

# ANTITRUST TRENDS

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**30<sup>th</sup> Annual National Institute on White Collar Crime – ABA**

**March 2, 2016**

**San Diego, CA**

# I. OPENING OVERVIEW

- ❖ **DOJ PRIORITIES / ORGANIZATION / FUNCTIONS OF ANTITRUST DIV.**
- ❖ **TRENDS (DEFENSE PROSPECTIVE):**  
INVESTIGATION AND PROSECUTION IN FINANCIAL SERVICES INDUSTRIES / HOT PROSECUTIONS NATIONALLY / INTERNATIONAL
- ❖ **CRIM. ENFORCEMENT TRENDS - CHARTS / INCREASED BUDGET & HIRING**

## II. DIFF. B/W CRIMINAL & CIVIL ANTITRUST CASE

- What does prosecution look to in deciding?
- Role of defense counsel in process

# III. FOLLOW ON LITIGATION

- Relationship and conflict between antitrust investigations and follow-on class action lawsuits. The role of ACPERA in private class action litigation (Antitrust Criminal Penalty Enhancement & Reform Act (ACPERA))
- Explain ACPERA
- Confession to criminal cartel is significant (treble damages and joint and several liability) - follow-on civil litigation

- Under ACPERA, to receive full benefit of leniency program and avoid treble damages, leniency applicant must cooperate with civil plaintiffs in related private suits.
- What is civil exposure when cooperating (is it limited?)
- Statute states that cooperation must be “Satisfactory cooperation.” What is the standard?
- What is interplay with plaintiff’s counsel and defense counsel?

# IV. NAVIGATING A SUCCESSFUL LENIENCY RESULT

**A. Corporation** - Division's corp-leniency policy has been game changer.

Explain: Not prosecute 1<sup>st</sup> qualifying corp. to:

- report a cartel
- fully admit to its role in conspiracy
- ID co-conspirators
- complete and timely cooperation

- What % of cases begin w/o leniency applicant (more than 1/3 start w/o Applicant)
- What are the expectations of DOJ to obtain leniency status? (Answers) -
  - Thorough internal investigation
  - Details of conduct
  - Producing foreign-located documents
  - Prepare translations
  - Make witnesses available for interviews

## B. Individual - Can employees earn leniency as well?

- Employees given immunity for cooperation?
- Apply to former employees?
- What if violations are other crimes, such as fraud, tax evasion, corruption?

[Only Sherman Act violations]



## C. Yates Memo; go after individuals; how square w/leniency?

Dep. A.G. Sally Yates' memo to pursue individuals -

- Do you see increased prosecutions and prison terms for individuals
- In addition to antitrust violations, what related violations being used (i.e., obstruction of justice)
- Yates Memo denies cooperation credit to companies that disclose incomplete information regarding individual culpability.

Sets the stage for choice between self-incrimination and employment. Is it improperly coercive?

- Yates Memo directs prosecutors insert themselves at early stage; requiring consultation with administrative and corporate counsel sees problems.
- When does representation conflict arise? At what point does company counsel recommend separate counsel for employee?

- What if crime also outside U.S., any benefits w/other countries?
- What if not 1<sup>st</sup> in door for leniency. What about early acceptance of responsibility?
- Does cooperation require more than accepting responsibility?
  - Might rise to “Substantial Assistance”
- Individuals included in non-prosecution provisions of a corporate plea agreement called “carve-ins”; excluded “carved-out”; what basis use to decide?

# V. INTERNATIONAL ANTITRUST ENFORCEMENT

Overlapping prosecutions by U.S. and foreign antitrust authorities (concern about multiple prosecutions for same conduct)

A. Different countries involved, how can we be assured enforcement decisions be based on competitive effects and consumer benefits rather than policy goals, protect companies from foreign competitors or leverage in international trade negotiations.

- What goes into making decision to handle antitrust case initialized abroad?
- Organization by prosecution (what challenges)
- Defense organization (what challenges)

B. Extraterritorial reach of U.S. antitrust laws and prosecution of purely foreign conduct.

Foreign companies fixing prices of components abroad that end up in U.S. after being incorporated into a finished product like a laptop or cellphone.

## C. Extradition for U.S. antitrust crime

- Extradition in Marine Hose industry investigation
- Germany extradited Romano Piscioti, an Italian national, to the U.S. (See DOJ Press Release 4-4-2014)
- What were considerations?
- What are implications for the future?

## VI. PENALTIES, FINES IN INTERNATIONAL CASE

- International cases, what is methodology used to calculate fines (automotive parts case involved 11 jurisdictions that imposed sanctions)
- Double counting (What being done to address?)

Give examples of double counting (cases)



- Discharging criminal antitrust fines in bankruptcy
- How are fines calculated?
- How loss calculated for sentencing?  
(Corp. / Individual)

## VII. COMPLIANCE PROGRAMS

Compliance prevents and detects anti-trust behavior and demonstrates management to complying with laws and regulations. Is there a willingness by DOJ to consider a company's compliance efforts?

- Why a shift in DOJ policy?
- What is effect of compliance program in reducing fines and sentences?

- What specific activities does Govt look to for effectiveness compliance programs?
  - Example: Informal/Formal reporting of consultant evaluation-assessment.
- Document review of information relevant to company compliance program
- What makes change in compliance culture?

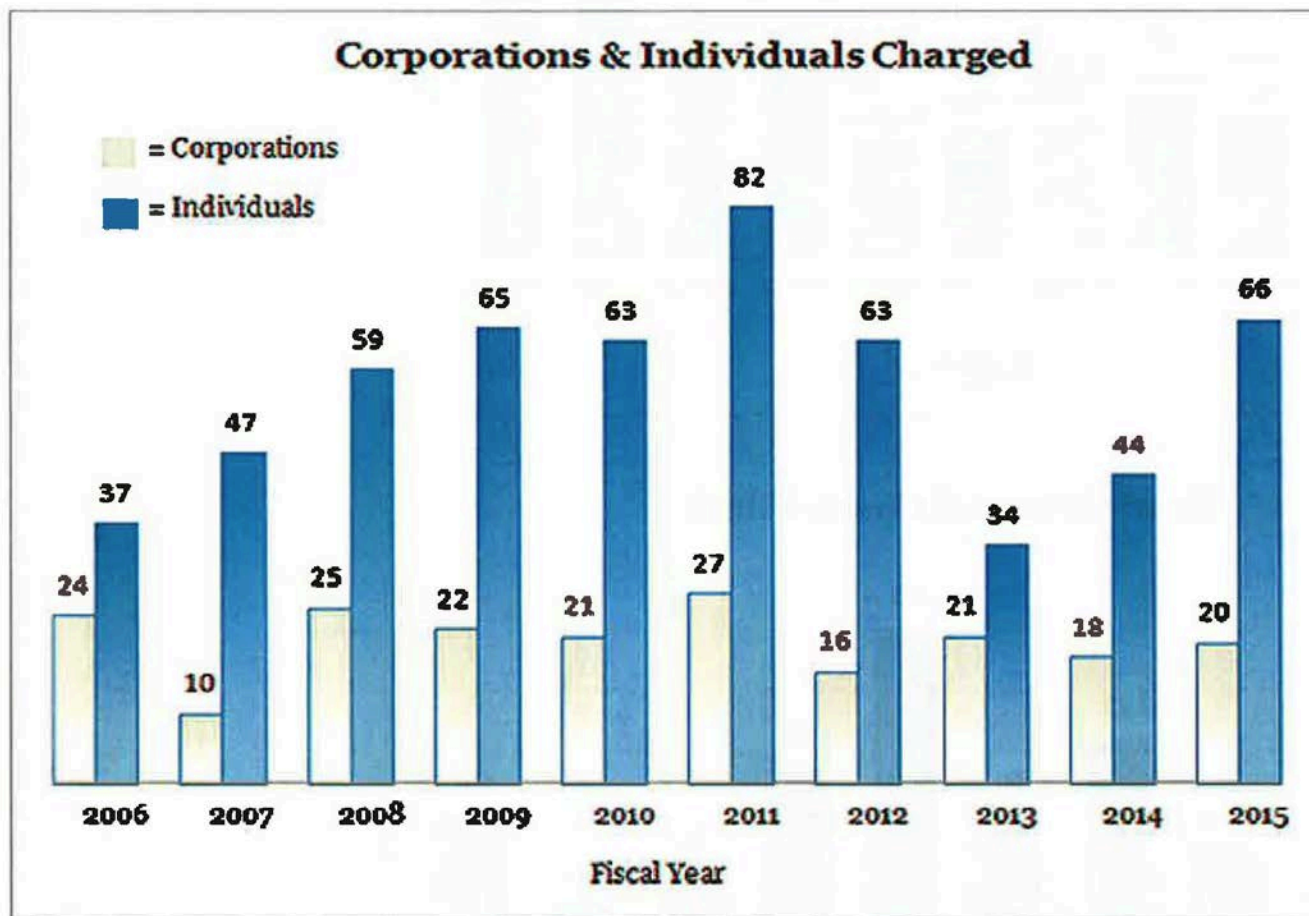
- Does culture matter?
- How does prosecution look at the culture?
- What is the interplay between guidance of Sentencing Guidelines / U.S. Atty Manual and the unique nature of antitrust cartel crime?

# VIII. MONITOR

Asst. A.G. Bill Baer, has indicted Antitrust Div.  
May bring in 3<sup>rd</sup> party monitors as part of teams of  
a negotiated plea or settlement agreement

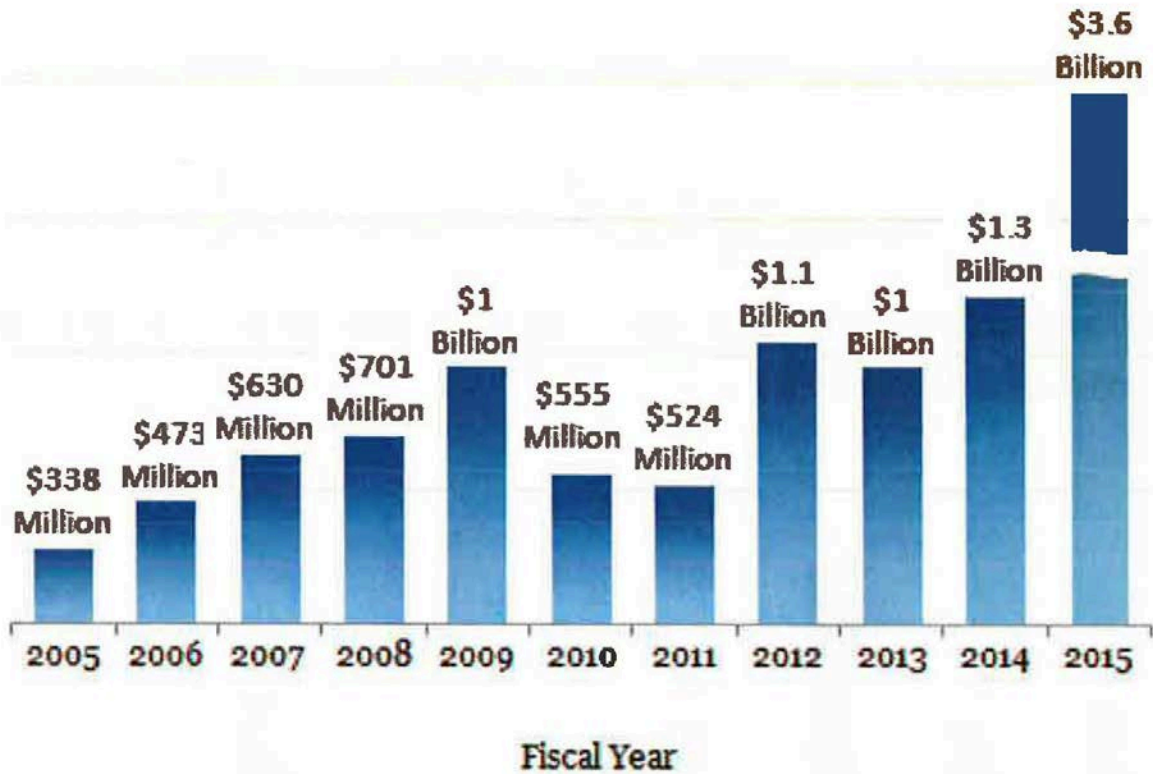
- When is it appropriate to call for Monitor?
- How chosen?
- Role of defense counsel for input for Monitor

## CRIMINAL ENFORCEMENT Trends Charts Through Fiscal Year 2015



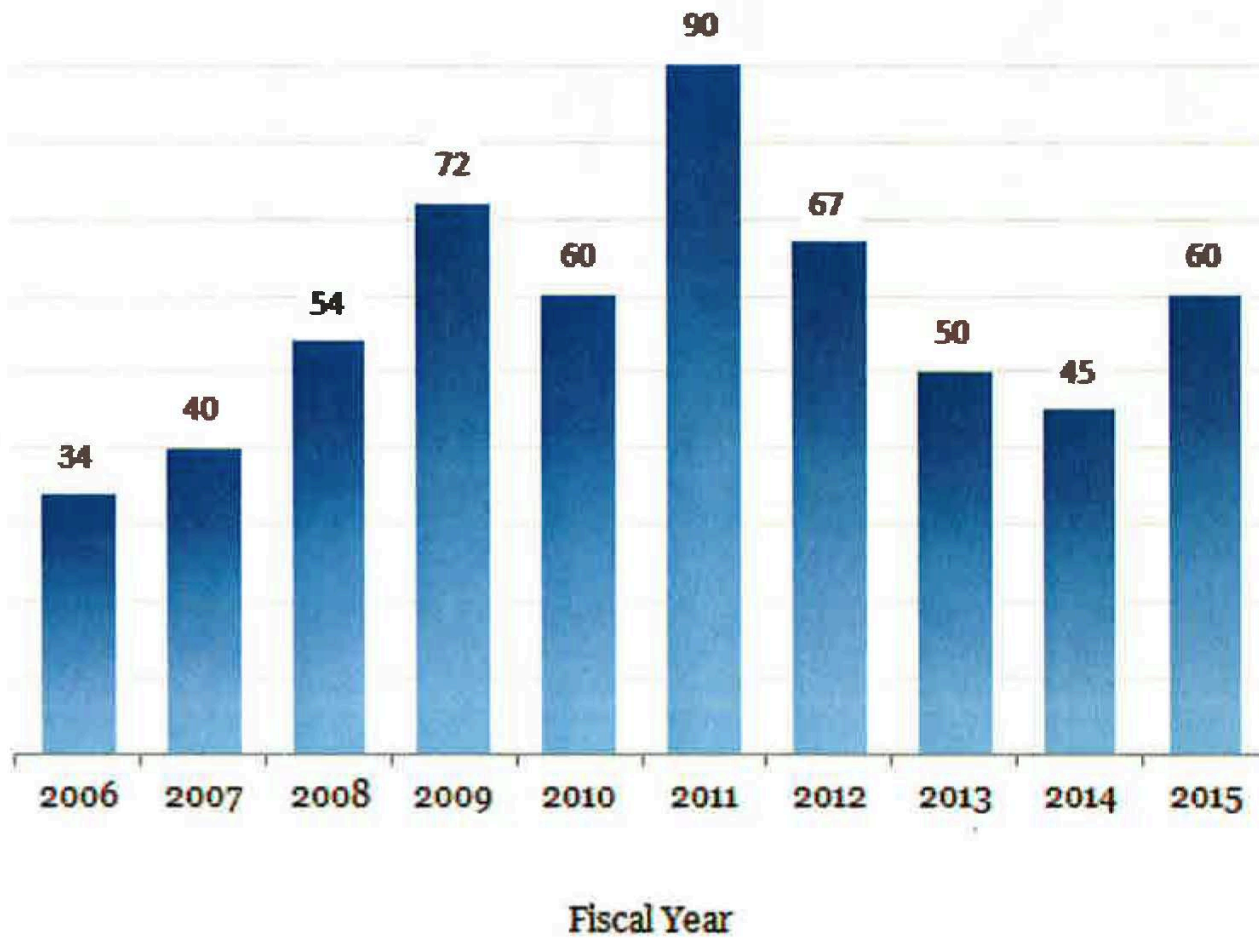
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## Total Criminal Fines & Penalties



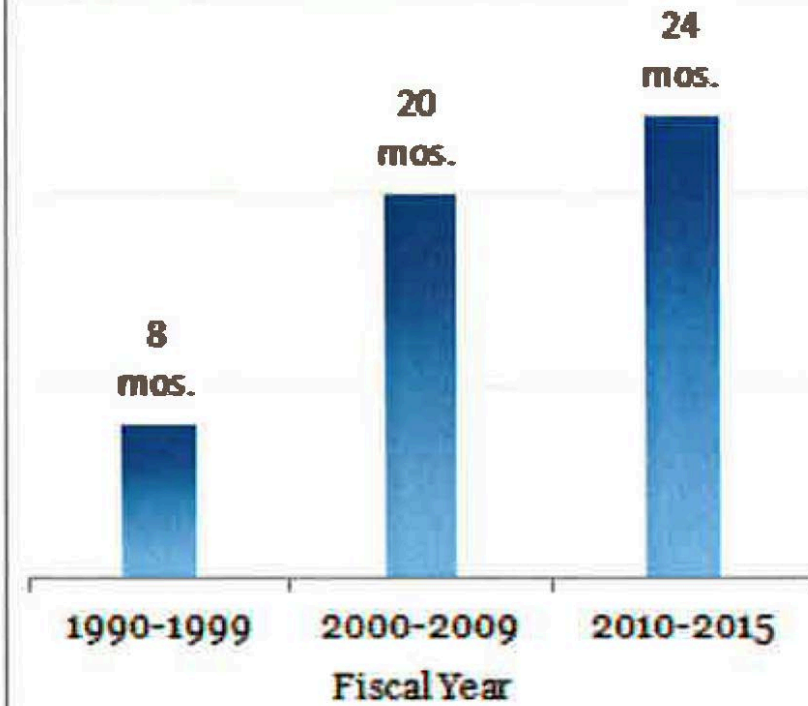
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## Total Criminal Cases Filed





## Average Prison (months)



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