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Avoiding Antitrust and FCPA Traps

PRESENTER

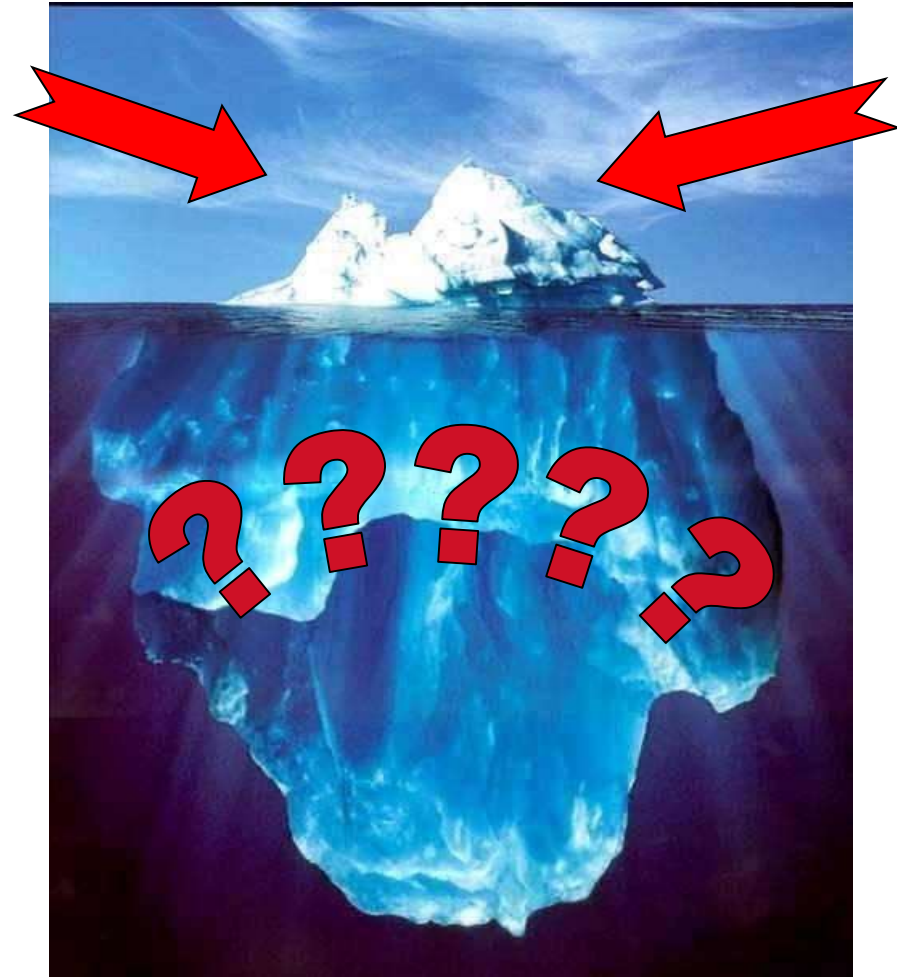


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- **Antitrust counselor and litigator recognized by Texas Super Lawyers and Chambers USA**
- **Defends clients across industries in antitrust & FCPA investigations**
- **Career highlight: Successfully argued antitrust appeal before noted Judge Richard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



Senator John Sherman

- *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.”*

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 that 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 of Damages
- **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

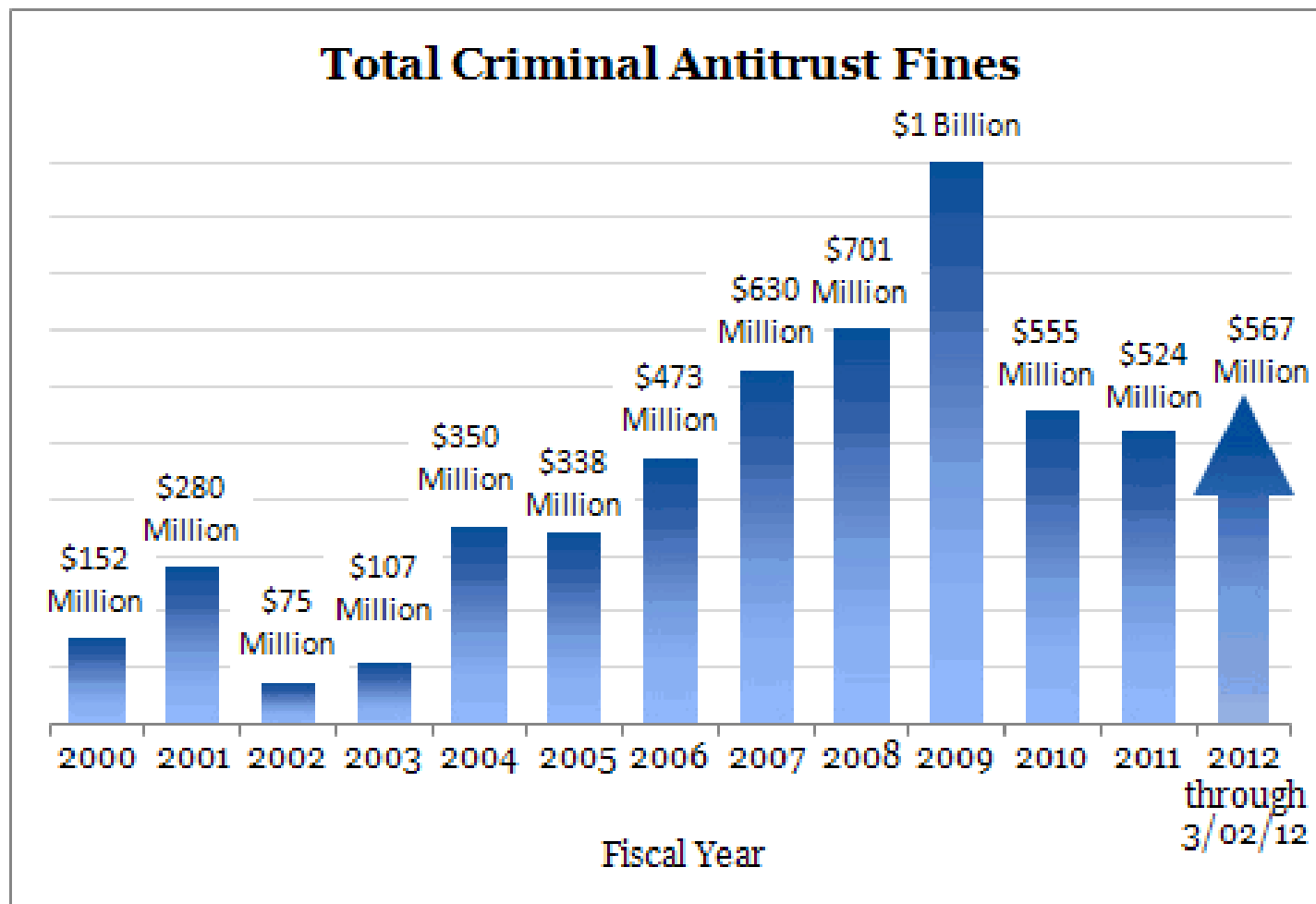


U.S. Criminal Antitrust Penalties



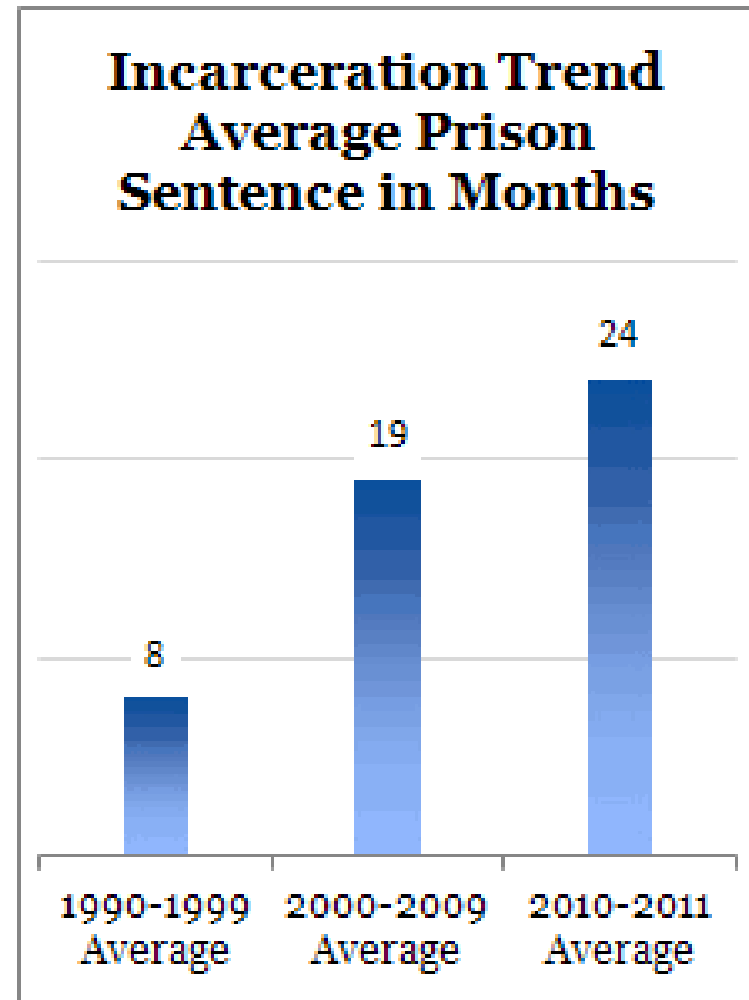
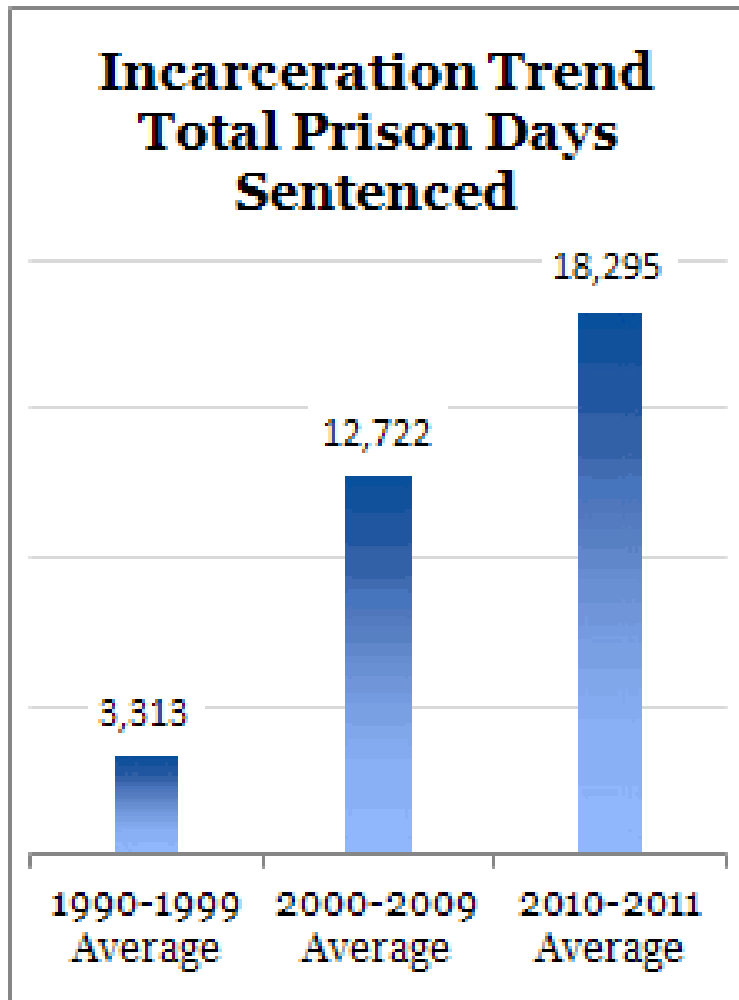
- **Hard-core violations of Section 1**
- **Individuals**
 - \$1 million fine
 - Up to 10 years in jail
 - Jail time is standard; currently averages 24 months
- **Company fines**
 - Greater of:
 - \$100 million, or
 - twice loss to victim or gain to violator
 - Company fines exceeding \$100 million not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

Fines Are Real . . .



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

Foreign Corrupt Practices Act



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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**

