Avoiding Antitrust and FCPA Traps
David M. Rodi, Partner, Baker Botts L.L.P.

- Antitrust counselor and litigator recognized by Texas Super Lawyers and Chambers USA
- Defends clients across industries in antitrust & FCPA investigations
- Career highlight: Successfully argued antitrust appeal before noted Judge Richard Posner
Today's Agenda

- **Antitrust**
  - Basic laws
  - Vertical vs. horizontal
  - Per se vs. Rule of Reason
  - Enforcement/Penalties

- **FCPA**
  - Basic rules
  - Who's covered
  - Enforcement/Penalties
  - Mitigating Risk
Antitrust: What's It All About, Anyway?
Father of U.S. Antitrust Law

- The Ohio Icicle
- General Sherman's brother
- Sherman Act passed in 1890
  - Senate approved 51-1
  - Unanimous House
- Intended to "nullify contracts that . . . increase price of articles, and thereby diminish the amount of commerce."

Senator John Sherman
Basic Antitrust Statutes

- **Sherman Act (1890)**
  - §1: outlaws "contracts, combinations and conspiracies in restraint of trade"
  - §2: monopolization, attempt/conspiracy to monopolize

- **Clayton Act (1914)**
  - Targets "mergers substantially lessening competition"
  - Hart-Scott-Rodino premerger notification
  - Created private right of action
  - Robinson-Patman Act (price discrimination)
  - Competitor corporate interlocks

- **Federal Trade Commission Act (amended 1938)**
  - Targets "unfair methods of competition"
Sherman Act Section 1

- Outlaws contracts, combinations, and conspiracies in restraint of trade or commerce
- Requires concerted action by 2 or more firms
  - There must be an "agreement"
- Covers horizontal and vertical arrangements
  - Horizontal: firms the compete at same level of distribution
  - Vertical: firms at different levels of distribution chain
- Read literally, would prohibit many innocuous and commonplace business arrangements
  - Exclusive supply contracts
- Courts have narrowed §1 to agreements that *unreasonably* restrain trade
Two Approaches to Determining "Unreasonable"

- **Per Se Rule**
  - Horizontal agreements that always, or almost always, restrict output or raise price
  - Illegal without regard to purpose or effect
  - Subject to criminal enforcement

- **Rule of Reason**
  - Agreements that might restrict output or raise price, but might be neutral or even pro-competitive
  - Balances competitive effects of the agreement
  - Includes all vertical agreements and many horizontal agreements with some pro-competitive effect
Examples of *Per Se* Section 1 Violations

- **Price Fixing**
  - Example: Managers of LodgeCo and StayCo agree that price of king room in downtown Atlanta will be $225.
  - Example: Procurement managers of LodgeCo and StayCo agree on max. price *they will pay* for bath soap.

- **Agreement on Terms Affecting Price**
  - Example: New Orleans Hotel Ass'n votes that minimum-stay during Super Bowl should be 4 nights.

- **Market or Customer Allocation**
  - Example: LodgeCo agrees not to enter Orlando market if StayCo agrees not to enter Las Vegas market.
More *Per Se* Examples

- **Bid Rigging**
  - Example: coordinated bids on convention business
  - Example: LodgeCo agrees not to bid for new convention center hotel project sought by StayCo

- **Restricting Competition for Talent**
  - Example: agreement not to solicit employees of competitors to fill open positions

- **Group Boycotts — *law muddled, but why risk it?***
  - Example: three large hotel chains agree not to do business with particular in-room Internet provider
What Constitutes An "Agreement"?

- Agreement need not be formal or in writing
- Agreement can be proved by:
  - Emails
  - Telephone calls
  - Discussion at trade association meeting
  - Conversations at social gatherings
  - "Hub-and-spoke" conspiracy
  - "Invitation to collude" through public statements
  - Parallel conduct with a "plus factor"

- Unilateral "price matching" is lawful—but can you prove it was truly unilateral?
- *Every* communication with a competitor regarding sensitive subjects creates antitrust risk
Rule of Reason Example: Resale Price Maintenance

- **RPM**: *vertical* agreement between firms at different levels of the market to set a price floor.
- **Pre-2007**: RPM agreements were per se illegal.
- **Leegin (2007)**:
  - Supreme Court recognized that economic literature "is replete with procompetitive justifications" for RPM.
  - New rule: courts must balance the net procompetitive and anticompetitive effects of RPM in each case.
- **Factors**:
  - Number of firms in market engaged in RPM.
  - Who was driving force: manufacturer or retailers?
  - Does any party have market power?
Rule of Reason Example: Resale Price Maintenance

- **Online Travel Co. MDL Litigation** (MDL 2405)
  - Accuses OTAs of using their dominance to impose minimum pricing on major hotel chains
  - "Rate Parity" policies embodied in Retailer-Hotel Contracts

- **Issues:**
  - Who drove adoption of Rate Parity?
  - Unilateral vs. Coordination decisions?
  - Agency Model vs. Merchant/Wholesale Model
  - Proof ofDamages

- **RPM still per se illegal under law of some states**
  - California, Maryland, Kansas
Antitrust Enforcers

- **DOJ**
- **FTC**
- **State AGs**
- **Private Plaintiffs**
  - Aggrieved competitors
  - Overcharged customers
- **Enforcement tactics**
  - Wire taps, hidden cameras, informants, extradition
  - Leniency program encourages self-reporting
  - Conviction after trial or guilty plea is *prima facie* evidence in civil case
Vigorous Enforcement Across Industries

- Construction
- Chemicals
- Vitamins
- Auto parts
- LCD displays
- DRAM
- E-books
- Fine art auction services
- Freight forwarding
- International air travel
- *and now . . .* Online hotel bookings
U.S. *Criminal* Antitrust Penalties

- **Hard-core violations of Section 1**
  - **Individuals**
    - $1 million fine
    - Up to 10 years in jail
    - Jail time is standard; currently averages 24 months
  - **Company fines**
    - Greater of:
      - $100 million, *or*
      - twice loss to victim or gain to violator
    - Company fines exceeding $100 million not uncommon
Fines Are Real . . .

Total Criminal Antitrust Fines

Fiscal Year

Source: DOJ Antitrust Division Update, Spring 2012
... And Jail Time Is Increasing

Source: DOJ Antitrust Division Update, Spring 2012
U.S. *Civil* Antitrust Penalties

- **Civil Enforcement by Government**
  - Suits for damages and injunctions by FTC, DOJ and State AG's

- **Private Civil Litigation**
  - Suits for treble damages by private plaintiffs injured "by reason of" the violation
  - Trebling of damages found by jury is automatic
    - Jury not advised of trebling
    - De-trebling possible in exchange for cooperation
  - Losing defendant pays plaintiffs' attorney fees on top of damages
Today, antitrust/competition laws are enforced in over 100 countries worldwide
Foreign Corrupt Practices Act
FCPA Overview

- **Prohibits corrupt payments**
  - to foreign officials
  - for the purpose of obtaining or retaining business, directing business to any person, or securing any "improper advantage."

- **Two components:**
  - Anti-bribery
  - Recordkeeping and internal controls
Who is Subject to the FCPA?

- **Anti-bribery provisions apply to:**
  - U.S. or foreign companies listed on U.S. securities exchanges ("Issuers")
  - Other businesses organized in the U.S., and U.S. citizens ("Domestic Concerns")
  - Foreign persons who commit any act in furtherance of a corrupt act while in the U.S.
  - U.S. citizens who commit any act in furtherance of a corrupt act while outside the U.S.

- **Recordkeeping and Internal Control provisions apply to Issuers**
Jurisdiction over Non-U.S. Subsidiaries

- A non-U.S. subsidiary of a U.S. parent corporation is not itself subject to the FCPA
- Directors, officers and employees who are U.S. citizens are still subject to the FCPA
- Conduct by the non-U.S. subsidiary may in certain circumstances cause the U.S. parent company to be liable for a violation
Anti-bribery Provisions

- FCPA prohibits
  - use of the mails or any instrumentality of interstate commerce
  - corruptly
  - in furtherance of an offer, payment, promise to pay, or authorization of payment of any money or anything of value
  - to any foreign official
Anti-bribery Provisions (Cont'd)

- for the purpose of:
  - influencing the foreign official, or
  - inducing the official to act or omit to act in violation of his lawful duty, or
  - to induce the official to use his influence to affect any act or decision of a foreign government

- in order to:
  - assist the FCPA-covered entity in obtaining or retaining business, or
  - to direct business to any person; or
  - to gain any "improper advantage"
"Anything of Value"

- Cash or cash equivalent
- Gifts or services
- Charitable donations
- Political contributions
- Loans
- Travel expenses
- Sporting events
- Entertainment outings
- Hiring of relatives
Who is a "Foreign Official"

- Elected Officials
- Cabinet Ministers
- Agency Personnel
- Candidates for Office
- Political Parties
- Political Party Officials and Employees
- Management and Employees of State-Owned Enterprises
Recordkeeping Provisions

- **Every Issuer must:**
  - "make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets" and
  - develop and maintain an adequate system of internal accounting controls in connection with the forgoing

- **Typical violations:**
  - Falsified records that disguise improper transactions
  - Records that are quantitatively accurate but fail to identify true purpose of improper payments
  - Off-the-books transactions, such as kickbacks

- Issuer can violate FCPA if **foreign subsidiary** creates false records and parent incorporates foreign subsidiary's information into its books and records
Penalties for Violations

Criminal (Department of Justice)

- **Anti-bribery violations:**
  - Individuals may be fined up to $100,000 and/or imprisoned for up to five years
  - Corporations may be fined up to $2 million per count
  - Company may not indemnify employees

- **Books & records violations (willful)**
  - Individuals may be fined up to $5 million and imprisoned up to 20 years
  - Corporations may be fined up to $25 million
Penalties for Violations

Civil (SEC)

- Anti-bribery violations:
  - Individuals subject to a civil penalty of $10,000 per count
  - Company may not indemnify its employees
  - Companies may be fined up to $2 million per count and subject to a civil penalty of $10,000

Alternative Fine Statute

- Can increase criminal fines to twice the gross gain or loss

Other adverse consequences

- Disgorgement
- Debarment
- Monitor
- Costs of investigation
Recent Enforcement Trends

- U.S. government has never been more active or aggressive
- More criminal prosecutions and enforcement actions in last 5 years than in prior 20 years combined
- Largest fines and penalties ever assessed
  - Douglas Murphy (American Rice): 5+ years
  - David Kay (American Rice): 3+ years
  - **Titan**: $28.5 million
  - **Vetco**: $26 million
  - **Baker Hughes**: $44 million
  - **Chevron**: $30 million
Enforcement Trends: Collaboration Among International Agencies

- Increased collaboration among international agencies
- More European countries have enacted anti-bribery laws
- Trend toward more cross-border investigations and information-sharing
Mitigating Risk: Before

- E&Y Study: 90% of FCPA enforcement cases involve agents
- Use due diligence to determine the trustworthiness and compliance practices of a prospective agent
- Gather as much information as possible from:
  - FCPA Questionnaire
  - Interview of the agent
  - Online sources
  - Interview of references
  - Denied persons lists
  - U.S. Embassy and other government sources
- Increasing number of cases arise in M&A context
Mitigating Risk: During

- Strict adherence to internal controls
- Active and vigorous oversight of FCPA compliance program
- Monitoring third-party relationships
- Updating due diligence periodically, as called for in compliance program
- Auditing
- Alertness to RED FLAGS
  - Questionable situations or suspicious circumstances
Mitigating Risk: After

- **Internal investigation**
  - Genuinely independent investigators
  - Outside counsel if necessary
- **Report violations to Board, Audit Committee or other oversight body**
- **Disciplinary measures for employee violations**
- **Voluntary self-reporting if warranted**