



presents

Heightened Antitrust Enforcement: New Emphasis, New Risks

Sharpening Compliance to Withstand Tougher DOJ Scrutiny

A Live 90-Minute Audio Conference with Interactive Q&A

Today's panel features:

Stephen B. Donovan, Chief Counsel – Antitrust, **International Paper**, Memphis, Tenn.
Henry Thaggert, Senior Counsel, Antitrust, **Northrop Grumman Corporation**, Los Angeles
Mark R. Rosman, Assistant Chief, **U.S. Department of Justice**, Antitrust Division, Washington, D.C.
J. Brady Dugan, Partner, **Akin Gump Strauss Hauer & Feld**, Washington, D.C.

Tuesday, August 25, 2009

The conference begins at:

1 pm Eastern

12 pm Central

11 am Mountain

10 am Pacific

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Heightened Antitrust Enforcement: New Emphasis, New Risks

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August 25, 2009

Heightened Antitrust Enforcement: An In-House Perspective

In-house counsel typically look at three things in assessing antitrust risks and adequacy of compliance plans

- Private litigation
- Non-U.S. rules and regulations
- DOJ and FTC activity

With exception of M&A activity, in-house lawyers do not take a short-term view of what the current Administration is or is not doing regarding enforcement levels

Heightened Antitrust Enforcement: An In-House Perspective

In-house counsel spent the past 8 years looking at –

- Adoption of new laws around the world
- Increase in cartel prosecution and cooperation around the world
- Twombly, Leegin, Stolt-Nielsen
- Bigger fines and tougher individual sentences
- The rise and fall of the McNulty Memorandum
- Impact of SOX on governance and compliance

Heightened Antitrust Enforcement: An In-House Perspective

Current corporate environment creates significant compliance challenges

- **Significant resource constraints**
 - Shrinking budgets
 - Chronic staffing shortages
- **Financial performance pressures**
- **Competing compliance requirements**
- **SOX exhaustion**

Heightened Antitrust Enforcement: An In-House Perspective

Maintaining a “best of class” compliance program is difficult but doable in current climate

- **Push the value added nature of compliance**
 - According to CRO Magazine, the top 100 “most ethical” companies have outperformed the Russell 1000 by 26% over the past 3 years
 - Governance Metrics International (GMI) observed that those companies ranked in the top 10% of governance ratings outperformed those in the bottom 10% of ratings by a 56% in average return on equity
- **Adopt a risk-centric approach**
 - Better way to allocate scarce resources
 - Dovetails with current trend towards greater use of Enterprise Risk Management tools
- **Capitalize on resources acquired during SOX ramp-up**
 - Internal Audit has developed considerable skill in compliance review



Heightened Antitrust Enforcement: New Emphasis, New Risks

Sharpening Compliance to Withstand
Tougher DOJ Scrutiny

August 25, 2009

Henry L. Thaggert
Senior Counsel, Antitrust
Northrop Grumman Corporation

"OFFENSIVE VIGILANCE"

- A key role that compliance plays in my company is educating and sensitizing the business community to be vigilant against antitrust harms inflicted upon our company.

- Obama Admin has announced a record \$ 533.8 Billion budget for 2010 (4% increase).
- Overall, there is a decline in procurement expenditures (e.g., Space Programs).
- Uncertainty about budgets and big-ticket weapons systems.
- News reports of layoffs at major contractors.

- DoD is pushing for multipurpose joint programs where the winner takes all (JLTV, JSF, JTRS).
- DoD is placing less emphasis on programs where the runner-up wins contracts (F-15, F-16, F-18).
- Absent collaboration, Primes cannot stay engaged in the industry or program.
- Result: creates incentives among competitors to collaborate.

SUPPLIER CONSOLIDATION

- Future consolidation among the larger firms not likely.
- Future consolidation more likely among lower tier suppliers—medium and small firms that provide inputs—from steel to microchips.
 - Creditors cut off small suppliers.
 - Foreign firms or our competitors purchase suppliers.
- Result: Increased concentration leads to supplier collusion, access foreclosure & other vertical issues.

HEIGHTENED ENFORCEMENT

- The Contracts Business Compliance Program and Disclosure Rule.
 - December 12, 2008.
 - Mandatory Reporting.
 - Contractors now must report in a timely fashion to the Government Customer, credible evidence of criminal activity, false claims or other improper conduct.

- Top-down training to capture business executives in marketing, operations and strategy.
 - Live training (follow the market shares; follow the documents).
 - Hot line or a reporting mechanism
 - Easily accessible training manual
 - Easy access to antitrust counsel

POTENTIAL AREAS OF CONCERN IN A RECESSED ECONOMY



- Collusion among suppliers
- Collaboration among rivals
 - Winner take all programs
 - Pressure from Government Customer to collaborate to preserve skill levels in the industrial base
- Business pressure to increase probability of win by, e.g.:
 - Exclusive teaming
 - Working with incumbents rather than new entry
 - Buyers Consortia

COMPLIANCE PRESSURES IN A RECESSED ECONOMY



- Internal training and compliance should be simple, but still robust.
- Deficiencies in training could lead uninformed workers to:
 - Engage in questionable conduct; or
 - Over react and delay business operations
- An emphasis on “offensive vigilance.” Look out for anticompetitive conduct that impacts our business.

KEEPING COMPLIANCE SIMPLE

- Defense contractors are not exempt from antitrust scrutiny.
- There is a business value associated with knowing the antitrust laws.
- There is value in coming forward to report antitrust violations.
- Pick up the phone rather than assume an antitrust risk.
- Maintain open markets for benefit of our ultimate customer and the U.S. tax payer.

KEEPING COMPLIANCE SIMPLE

- Overriding concern: whether the conduct will help or hurt our Government Customer.
- If harmful to the Customer, then the conduct is subject to detailed scrutiny. Appropriate action is taken to modify or stop the offending conduct.
 - Regardless whether conduct results in a win for us.
 - Regardless whether conduct reduces our internal costs.

NO EXEMPTION FOR DEFENSE CONTRACTORS



- FEDERAL ACQUISITION REGULATIONS SUBPART 9.604
 - Teaming is NOT permission to violate the antitrust laws.
 - “Nothing in this subpart authorizes contractor team arrangements in violation of antitrust statutes . . .”

NO EXEMPTION FOR DEFENSE CONTRACTORS



- F.A.R. 3.301:
 - Practices that eliminate a competitor usually lead to excessive prices; and
 - May warrant criminal, civil or administrative action.

“OFFENSIVE VIGILANCE”

- Educate the business community to look out for collusion among our suppliers, competitors.
- Vigilance helps control costs.
- Internal training is not weaker in a recessed economy, but there's an emphasis on identifying conduct that impacts our business.
- Result: A subtle reminder to the business people in high-pressure times that they, too, have a duty to follow antitrust laws.

"RULE OF REASON" CONDUCT

- PROCEED, IF BENEFITS OUTWEIGH HARMS:

- BENEFITS TO THE CUSTOMER
 - Reduce the risk and cost of failure
 - Reduce delivery time
 - Complementary abilities enable "leap frog" in technology

- HARMS TO THE CUSTOMER
 - Competitors agree on prices
 - Reduce customer choice
 - Eliminate alternate supply source
 - Reduce innovation
 - Competitors will lose interest in quality or innovation.

PROCOMPETITIVE BALANCING TEST

- “PROCOMPETITIVE BENEFIT” REFERS TO THE CUSTOMER, NOT TO NORTHROP AND/OR TEAMMATE.

CONCLUSION

- Internal training and compliance remains robust.
- Access to training and information is key.
- Economic downturn may create heightened pressure to engage in collaborations or risky conduct to reduce the costs of competition or increase the probability of winning a bid.
- An emphasis on “offensive vigilance.” Look out for anticompetitive conduct that impacts our business.

NORTHROP GRUMMAN





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The views expressed do not purport to reflect those of
the U.S. Department of Justice.

Sherman Act (15 U.S.C. § 1)

- “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”
- Prohibits agreements among competitors in restraint of trade or commerce

Sherman Act Elements

- **Agreement**
- **Unreasonable restraint of trade**
 - Price-Fixing
 - Customer/Market Allocation
 - Bid-Rigging
- **Interstate commerce**
- **Statute of Limitations: 5 years from the *last act* in furtherance of the conspiracy**



Price Fixing

Agreements among competitors to:

- Same price or raise prices
- Eliminate discounts or have uniform discounts
- Establish minimum or floor prices
- Establish a standard pricing formula



Allocation

Agreements among competitors to:

- Allocate customers
- Allocate territories
- Allocate sales volumes
- Allocate production volumes
- Allocate market shares



Bid Rigging

- Agreement in advance to manipulate outcome of bidding process
- Types:
 - Bid Suppression
 - Complementary Bidding
 - Bid Rotation



Penalties Are Significant

- **Corporation**
 - Up to \$100 million
- **Individual**
 - \$1,000,000; and/or
 - 10 years incarceration
- **Corporation or Individual**
 - Twice gain to defendant; or
 - Twice loss to victim



Companion Violations

- Bribery/Gratuities (18 U.S.C § 201)
- False & Fictitious Claims (18 U.S.C. § 287)
- Conspiracy to Defraud U.S. (18 U.S.C. § 371)
- False Statements (18 U.S.C. § 1001)
- Mail/Wire Fraud (18 U.S.C. §§ 1341, 1343) – Honest Services
- Obstruction of Justice (18 U.S.C. § 1519)



What Prompts an Investigation

- Tip from an insider
- Tip from an ex-employee
- Amnesty application (individual or corporate)
- Complaint from a customer
- Industry patterns

Red Flags: Are Conditions Conducive to Collusion?

- There are few sellers in an industry, or a small group of major vendors controls a large percentage of the market



MARKET

Other Indicators

- The product is standardized and other competitive factors, such as design, quality, or service are not prevalent
- Repeat competing vendors
- Competitors frequently interact through social conventions, trade association meetings, shifting employment, etc.
- Protracted cut-throat competition, followed by price stabilization



PATTERNS

- The same vendors submit bids and each one seems to take a turn as the winning bidder (bid rotation)
- A winning bidder subcontracts work to competitors that submitted unsuccessful bids or withdrew bids
- All bidding companies end up winning the same amount of work over a series of bids
- Same company always wins a particular bid
- Fewer than normal number of bidders



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Working With The Criminal Antitrust Enforcers

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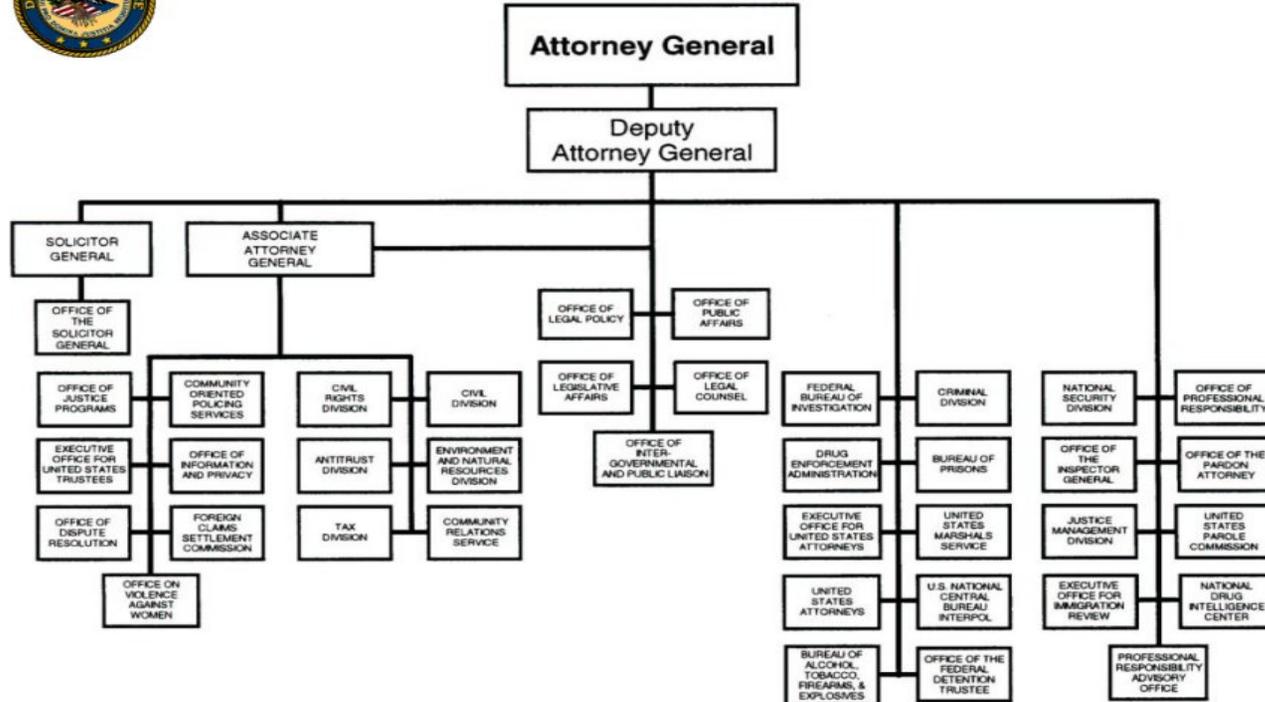
202-887-4152

Date: August 25, 2009

U.S. Department of Justice



U.S. DEPARTMENT OF JUSTICE



Approved by:

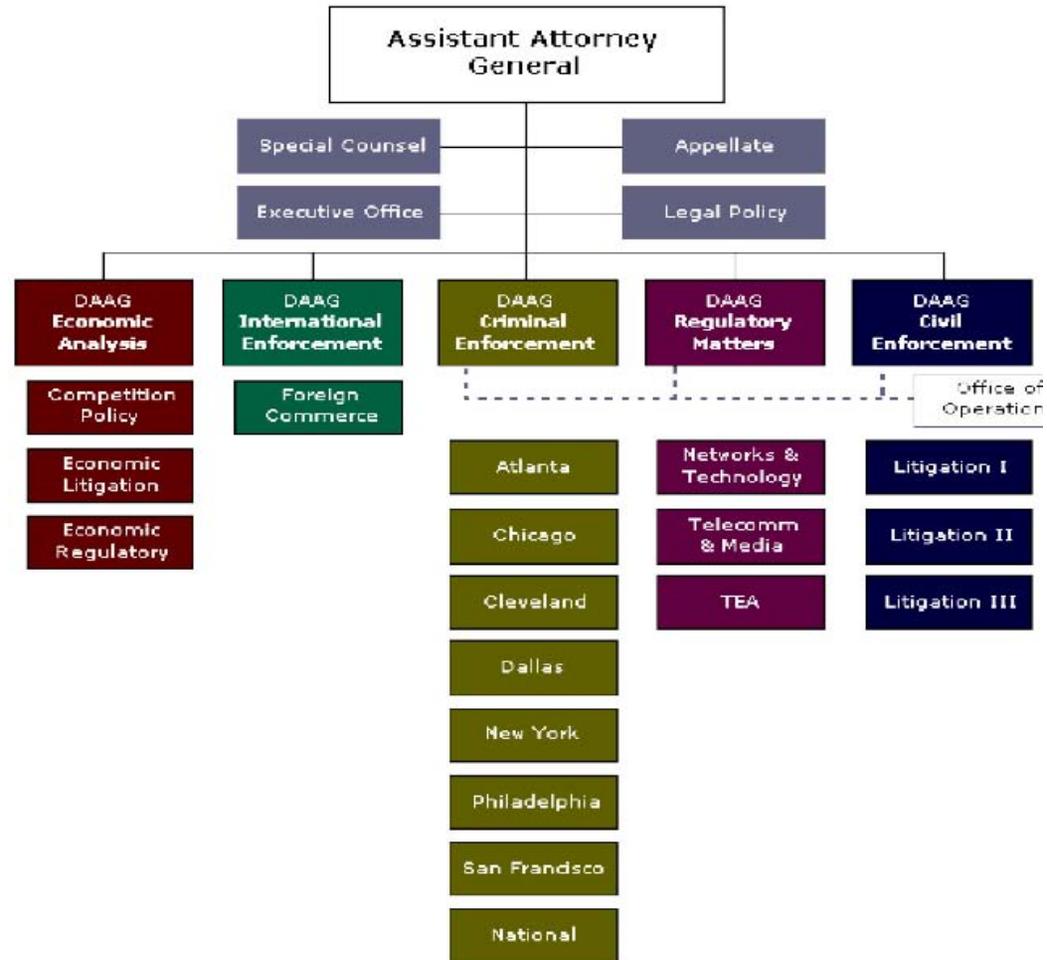
Albert R. Gonzales
ALBERT R. GONZALES
Attorney General

Date:

3-13-04



U.S. Department of Justice, Antitrust Division



The Department of Justice Aggressively Pursues Criminal Antitrust Matters

- **President Obama promised during his campaign even more antitrust enforcement**
 - ◆ “As president, I will direct my administration to reinvigorate antitrust enforcement.”
 - ◆ Promised “aggressive action” against antitrust cartels
- **The Department of Justice is following through on these promises of increased enforcement**
 - ◆ For example, by May 2009, DOJ had trained over 8,000 inspector generals and government procurement officers to ferret out competition crimes in connection with money disbursed under the Stimulus Bill
- **The result will be even more criminal antitrust matters brought by DOJ**

Working With the Antitrust Division Criminal Enforcers

- **Working with the Division Proactively**
 - ◆ Is cooperation in the company's best interest?
 - What is the alternative to cooperating?
 - The Antitrust Division's Leniency Program
 - Cooperating outside the context of the Leniency program

- **Working with the Division Reactively**
 - ◆ Search warrants
 - ◆ Grand jury subpoenas
 - ◆ Other compulsory process

Approaching the Antitrust Division: The Leniency Program

■ Corporate Leniency (“Amnesty”) Process

- ◆ First company to satisfy amnesty criteria gets **immunity from prosecution**
 - Usually extends to all current and former employees who agree to cooperate
 - Can get amnesty where there is no current DOJ investigation (Part A amnesty) and where there is a DOJ investigation already open (Part B amnesty)

- ◆ **Civil implications:** private plaintiffs limited to **single damages**; no joint & several liability

- ◆ **International implications:** some form of leniency is available in many foreign jurisdictions; for international cartels, generally need multiple leniency applications

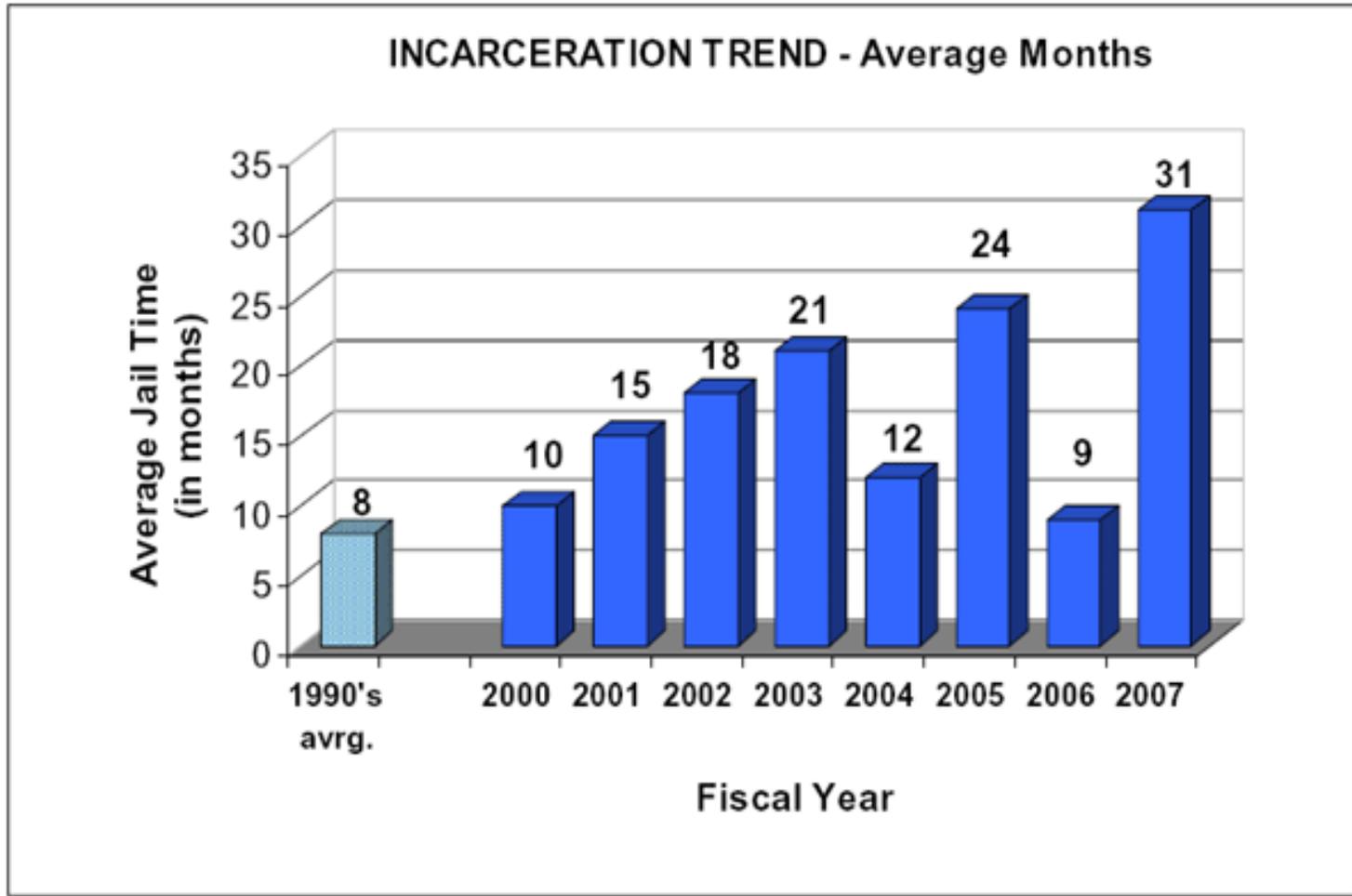
The Antitrust Division's Leniency Program

- **Alternative to amnesty is prosecution**
 - No “deferred prosecution agreements”
 - No “no-jail deals” for individuals
- **Prosecution has meant high fines and long jail sentences**
- **Collateral consequences to prosecution**
 - ◆ Debarment
 - ◆ Private damages litigation

Antitrust Division Fines: \$100 Million or More

F. Hoffmann-La Roche, Ltd.	(1999)	Vitamins	\$500 Million
LG Display Company, Ltd			
LG Display America, Inc.	(2008)	TFT-LCD Displays	\$400 Million
Korean Air Lines Co., Ltd.	(2007)	Air Transportation	\$300 Million
British Airways	(2007)	Air Transportation	\$300 Million
Samsung Electronics Company, Ltd.;			
Samsung Semiconductor, Inc.	(2006)	DRAM	\$300 Million
BASF AG	(1999)	Vitamins	\$225 Million
Hynix Semiconductor, Inc.	(2005)	DRAM	\$185 Million
Infineon Technologies AG	(2004)	DRAM	\$160 Million
SGL Carbon AG	(1999)	Graphite Electrodes	\$135 Million
Mitsubishi Corp.	(2001)	Graphite Electrodes	\$134 Million
UCAR International, Inc.	(1998)	Graphite Electrodes	\$110 Million
Sharp Corp.	(2008)	TFT-LCD Displays	\$120 Million
Archer Daniels Midland Co.	(1996)	Lysine & Citric Acid	\$100 Million

Antitrust Division Jail Terms



Leniency Program Requirements

■ Requirements for Leniency

- ◆ Available on the Web:
<http://www.usdoj.gov/atr/public/guidelines/0091.pdf>
- ◆ Sherman Act violation
- ◆ First to qualify
- ◆ Took prompt and effective action to terminate
 - U.S. v. Stolt-Nielsen, 524 F.Supp 2d 586 (E.D. Pa. 2007)
- ◆ Full, continuing, complete cooperation
- ◆ Did not coerce others; not the organizer or ringleader
- ◆ Other requirements

When the Division Comes to You

- **Search Warrants**
 - ◆ Have become very common for Division investigations
 - ◆ Benefits to the government
 - ◆ Often executed in multiple locations
 - In U.S.
 - In foreign jurisdictions
- **Grand Jury Subpoenas**
 - ◆ Documents
 - ◆ Testimony
- **“Drop-in” Interviews**

What Can You Do: Compliance

- Antitrust compliance program
 - ◆ Catch problems
 - An effective compliance program can catch problems at an early stage
 - The alternative can be expensive and time-consuming litigation, fines, and imprisonment
 - ◆ Minimize the impact of problems
 - DOJ considers compliance programs when deciding whether to charge companies (outside the antitrust context)
 - Companies that are convicted of crimes can get sentencing credit for an effective compliance program