commission (ACCC) filed first criminal cartel cases against a corporation
  - First two corporate criminal antitrust cases arose in the roll-on roll-off shipping investigation
- Spain’s National Authority on Markets and Competition (CNMC) fined executives in an antitrust investigation for the first time
  - Cartel for products eligible for subsidies and bought through pharmacies
- Peru’s National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI) imposed both fines (totaling $2.6 million) and corrective measures for the first time in an antitrust case
  - Five pharmacy chains for fixing the prices of medicine and dietary supplements
- UK Competition and Markets Authority secured the first disqualification of an individual director from acting as a director of any UK company for five years
  - Investigation of suppliers of posters and frames on Amazon’s UK website

CARTEL UPDATE

# CARTEL FINES

# Total Global Cartel Fines 2015–2016




| 2016 TOTAL GLOBAL FINES: $7.8B | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| AMERICAS: $581.9m | | | | EUROPE: $5.2b | | ASIA: $1.9b | | | | | AFRICA: $114.2m | | AUSTRALIA AND OCEANIA: $57.5m | |
| UNITED STATES | BRAZIL | CANADA | OTHER | EU | OTHER | CHINA | JAPAN | SOUTH KOREA | RUSSIA | OTHER | SOUTH AFRICA | OTHER | AUSTRALIA | NEW ZEALAND |
| $337.4m | $141.0m | $10.2m | $93.3m | $4.1b | $1.1b | $5.1m | $88.3m | $766.0m | $7.6m | $1.0b | $113.1m | $1.1m | $45.9m | $11.6m |

| 2015 TOTAL GLOBAL FINES: $7.1B | | | | | | | |
|---|---|---|---|---|---|---|---|
| AMERICAS: $3.974b | | | EUROPE: $2.5b | ASIA: $598.2m | | | |
| UNITED STATES | BRAZIL | CANADA | EU | CHINA | JAPAN | SOUTH KOREA | RUSSIA |
| $3.8b | $165m | $8.7m | $2.5b | $153.9m | $13.9m | $426m | $4.4m |

b = billion

m = million

*Fines based on the calendar year

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# Cartel Fines by jurisdiction 2015–2016

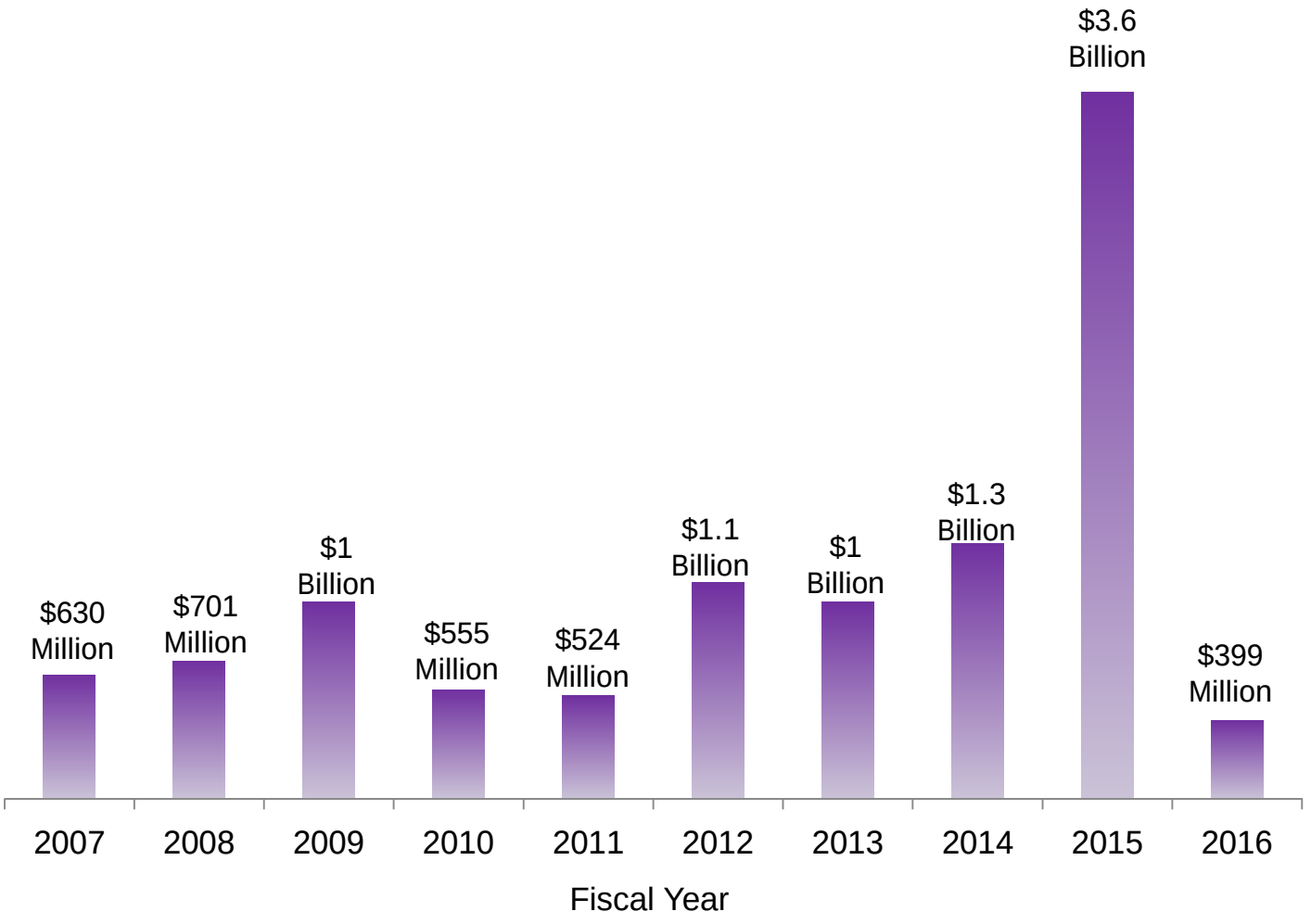
| | EU | UNITED STATES | BRAZIL | SOUTH KOREA | JAPAN | CHINA | AUSTRALIA | CANADA | RUSSIA |
|---|---|---|---|---|---|---|---|---|---|
| 2016 | $5.2b | $337.4m | $141.0m | $766.0m | $88.3m | $5.1m | $45.9m | $10.2m | $7.6m |
| 2015 | $2.50b | $3.8b | $1.6b | $1.01b | $398.5m | $290.2m | $3.2m | $16m | $13.3m |

b = billion

m = million

*Fines based on the calendar year

# Total Criminal Fines & Penalties

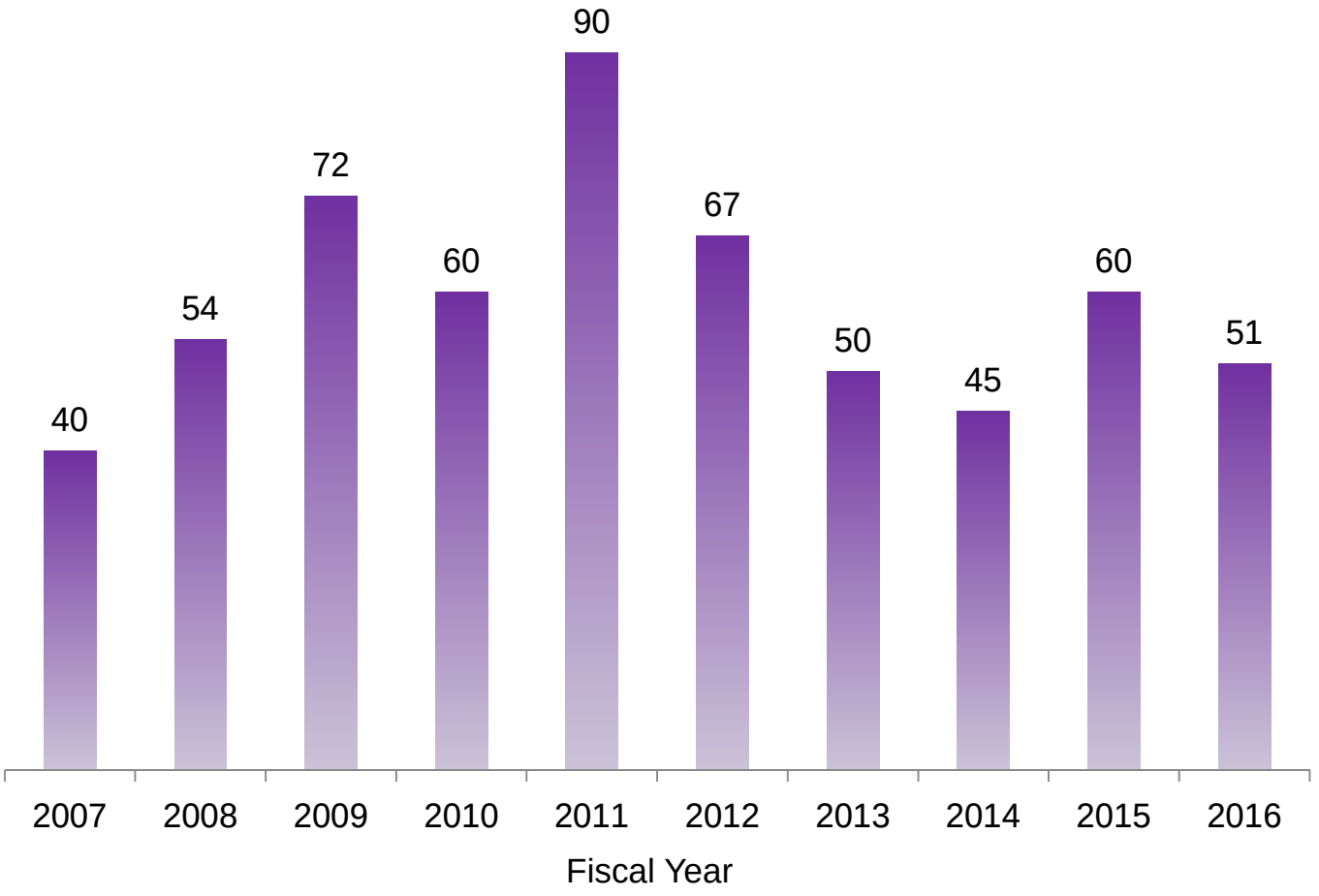



Note: All totals reflected on this page are for the DOJ fiscal years at issue, whereas the fines and penalties we summarize elsewhere in the report are on a calendar-year basis.



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

# Total Criminal Cases Filed




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.

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

CARTEL UPDATE

# DAWN RAIDS

# Dawn raids - coming to a place near you?

- Most common and widespread in Europe
  - EU Commission, Germany, France, UK, Spain, Slovakia, Czech Republic, Austria, Romania, Belgium, Portugal, Hungary, Russia and Sweden conducted raids last year
  - Pharmaceuticals sector is a target: Belgium, Germany
- Growing rapidly in scope in Asia and Africa
  - India, Hong Kong, South Africa
- Increasing body of case law on limits to agency powers
  - “Fishing expeditions”
  - Data privacy
- Will we see more dawn raids in the Americas and China in 2017?

# Dawn raids – 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, and persons in focus.
- **Know your rights**:
  - The search should be limited to the scope of the warrant.
  - You have the right to receive inventory of materials seized.
  - You have the right to withhold or receive back-privileged materials.
  - In the United States, interviews on substantive topics are voluntary and may be refused. You may insist on counsel being present.
  - In the EU, you must answer purely factual questions but may refuse to answer questions to which the answers may be self-incriminating.

# Dawn raids – step-by-step response

1. **Ask to see** investigators' identification and documents authorizing the search.
   a) Confirm that your company's premises are permitted to be searched.
   b) Keep a record of the investigators' names and affiliations.
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. **Ensure document preservation**, send out a litigation hold notice immediately, and take steps to ensure that all relevant evidence is preserved—regardless of location.

# Dawn raids – step-by-step response (cont'd)

5. **"Shadow" the search—assign** someone to follow each investigator.
   a) This person should be trained to understand the rights of both the company and individuals.
   b) Ensure that company employees are cooperating with the 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 and 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).

CARTEL UPDATE

# INDUSTRIES UNDER SCRUTINY

# Pharmaceuticals

- **Key Developments**
  - Multiple US investigations and litigation
  - Dawn raids in Belgium, Germany
  - Investigation in the UK
  - Considerable political pressure for more enforcement due to increased reimbursement costs
- **Looking Ahead**
  - Further investigations in more jurisdictions
  - Tension between regulation and antitrust enforcement
  - New legislation in relation to generics?

# Electronic Components

- **Key Developments**
  - Investigations into capacitors in the US, China, EU, Japan, South Korea, Brazil and Taiwan
  - US: 5 companies (3 pleaded guilty) and 9 individuals facing criminal charges; $13.8 million in corporate fines in case involving guilty plea
  - Taiwan: $177 million in fines
  - Japan: $68 million in surcharge payment orders
  - Brazil: $327K in fines
- **Looking Ahead**
  - EU to impose infringement decision
  - South Korea to issue charges
  - US: sentences to be confirmed
  - Further products to be investigated?

# Automotive Parts – DOJ Investigation

- Commenced February 2010
  - Dawn raids and search warrants of wire harness manufacturers
  - Nearly seven years
- Prosecution
  - **47** corporations
  - **65** individuals
    - **30 executives** convicted with prison terms ranging from **one year and one day** to **24 months**
- Corporate fines exceeding **$2.9 billion**
  - Two corporate fines exceeding $425 million
  - One corporate fine $200 million
  - Six corporate fines exceeding $100 million
  - Ten corporate fines exceeding $50 million

APPENDIX A
CORPORATE GUILTY PLEAS IN AUTO PARTS DOJ ANTITRUST INVESTIGATION

| NO. | CORPORATION/ LOCATION | AUTOMOTIVE PART | CHARGES FILED | CHARGE / VIOLATION | COUNTS | CONSPIRACY / RELEVANT PERIOD | SALES AFFECTED | FINE / SENTENCE DATE | CARVE-OUT(S) | COURT / CASE NO. |
|---|---|---|---|---|---|---|---|---|---|---|
| 1 | Manufacturer of Wire Harness / Tokyo, Japan | Wire Harness | Information Sept. 29, 2011 | Bid Rigging<br>Price Fixing - Horizontal | One Count - Conspiracy to Restrain Trade | Jan. 2000 – Jan. 2010 | Defendants' sales of wire harness affected US auto manufacturers totaled approx. $859 M during relevant period. | $200 M / July 2, 2013 | 4 individuals listed in the Plea Agreement | USDC, Eastern District of Michigan Southern Division 2:11-cr-20613-GCS-FJK |
| 2 | Manufacturer of Wire Harness, Instrument Panel Clusters (ICPs), and Fuel Senders / Tokyo, Japan | Wire Harness<br>Instrument Panel Clusters<br>Fuel Senders | Information Jan. 30, 2012 | Bid Rigging<br>Price Fixing - Horizontal | Three Counts - Conspiracy to Restrain Trade | Wire Harness Jan. 2000 - Feb. 2010<br>Instrument Panel Clusters Dec. 2001 - Feb. 2010<br>Fuel Senders March 2004 - Feb. 2010 | Defendants' sales of wire harnesses affected auto manufacturers in US and elsewhere totaled approx. $2.8 during relevant period.<br>Defendants' sales of ICPs affected auto manufacturers in US and elsewhere totaled approx. $71 M during relevant period.<br>Defendants' sales of fuel senders affected US auto manufacturers in US and elsewhere totaled approx. $1.6 M during relevant period. | $470 M / March 1, 2012 | 7 individuals listed in the Plea Agreement | USDC, Eastern District of Michigan Southern Division 2:12-cr-20004-GCS-FJK |
| 3 | Manufacturer of Electronic Control Units (ECUs) and Heater Control Panels (HCPs) / Kariya, Japan | Electronic Control Units<br>Heater Control Panels | Information Jan. 30, 2012 | Bid Rigging<br>Price Fixing - Horizontal | Two Counts - Conspiracy to Restrain Trade | Jan. 2000 - Feb. 2010 | Defendants' sales of ECUs affected US auto manufacturers totaled approx. $237 M during relevant period.<br>Defendants' sales of HCPs affected US auto manufacturer totaled approx. $211 M during relevant period. | $78 M / March 5, 2012 | 7 individuals listed in the Plea Agreement | USDC, Eastern District of Michigan Southern Division 2:12-cr-20063-DML-DRG |

APPENDIX B
GUILTY PLEA OF INDIVIDUALS IN AUTO PARTS ANTITRUST INVESTIGATION

| NO. | INDIVIDUAL / POSITION | AUTOMOTIVE PART | CHARGES FILED | CHARGE / VIOLATION | COUNTS | CONSPIRACY / RELEVANT PERIOD | CONVICTION DATE | SENTENCE / DATE | COURT / CASE NO. |
|---|---|---|---|---|---|---|---|---|---|
| 1 | Junichi Funo<br>2002: Sales Representative in a Sales Division of a wire harness company<br>2003 – 09: Assistant General Manager in a Sales Division of US subsidiary of a wire harness company<br>2009: Manager of a Sales Division of a wire harness division | Wire Harness | Information (September 29, 2011) | Conspiracy to rig bids for, and to fix, stabilize, and maintain the prices of, automotive wire harnesses and related products sold to automobile manufacturers in the United States and elsewhere. | One Count - Conspiracy to Restrain Trade | Apr. 2003 to July 2009 | Plea Agreement (October 24, 2011) | 11 months 1 day $20,000 / March 1, 2012 | USDC, Eastern District of Michigan Southern Division No. 11-cr-20614 |
| 2 | Hirokazu Nagata<br>2004 – 07: General Manager of Sales of US subsidiary of a wire harness company<br>2004 – 09: Marketing Manager of US subsidiary of a wire harness company<br>2004 – 09: Chief Financial Officer of US subsidiary of a wire harness company | Wire Harness | Information (September 29, 2011) | Conspiracy to rig bids for, and to fix, stabilize, and maintain the prices of, automotive wire harnesses and related products sold to automobile manufacturers in the United States and elsewhere. | One Count - Conspiracy to Restrain Trade | Jan. 2004 to June 2009 | Plea Agreement (October 24, 2011) | 15 months $20,000 / January 11, 2012 | USDC, Eastern District of Michigan Southern Division No. 11-cr-20615 |
| 3 | Tetsuya Ukai<br>2003 – 05: Manager in Sales Division of a wire harness company<br>2005 – 07: Unit Chief in Sales Division of a wire harness company<br>2007 – 09: General Manager of a Sales Division of a wire harness company | Wire Harness | Information (September 29, 2011) | Conspiracy to rig bids for, and to fix, stabilize, and maintain the prices of, automotive wire harnesses and related products sold to automobile manufacturers in the United States and elsewhere. | One Count - Conspiracy to Restrain Trade | Apr. 2003 to July 2009 | Plea Agreement (November 10, 2011) | 18 months $20,000 / November 10, 2011 | USDC, Eastern District of Michigan Southern Division No. 11-cr-20613 |

https://www.morganlewis.com/~/media/files/document/apg_cer-report-auto-parts-appendix-a-b.pdf

# Automotive Parts

- **Key Developments**
  - EU: **$1.6 billion fines** imposed in relation to wire harnesses, foam, parking heaters and engine starters
  - Canada: **Nine guilty pleas** and **$54 million in fines**
  - South Korea: over **$10 million in fines**
- **Looking Ahead**
  - EU to continue investigations in airbags, thermal systems and car lights
  - Brazil, Mexico, Germany, Spain, India, South Africa to continue investigations into several different products

# Financial Benchmarks

- **Key Developments**
  - Several individuals sentenced in the US for manipulation of LIBOR in US and UK
  - Fines in Switzerland
  - US criminal and civil enforcement in relation to FX but UK SFO closes investigation
  - Fines imposed in South Korea and Brazil
  - EU fines of $520 million in respect of Euribor
  - US CFTC fines of $250 million in relation to ISDAFIX
- **Looking Ahead**
  - US and EU investigating US Treasury market
  - EU investigation into FX
  - Civil litigation in US (SIBOR/SOR) and Australia (BBSW)

# Real Estate

- **Key Developments**
  - US investigations of bid rigging in public real estate foreclosure auctions in Northern California, Georgia, Alabama and North Carolina
  - Brazil: investigation of real estate brokers fixing standard charges in rental contracts
  - New Zealand: fines of over $3.9 million on real estate agencies for colluding to pass on cost of advertising listings to sellers of real estate
- **Looking Ahead**
  - In the US, multiple trials scheduled for early 2017 in California and Georgia

# Packaged Seafood

- **Key Developments**
  - Two executives charged by US DOJ in relation to price fixing of canned tuna
- **Looking Ahead**
  - Further charges expected in the US
  - Resolution of charges with DOJ?
  - Further investigations in other jurisdictions?

# Shipping

- **Key Developments**
  - Investigations in US, China, Japan, Chile, New Zealand and Australia into roll-on roll-off services
  - US: 8 executive charged, 4 pleaded guilty and are serving prison terms; 4 companies pleaded guilty and agreed to pay criminal fines of $230 million
  - China imposed fines of $58 million
  - Mexico imposed fines of $2.2 million
- **Looking Ahead**
  - First Australian corporate criminal cases could result in criminal fines

CARTEL UPDATE

# EUROPE TRENDS

# EU cartel enforcement trends

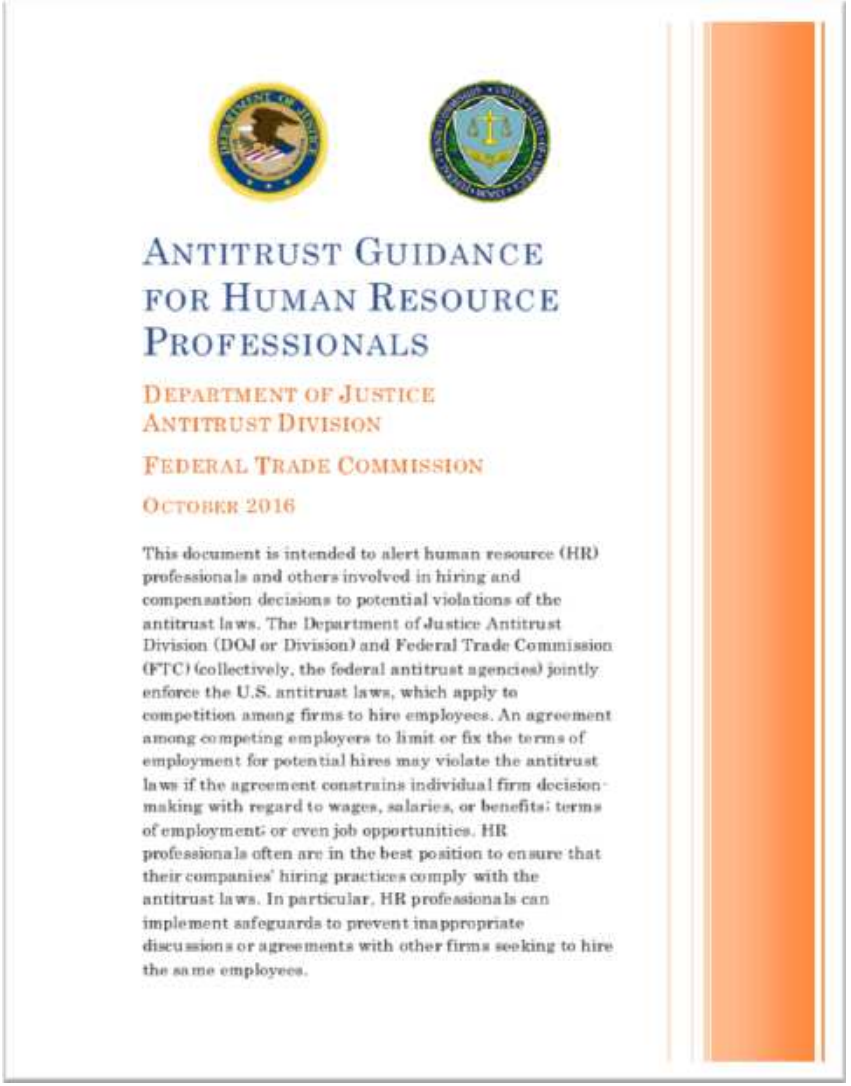
- **Very large EU Commission fines** for infringements covering large markets for a long duration
  - E.g. *Trucks*
- **Increased national enforcement complementary to EU Commission**
  - Italy and Spain in particular have joined Germany, France and UK as very active enforcers
  - UK CMA will have to ramp up parallel enforcement post-Brexit
- **Follow-on civil damages litigation** will impact on EU Commission and national authority enforcement practice in relation to the concept of "single and continuous infringement"
  - E.g. *Air Cargo*
- Continued development of **accessory/facilitator liability**

CARTEL UPDATE

# US DOJ CRIMINALIZES WAGE-FIXING & NO-POACHING AGREEMENTS

# Criminalizing Wage-Fixing & No-Poaching Agreements

- DOJ and FTC Joint Announcement
  - "[A]lert human resource (HR) professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws"
  - **FTC** civil actions against employment-related conduct such as companies **sharing sensitive employee compensation information** without actually agreeing to fix wages
  - **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



ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS

DEPARTMENT OF JUSTICE
ANTITRUST DIVISION

FEDERAL TRADE COMMISSION

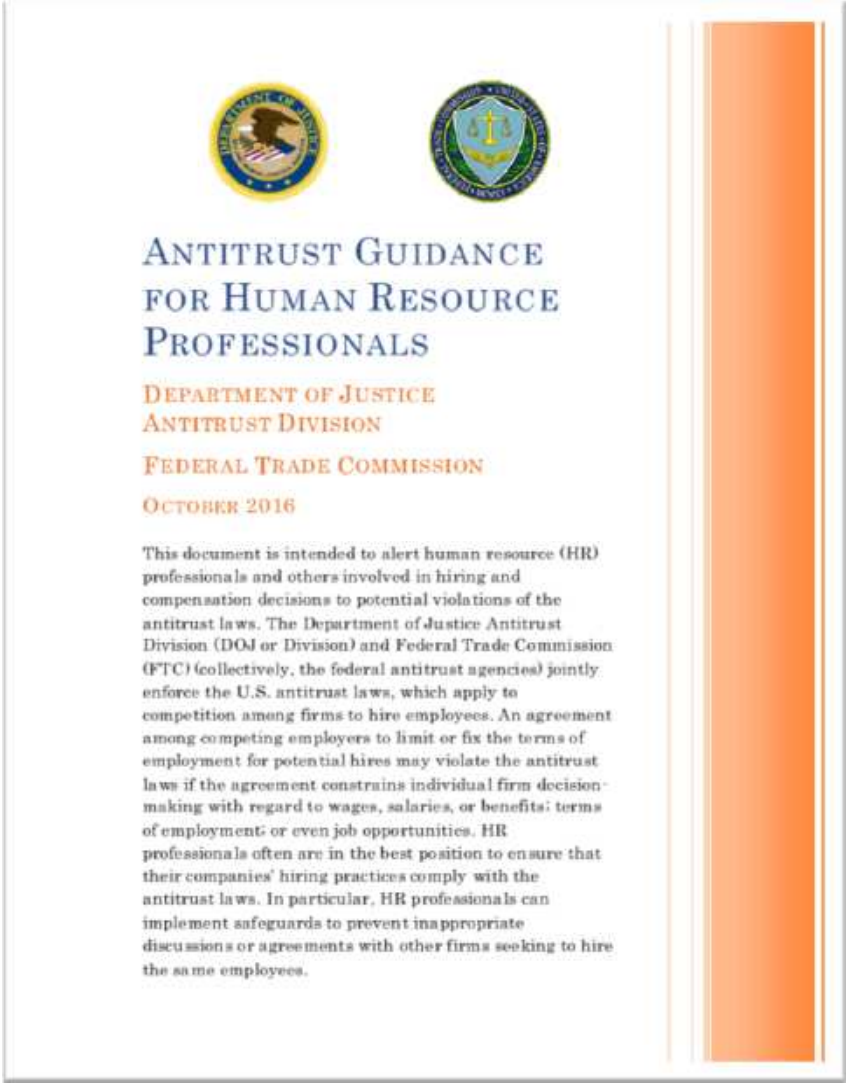
OCTOBER 2016

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.

# Criminalizing Wage-Fixing & No-Poaching Agreements

- **Competitors**
  - o "compete to hire or retain employees ... regardless of whether the firms make the same products or compete to provide the same services"

- ***Per se* unlawful**
  - o Naked wage-fixing
    - – Agreement "about employee salary or other terms of compensation, either at a specific level or within a range"
  - o No-poaching agreements
    - – Agreement "to refuse to solicit or hire that other company's employees"



ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS

DEPARTMENT OF JUSTICE
ANTITRUST DIVISION

FEDERAL TRADE COMMISSION

OCTOBER 2016

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# Human Resources Areas to Watch

## Antitrust Red Flags for Employment Practices

Agreements and information exchanges among employers that compete to hire or retain employees may be illegal. If you are a **manager or human resource (HR) professional**, antitrust concerns may arise if you or your colleagues:

- Agree with another company about employee salary or other terms of compensation, either at a specific level or within a range.
- Agree with another company to refuse to solicit or hire that other company's employees.
- Agree with another company about employee benefits.
- Agree with another company on other terms of employment.
- Express to competitors that you should not compete too aggressively for employees.
- Exchange company-specific information about employee compensation or terms of employment with another company.
- Participate in a meeting, such as a trade association meeting, where the above topics are discussed.
- Discuss the above topics with colleagues at other companies, including during social events or in other non-professional settings.
- Receive documents that contain another company's internal data about employee compensation.

# 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

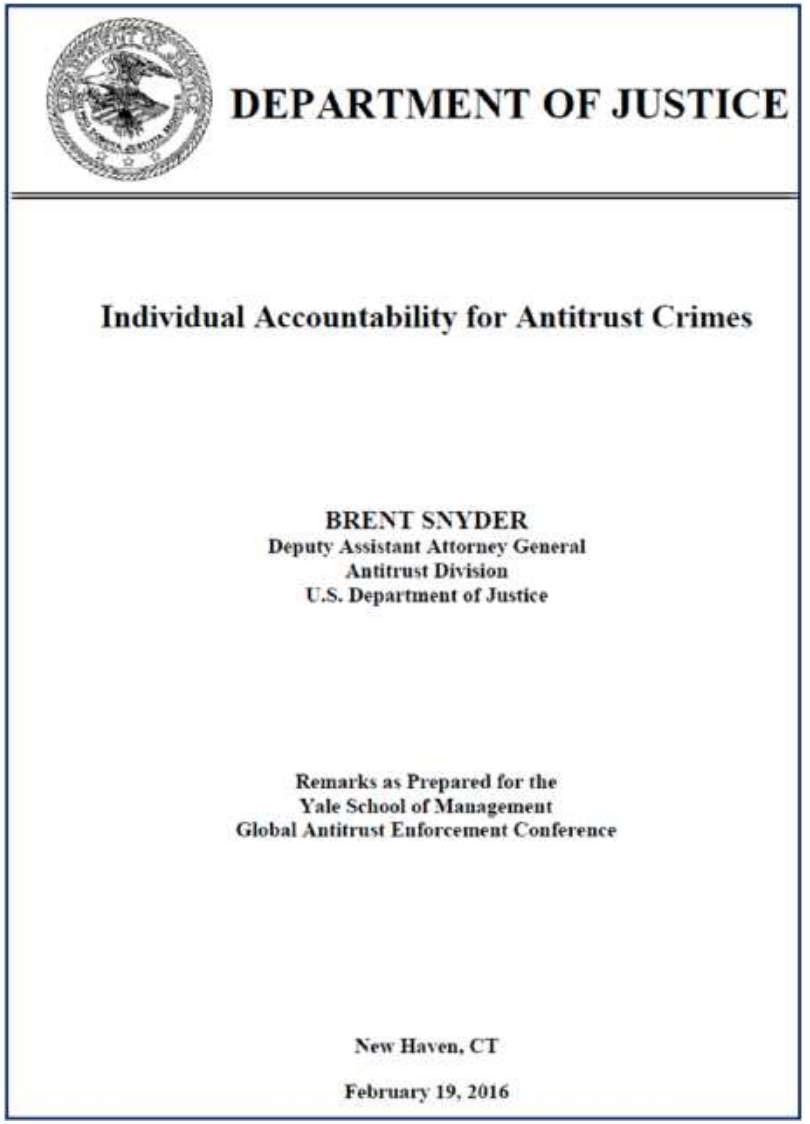
SUBJECT: Individual Accountability for Corporate Wrongdoing

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.

# Individual Accountability

- "[C]orporate offenders who hope to obtain leniency, or to receive credit for substantial assistance, need to be aware of our current expectations and practices in this regard. The **Yates memo** emphasizes what the Division already expects of corporate offenders who wish to mitigate their criminal penalties, and highlights our focus on holding accountable the individuals who commit antitrust crimes for which these offenders are liable."



DEPARTMENT OF JUSTICE

Individual Accountability for Antitrust Crimes

BRENT SNYDER
Deputy Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Remarks as Prepared for the
Yale School of Management
Global Antitrust Enforcement Conference

New Haven, CT

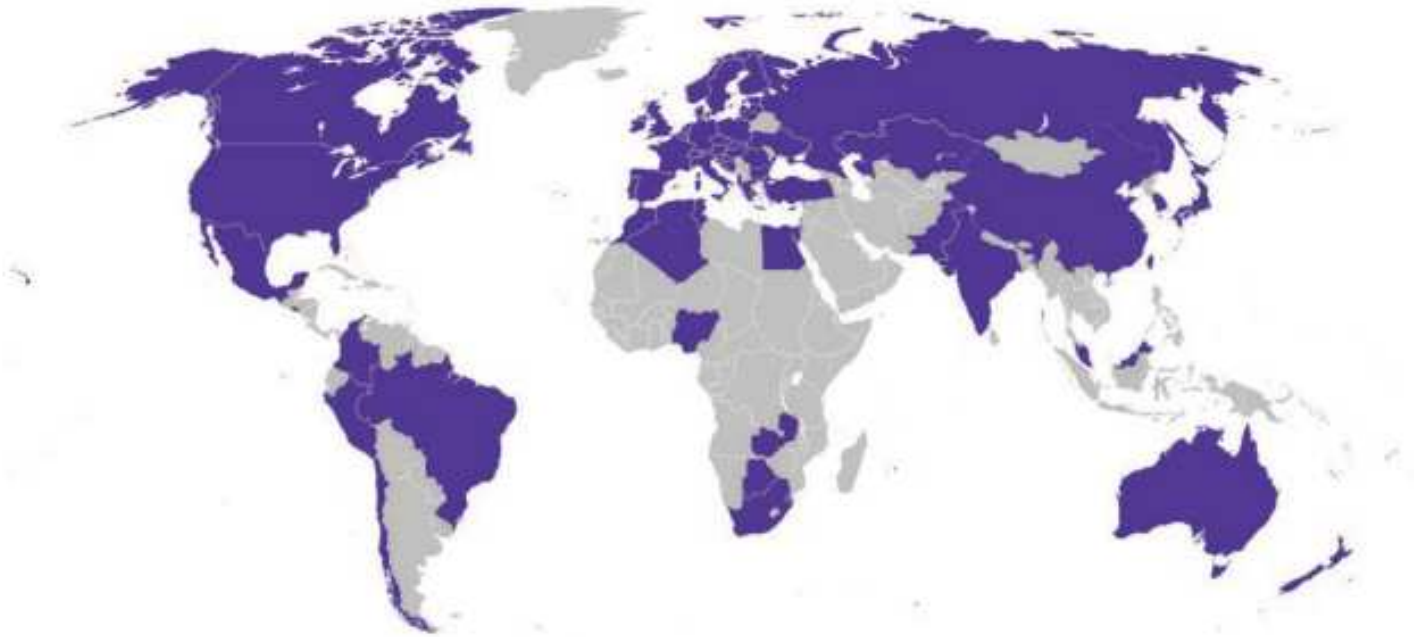
February 19, 2016

Source: https://www.justice.gov/opa/file/826721/download

CARTEL UPDATE

# LENIENCY

# Jurisdictions with Cartel Immunity/Leniency Programs



**65 countries offer leniency or criminal cartel immunity programs**

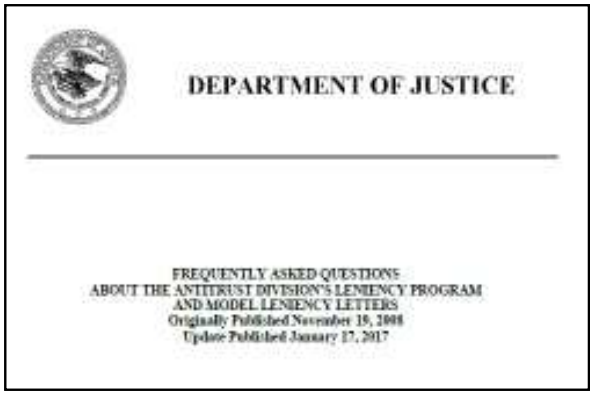
- Albania
- Algeria
- Australia
- Austria
- Belgium
- Bosnia & Herzegovina
- Botswana
- Brazil
- Bulgaria
- Canada
- Chile
- China
- Colombia
- Croatia
- Czech Republic
- Cyprus
- Denmark
- Egypt
- El Salvador
- Estonia
- Finland
- France
- Germany
- Greece
- Hong Kong
- Hungary
- India
- Ireland
- Israel
- Italy
- Japan
- Kazakhstan
- Lithuania
- Luxembourg
- Malaysia
- Mauritius
- Mexico
- Morocco
- Netherlands
- New Zealand
- Nigeria
- Norway
- 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

# Leniency Program FAQs

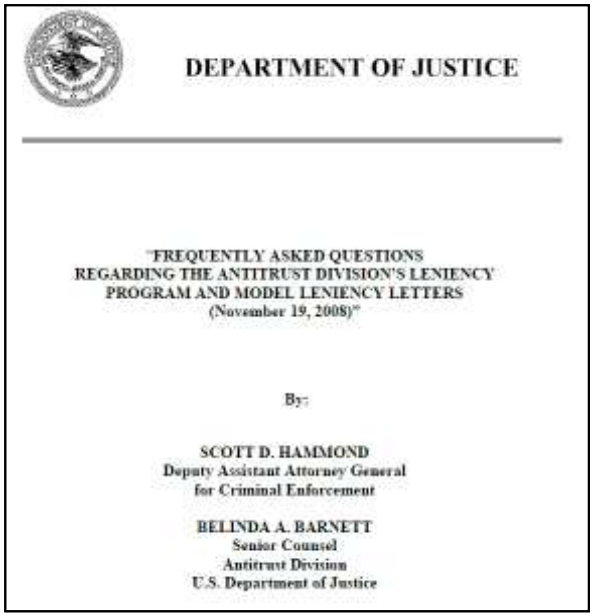
- Jan. 2017, DOJ significant policy update concerning the operation of its leniency program
  - 1993, DOJ modified the leniency program and announced its corporate policy
  - 1994, DOJ issued its individual policy

- Updates and clarifications emphasize need to evaluate the facts of each case in applying for leniency

- Future updates will be noted on the Leniency Program FAQs


DEPARTMENT OF JUSTICE

FREQUENTLY ASKED QUESTIONS
ABOUT THE ANTITRUST DIVISION'S LENIENCY PROGRAM
AND MODEL LENIENCY LETTERS
Originally Published November 19, 2008
Update Published January 17, 2017


DEPARTMENT OF JUSTICE

"FREQUENTLY ASKED QUESTIONS
REGARDING THE ANTITRUST DIVISION'S LENIENCY
PROGRAM AND MODEL LENIENCY LETTERS
(November 19, 2008)"

By:

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U.S. Department of Justice

# New Belgian 2016 Leniency Guidelines

- March 1, 2016, Belgian Competition Authority (BCA) new leniency guidelines
  - Effective March 22
  - Prior guidelines in 2007
- Key Features
  - Full or partial immunity from fines
  - Immunity from prosecution for individuals
  - Overlapping percentages of fine reductions
  - Implementation of the ECN Model Leniency Program
- August 19, 2016
  - BCA Chief Prosecutor Véronique Thirion
    - BCA had already opened more cases based on leniency applications than during all of 2015 (i.e., eight cases)

Belgian Competition Authority

**PRESS RELEASE**
N° 5/2016
4 March 2016

**The Belgian Competition Authority adopts new leniency guidelines**

The board of the Belgian Competition Authority (BCA) has adopted new leniency guidelines on March 1st, 2016. These leniency guidelines replace the 2007 notice of the Competition Council on immunity from fines and reduction of fines in cartel cases.

The BCA organised a public consultation on the draft new leniency guidelines from November 2015 to January 2016. We received numerous comments and suggestions from competition lawyers and other stakeholders, which led to an enrichment of the text and clarification of certain points.

**Why do we need a leniency program?**

Leniency is a tool that allows competition authorities to detect, terminate and sanction cartels more easily, in exchange for a more lenient treatment for the individuals, undertakings and associations of undertakings which have enabled the BCA to detect these practices and to sanction them.

The fight against cartels is one of the priorities of the BCA. Cartels cause serious harm to the economy and to consumers, including through artificial price increases or a restriction of supply.

Cartel agreements are usually secret, and therefore difficult to detect. As in other countries the legislator has ruled that, in the fight against cartels, it is in the public interest to grant individuals, undertakings and associations of undertakings who cooperate with the BCA full or partial immunity from fines.

**The new leniency guidelines in a nutshell**

The old leniency guidelines date back to 2007. The revision of the guidelines pursues essentially three goals:

***- Set out the practical rules for immunity from prosecution for individuals***

In 2013, the legislator has introduced fines of up to 10,000 Euros for individuals who participated in a cartel for their employer, coupled with the possibility of immunity from prosecution if they cooperate with the BCA. We therefore had to set out the practical terms and conditions for individuals to benefit from immunity from prosecution, as well as the relationship between leniency applications submitted by undertakings and immunity applications filed by their employees.

***- Incorporate the changes to the European Model Leniency Program***

The leniency guidelines also had to be amended to take into account the changes to the European Model Leniency Program at the end of 2012. This program aims to harmonize the leniency programs of the national competition authorities of the Member States of the European Union. An important innovation that was introduced in the European Model Leniency Program in 2012 is the possibility of summary applications for all type of leniency applications, irrespective of type or place in the queue. This innovation

CARTEL UPDATE

# EXTRADITIONS

# Extraditions

- In October 2016, fifth successful extradition of a foreign executive since 2010
- In the last two-and–a-half years, three foreign executives have been extradited by the Antitrust Division.

**EXTRADITIONS BY THE ANTITRUST DIVISION**

| NO. | NAME / CITIZENSHIP | DATE / COUNTRY OF EXTRADITION | CHARGES ORIGINALLY FILED | INVESTIGATION | RESOLUTION | NOTES |
|---|---|---|---|---|---|---|
| 1 | Ian P. Norris / British citizen | March 23, 2010 / United Kingdom | Sept. 24, 2003 original counts filed; superseding charges filed Oct. 15, 2003 included four counts: (1) conspiring to fix prices for certain carbon products sold in the United States (Sherman Act); (2) conspiring to obstruct justice; (3) corruptly persuading and attempting to corruptly persuade other persons with intent to influence their testimony; and (4) corruptly persuading other persons to alter, destroy, mutilate, or conceal documents with the intent to impair their availability for use in an official proceeding | Carbon Graphite Investigation | Extradited from the UK to face prosecution only on Counts (2) through (4); July 27, 2010 trial conviction on one count of conspiring to obstruct justice, acquitted on remaining counts; sentenced to serve 18 months in prison and a three-year term of supervised release, and a $25,000 fine; conviction was affirmed on appeal | Fought extradition for six and a half years contending that the charges were not covered under prior UK extradition law; conviction based on obstruction of justice charge and not Sherman Act charge |
| 2 | David Porath / Israeli and US citizen | Feb. 16, 2012 / Israel | Feb. 18, 2010, charged with (1) conspiring to rig bids; (2) conspiring to defraud the Internal Revenue Service; and (3) filing a false tax return | New York Presbyterian Hospital Investigation Concerning Award of Contracts | July 11, 2012, pleaded guilty as charged; sentenced to time served (just under one year) and a one year term of supervised release with three months of home confinement, and ordered to pay a $7,500 fine and $78,980 in restitution | Extradition based on Sherman Act and other nonantitrust charges |
| 3 | Romano Pisciotti / Italian citizen | April 3, 2014 / Germany | March 28, 2011 sealed indictment charging one count of rigging bids, fixing prices, and allocating market shares involving sales of marine hose; indictment unsealed by court order on Aug. 5, 2013 | Marine Hose Investigation | April 24, 2014 pleaded guilty to sole Sherman Act count; sentenced to serve 24 months in prison and pay a $50,000 fine (including credit for nine months and 16 days held in custody during extradition proceedings in Germany) | Arrest warrant (under an Interpol Red Notice) based on sealed charges while traveling in Germany; described by DOJ as "the first successfully litigated extradition on an antitrust charge" |
| 4 | John Bennett / Canadian citizen | Nov. 14, 2014 / Canada | Aug. 31, 2009 charged with two counts: (1) kickback and fraud conspiracy and (2) major fraud against the United States | Federal Creosote Superfund Site Investigation | March 16, 2016, trial conviction on two counts for (1) committing major fraud against the United States and (2) conspiring to provide kickbacks and to commit major fraud; sentenced to 63 months in prison, two years of supervised release, a $12,500 fine and $3.8 million in restitution | Fought extradition for more than five years; trial conviction following three-week jury trial |
| 5 | Yuval Marshak / Israeli citizen | Oct. 14, 2016 / Bulgaria | Jan. 21 2016 sealed charging five counts: (1)-(2) two counts of wire fraud, (3) mail fraud, (4) major fraud against the United States, and (5) international money laundering | Foreign Military Financing Program Investigation | Pending trial in 2017 | Arrest warrant (under an Interpol Red Notice) during travel |

# Fifth Extradition (Oct. 2016)

JUSTICE NEWS

**Department of Justice**

Office of Public Affairs

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FOR IMMEDIATE RELEASE

Friday, October 14, 2016

## Israeli Executive Extradited and Arraigned on Fraud Charges Involving the Foreign Military Financing Program

An Israeli national was extradited from Bulgaria and arraigned on charges arising from his participation in multiple schemes to defraud a multi-billion dollar United States foreign aid program, the Department of Justice announced today.

According to the allegations contained in a five-count indictment filed in the United States District Court for the District of Connecticut in Hartford, Yuval Marshak, a former owner and executive of an Israel-based defense contractor, carried out three separate schemes between 2009 and 2013 to defraud the Foreign Military Financing program (FMF) and used a company in the United States to launder some of the proceeds of his fraud.

Marshak and others falsified bid documents to make it appear that certain FMF contracts had been competitively bid when they had not, according to the indictment. Marshak further caused false certifications to be made to the United States Department of Defense (DOD) stating that no commissions were being paid and no non-United States content was used in these contracts, when, in fact, Marshak had arranged to receive commissions and to have services performed outside the United States, all in violation of the DOD's rules and regulations. Marshak arranged for these undisclosed commission payments to be made to a Connecticut-based company that was owned by a close relative to disguise the true nature and destination of these payments.

"By falsifying bid documents and receiving undisclosed side payments through a company in the United States, Marshak's actions threatened the integrity of the FMF program, through which the United States government provides billions of dollars each year in foreign aid to countries around the world," said Acting Assistant Attorney General Renata Hesse of the Department of Justice's Antitrust Division. "Marshak's extradition marks another step forward in our efforts to coordinate investigations with foreign authorities and is further evidence that the Antitrust Division will continue to vigorously pursue individuals and companies that compromise essential government programs regardless of where they reside."

"This alleged fraud scheme targeting the FMF program erodes public confidence in the United States government to properly execute our fiduciary responsibilities for spending United States tax dollars in an efficient and prudent manner," said Special Agent in Charge Craig W. Rupert of the U.S. Department of Defense's Defense Criminal Investigative Service (DCIS). "DCIS and its federal and international partners will continue to pursue and investigate similar fraud allegations in order to shield the American taxpayers' investment in defense."



https://www.justice.gov/opa/pr/israeli-executive-extradited-and-arraigned-fraud-charges-involving-foreign-military-financing

# Red Notices to Request International Arrest

- INTERPOL
  - International Criminal Police Organization
- 190 member countries
  - National Central Bureau (NCB) located in each country staffed by national law enforcement
- "In the case of **Red Notices**, the persons concerned are wanted by national jurisdictions for prosecution or to serve a sentence based on an arrest warrant or court decision. INTERPOL's role is to assist the national police forces in identifying and locating these persons with a view to their arrest and extradition or similar lawful action."

Source: http://www.interpol.int/INTERPOL-expertise/Notices

# Antitrust Extradition Ongoing Efforts

Automotive News

February 15, 2016

## Price fixing probes wane

### U.S. official renews extradition threat

Hans Greimel

Automotive News | February 15, 2016 - 12:01 am EST

TOKYO -- America's top cartel cop reiterated his threat to extradite individuals indicted on charges of auto-parts price fixing who are hiding overseas from U.S. justice.

But lawyers say the massive federal crackdown, which has largely reeled in Japanese suppliers, is winding down as statutes of limitations kick in. Even Bill Baer, head of the Department of Justice's antitrust division, hinted that his focus will increasingly shift to other matters.

America's top cartel cop reiterated his **threat to extradite individuals indicted on charges of auto-parts price fixing who are hiding overseas** from U.S. justice.

"Extradition is an important tool in our enforcement tool kit," Baer said at the conference. "Once we file charges, and that foreign national has not come back to the United States, he or she is considered **a fugitive under U.S. law**."

Some have even remained with the company that employed them when they were allegedly colluding with other companies to fix prices. In other cases, they left with retirement packages.

No individual has challenged the charges in court. Instead, 30 individuals have agreed to prison time.

Another 31 have yet to enter pleas or are otherwise ignoring their indictments, according to one lawyer who asked not to be named because the tally is related to ongoing casework.

Source: http://www.autonews.com/article/20160215/OEM02/302159902?template=printart

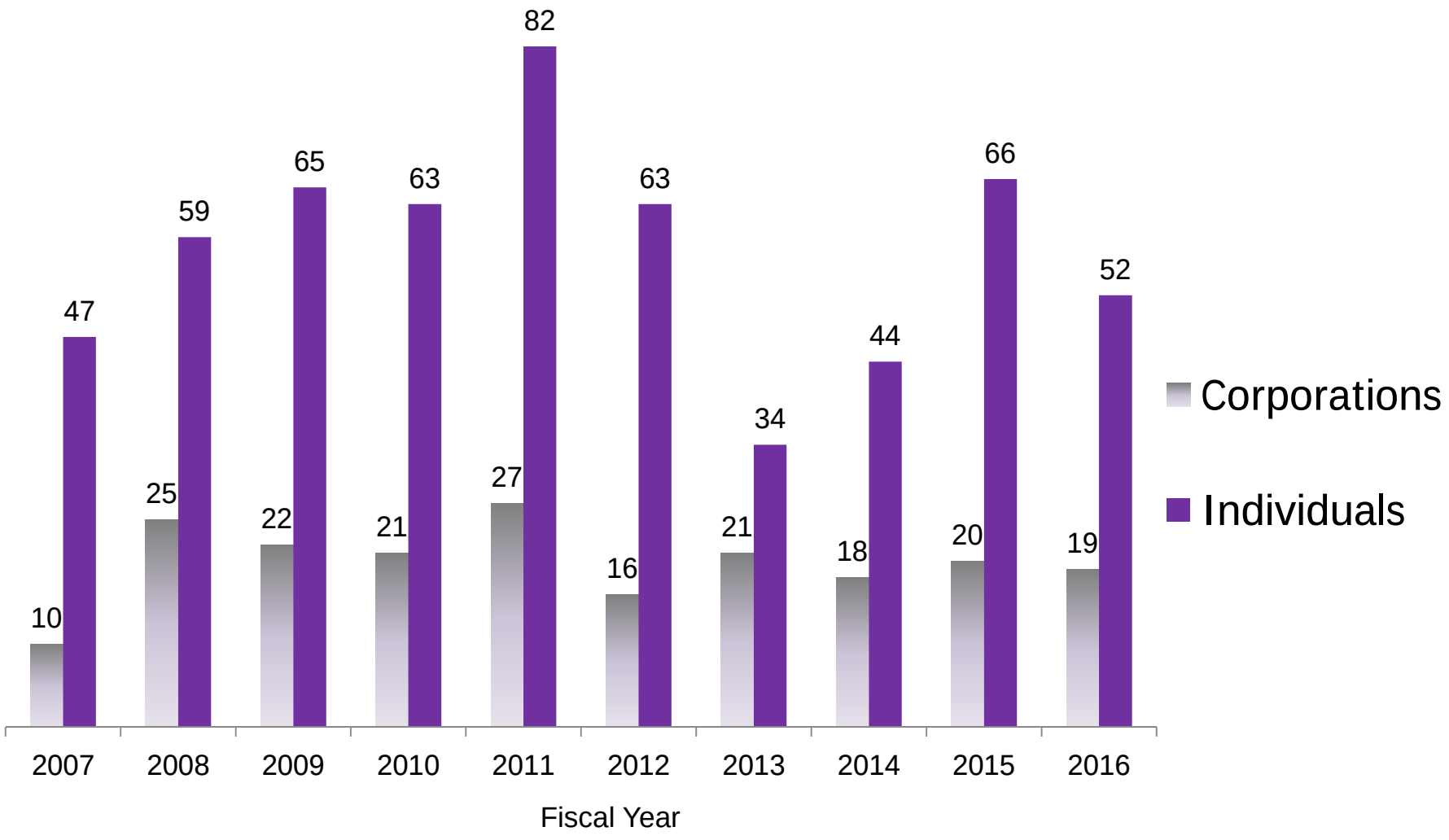
CARTEL UPDATE

# CRIMINALIZATION TREND

# Focus on Individuals

- Criminal penalties added in 2016
  - Chile
  - South Africa
- Link to extradition treaties
- First criminal case by ACCC
  - RoRo Ocean Shipping
- Individual liabilities
  - First individual fines, Spain
  - First individual barred from serving as officer or director of a public company, UK

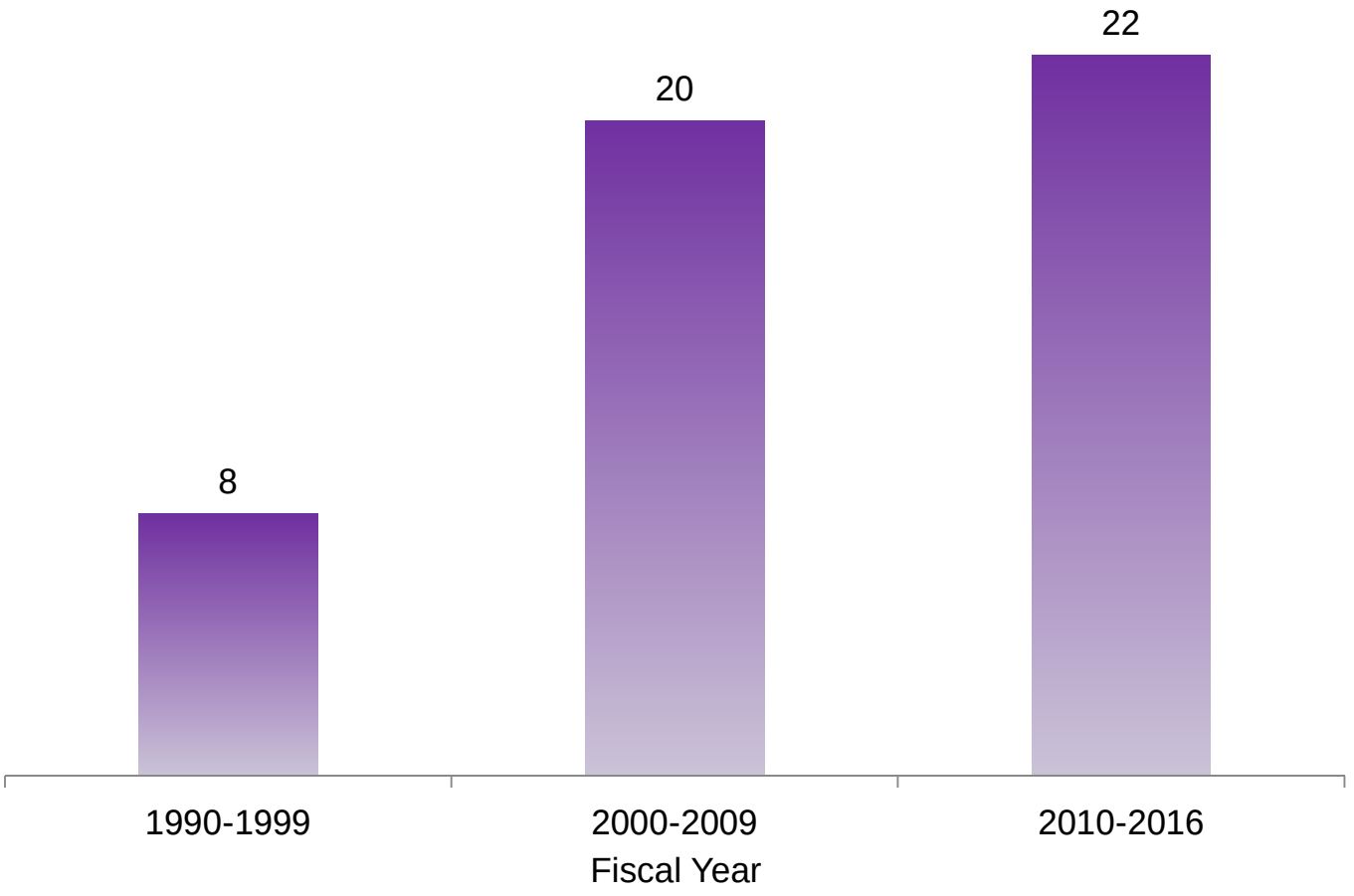
# Corporations & Individuals Charged




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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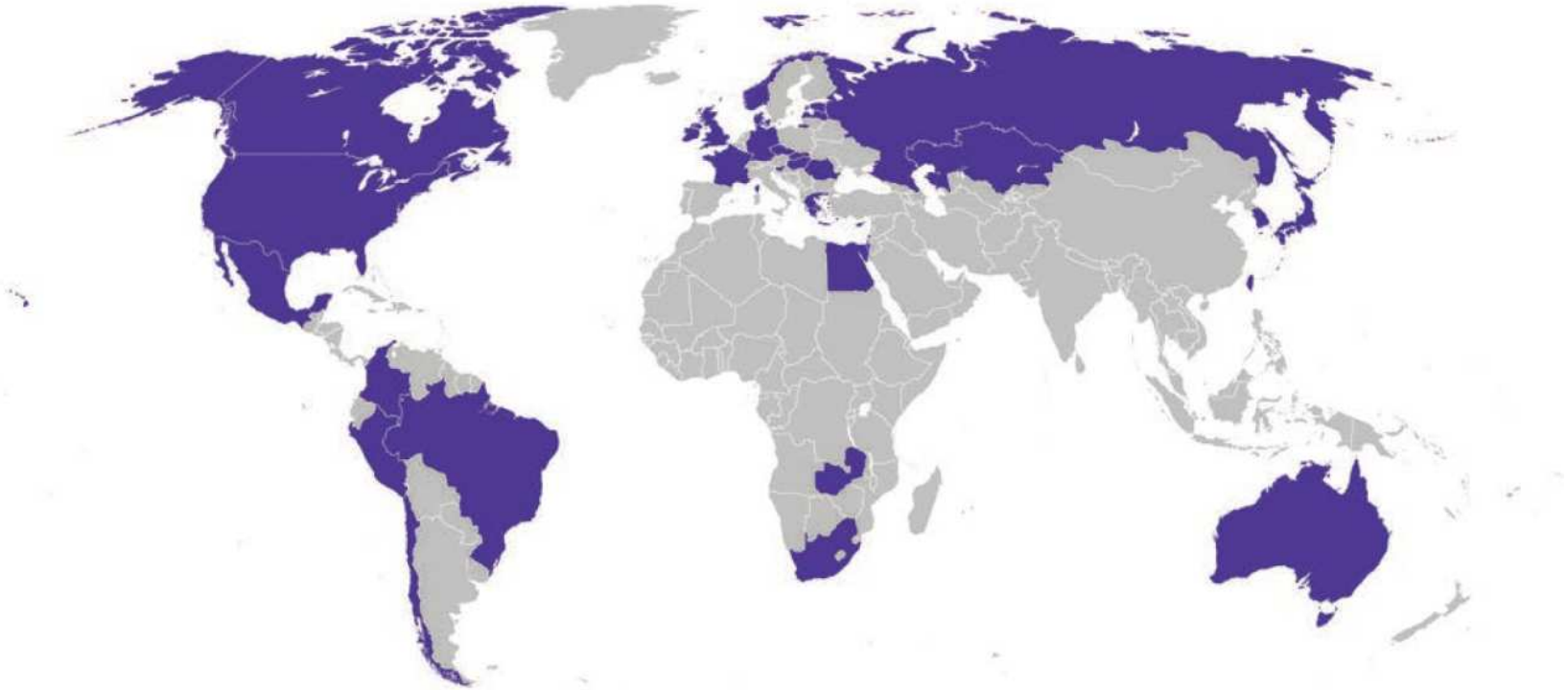
Morgan Lewis

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

# Jurisdiction with Criminal Penalties for Cartel Activities



**33 countries have criminal penalties for cartel violations or convictions**

- Australia
- Brazil
- Canada
- Chile
- Colombia
- Cyprus
- Czech Republic
- Denmark
- Egypt
- Estonia
- France
- Germany
- Greece
- Hungary
- Ireland
- Israel
- Japan
- Kazakhstan
- Latvia
- Malta
- Mexico
- Norway
- Peru
- Romania
- Russia
- Slovak Republic
- Slovenia
- South Africa
- South Korea
- Taiwan
- United Kingdom
- United States
- Zambia

CARTEL UPDATE

# EXTRATERRITORIALITY

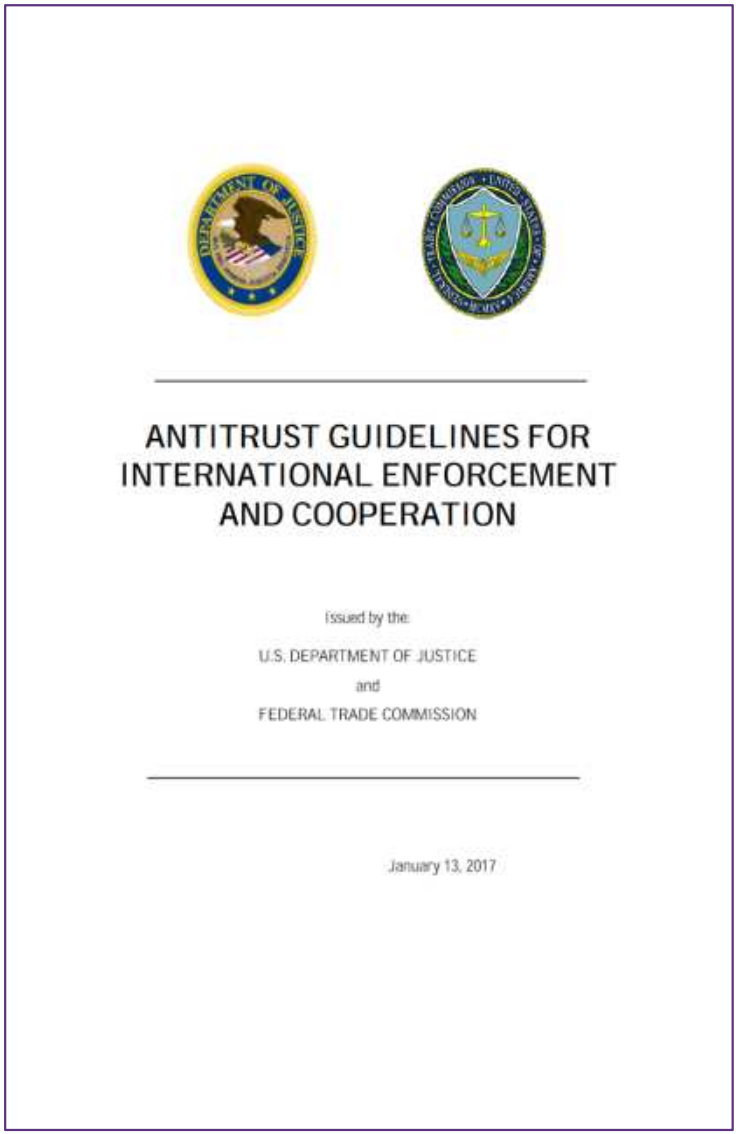
# FTAIA Developments

- ***In re Capacitors Antitrust Litigation*** **(ND Cal)**
  - Products "billed to" U.S. customers involve "import commerce" even if not shipped into the United States
  - Products "shipped to" U.S. customers involve "import commerce" even if not sold to a U.S. customer
  - Denies "global pricing theory" of plaintiffs
    - Pricing negotiated in the United States does not allow claims for purchases abroad
- ***In re Cathode Ray Tube Antitrust Litigation*** **(ND Cal)**
  - "Import commerce" exception applied even if defendant was not engaged in the importing activity
    - Sufficient that defendant "negotiated or set the price of the good" that was ultimately imported
  - Importation of finished products containing price-fixed components "involve import commerce" even if components sold outside the United States

# DOJ/FTC International Enforcement Guidelines

USDOJ Revised Antitrust Guidelines for International Enforcement and Cooperation (January 13, 2017)

- Broader interpretation of **"import commerce" exception**
  - May "involve" import commerce even if **defendants are not engaged in importing**
  - May "involve" import commerce even if not direct specifically at imports, and even if import commerce is a **"relatively small portion of the worldwide commerce involved"**
- **"Direct substantial and reasonably foreseeable"**
  - Direct = **"reasonably proximate causal nexus"**
  - Substantiality does not require **"effects to be quantified"**



ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION

Issued by the

U.S. DEPARTMENT OF JUSTICE

and

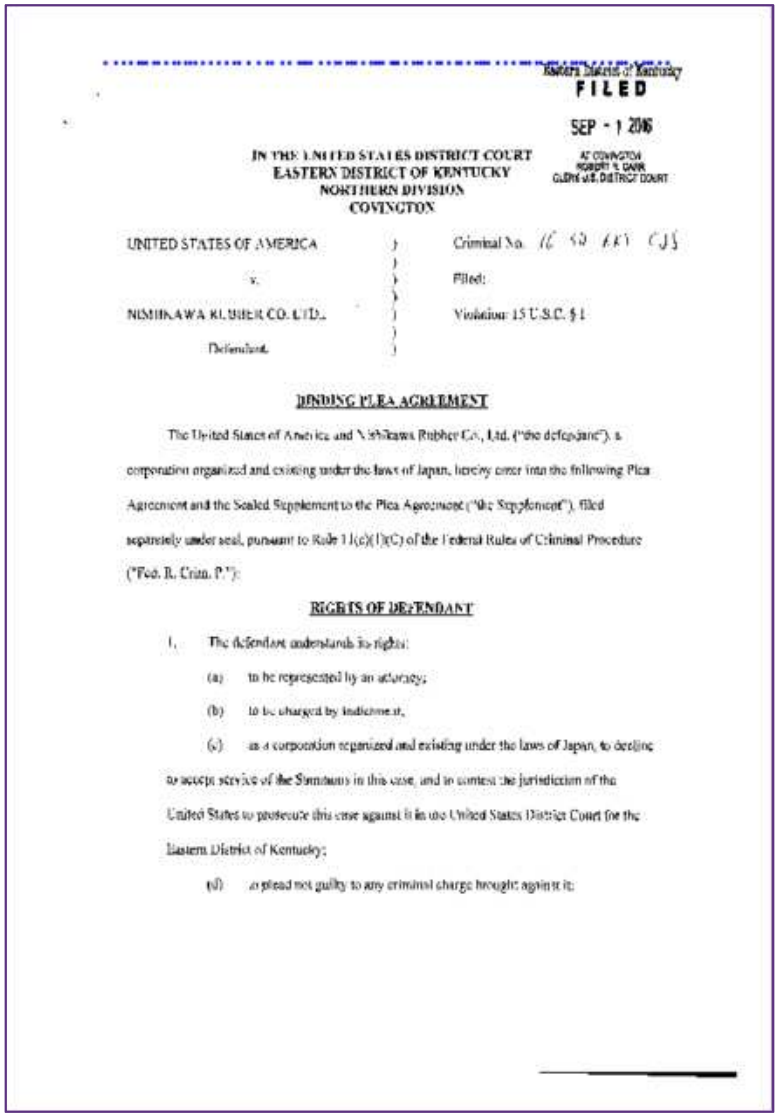
FEDERAL TRADE COMMISSION

January 13, 2017

# Extraterritoriality and Overlapping Jurisdiction

- Nishikawa Rubber
  - Joint DOJ/ CCB investigation
  - CCB accepted U.S. fine as resolution of Canadian investigation
  - Enforcement Authority cooperation to solve issues with overlapping investigations

- What will happen with the change in administration?



Eastern District of Kentucky
FILED
SEP - 1 2006
AT COVINGTON
ROBERT R. CARR
CLERK U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
COVINGTON

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | Criminal No. 06-59-KKC-CJS |
| v. | ) | Filed: |
| NISHIKAWA RUBBER CO. LTD., | ) | Violation: 15 U.S.C. § 1 |
| Defendant. | ) | |

**BINDING PLEA AGREEMENT**

The United States of America and Nishikawa Rubber Co., Ltd. ("the defendant"), a corporation organized and existing under the laws of Japan, hereby enter into the following Plea Agreement and the Sealed Supplement to the Plea Agreement ("the Supplement"), filed separately under seal, pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure ("Fed. R. Crim. P."):

**RIGHTS OF DEFENDANT**

1. The defendant understands its rights:

(a) to be represented by an attorney;

(b) to be charged by indictment;

(c) as a corporation organized and existing under the laws of Japan, to decline to accept service of the Summons in this case, and to contest the jurisdiction of the United States to prosecute this case against it in the United States District Court for the Eastern District of Kentucky;

(d) to plead not guilty to any criminal charge brought against it;

CARTEL UPDATE

# COMPLIANCE

# Compliance Continues to Take Center Stage

- DOJ Carrot and Stick
  - Carrot: fine reductions (KYB, Barclays)
  - Stick: penalty plus (Bridgestone)
  - Stick: revocation of non-pros agreement (UBS)

- Brazil: 50% fine discount based on compliance program
- Algeria: participants in CNC compliance program initiative can limit fines

- New compliance guidance from EU, CCB, BCA

# QUESTIONS?

# Contacts

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# THANK YOU

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