

**ABA SECTION OF ANTITRUST LAW  
2009 SPRING MEETING**

Detecting Illegal Behavior Within the Company:  
Audits, Bounties & Leniency  
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**“GET SMART”: REDUCING A COMPANY’S  
RISK OF BEING A CARTEL VICTIM**

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- I. COMPANIES MUST BE VILIGANT AGAINST CARTELS – WHILE NOT COMMONPLACE, THEY ALSO ARE NOT RARE**
- A. Despite the DOJ Antitrust Division's recovery of over \$4B in criminal fines over the past 11 years, price-fixing among commercial product and service suppliers continues as officials set enforcement records.
  - B. In FY 2007: (a) defendants prosecuted by the Antitrust Division were sentenced to 31,391 jail days; the highest total number of jail days imposed in any given year and more than doubling the previous high of 13,157 jail days imposed in FY 2005, (b) total fines obtained by the Division were more than \$630M, the second highest total in Division history, (c) records were set for the longest jail terms ever imposed on foreign nationals, and (d) the Division had 135 pending grand jury investigations including over 50 investigations of suspected international cartel activity; the highest number of pending grand jury investigations since 1992.
  - C. Cartel targets ranged from purchasers of air cargo transportation and rubber chemicals to purchasers of vitamins and graphite electrodes. And far beyond . . .

- D. See "Recent Developments, Trends, and Milestones in The Antitrust Division's Criminal Enforcement Program", Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, U.S. Department of Justice (March 26, 2008).

## **II. DEPUTIZE COMPANY PROCUREMENT EMPLOYEES AS FRONTLINE CARTEL SCOUTS**

- A. Procurement department is the eyes and ears of the company with respect to supplier conduct and can be instrumental in early detection of price-fixing, bid-rigging, market allocations, or output controls.
- B. Procurement employees are only ones with potential visibility into cartels as they are forming or while they operate. Whistleblowers, amnesty applicants, and agency investigations are essentially after the fact and based on historical conduct.
- C. Better to stop a cartel in its tracks rather than having to file litigation years after substantial harm has been incurred by the company.
- D. Procurement employees cannot do it alone. Legal Department must be integrally involved.

## **III. PROCUREMENT DEPARTMENT MUST BE TRAINED IN THE ART OF CARTELS – WHY AND HOW THEY OPERATE AND HOW TO DETECT THEM**

- A. Employees need to know what to look for and need to understand the lengths cartel members will go to keep cartels secret. Publicly available details of actual operations as released by the DOJ can significantly aid in this process.
- B. Additionally, employees need to be informed about cartel cases as they are brought by DOJ to enable (a) assessments of possible impact on company, and (b) understanding regarding the variety of industries involved in cartel activity.
- C. Legal should develop a training program to teach employees about key red flags.
- D. Consider bringing in law firms and economists who can provide insights from first hand experience prosecuting and defending cartels.

## **IV. CRITICAL AREAS FOR TRAINING**

A. Industry Characteristics

- Difficult or costly for new firms to enter
- Only a few suppliers or small group of suppliers
- Suppliers have similar costs or fixed costs account for high proportion of total costs
- Active trade association gives competitors opportunity to meet and discuss

B. Product Characteristics

- Product or service is not complex
- Product is a commodity
- Product has few or no close substitutes

C. Market factors

- Demand for product is stable
- Growth is slow to moderate
- Market share is important to success

D. Pricing Activity

- Prices, discounts or rebates are very similar or identical
- Unexpected or unjustified price increases or different suppliers raise prices by similar amounts at same time
- Price changes suggest one supplier is the leader and others following
- Range of quoted prices narrows suddenly or discount arrangements change suddenly

E. Bidding Activity

- Suppliers meet at times close to submission period
- Bids come in higher than expected
- Supplier(s) that would normally bid fails to do so without good reason
- Winners appear to be on a fixed rotation
- Same supplier is always lowest bidder
- Prices drop when a new supplier bids
- Successful bidder subcontracts out to competitors who submitted higher bids
- Bids received are very similar -- errors, miscalculations, etc.
- Bidders wait until last minute to submit bids

F. Suppliers Use Suspicious Language

- Use same words when explaining price increases
- Say the "the industry" has decided to increase margins

- Say cannot sell to you because of an agreement with others
- Say another supplier should not have sold to you

G. Recent History of Cartel Enforcement (particularly within industry)

## V. **PREPARE COMPANY/INDUSTRY “WATCH LIST”**

- A. Create a master list of key company purchases and suppliers.
- B. Analyze and apply the above historical and economic factors.
- C. Classify as High, Medium or Low risk. Please most attention on High and Medium Risk products.

## VI. **CREATE AN EARLY ALERT SYSTEM**

- A. Procurement Dept. Should Be Alert to and Track Suspicious Activity
  - Structural changes in industry
  - Apparent information exchanges among competitors
  - Odd price increases or odd bidding behavior
  - Trade press reports suggesting coordination
- B. Employees should get Legal Counsel involved Early
  - Depending on seriousness may want to retain economist
- C. Specific Next Steps Greatly Dependant on Facts, but . . .
  - Save, Save, Save (all relevant materials and notes)
  - Document, Document, Document (all conversations and events)
  - Ask for written confirmations of concerning responses or certifications of lack of collusion (to preserve fraudulent concealment arguments)
  - Ask questions when bids do not make sense
  - Act normally and do not discuss concerns with suppliers
  - Avoid accusing of collusion (may not be correct or it may give them opportunity to cover up)
  - Consider contacting supplier legal counsel

## VII. **IMPLEMENT PRODUCE MEASURES TO PREVENT FUTURE COLLUSION**

- A. Obtain signed statements from suppliers that they will adhere to the antitrust laws and the purchaser’s specific code of conduct.

- B. Obtain certifications that bids are competitive and not the product of collusion.
- C. Employ sealed bidding and keep identity of bidders secret.
- D. Limit amount of information shared with suppliers regarding other suppliers' dealings and bids.
- E. Increase number of bidders to as many as practicably possible.
- F. Require disclosure of possible subcontractors and their pricing.
- G. If bids are identical award contract to only one bidder or reissue the RFP (deters sharing of award).
- H. Record and save details information of information provided to all suppliers.