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The Anticorruption and Antitrust Interface

Stephen L. Braga, Christopher P.
Conniff, & Mark S. Popofsky

Ropes & Gray LLP.

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I. INTRODUCTION

The Foreign Corrupt Practices Act (“FCPA”) and the Sherman Act proscribe distinct forms of misconduct. The FCPA prohibits “the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to . . . any foreign official² for purposes of,” among other things, “securing any improper advantage.”³ The Sherman Act, *inter alia*, prohibits price-fixing, bid-rigging, and similar “hard core” cartel offenses that harm U.S. consumers.

The two statutory schemes nevertheless share a number of common attributes. Both statutes proscribe overseas misconduct. Legal environments that spawn corruption also can nurture cartels. The incentives that lead employees to bribe foreign officials can also induce them to engage in price-fixing. Both are subject to significant criminal penalties. The U.S. Department of Justice (“DOJ”) has made prosecution of both a priority. And DOJ and Securities Exchange Commission (“SEC”) enforcement of both statutes increasingly benefit from international cooperation among enforcers and self-reporting by firms under investigation.

These common attributes have given rise in recent years to notable examples of overlapping antitrust and anticorruption prosecutions by DOJ. Sometimes investigations initiated to pursue violations of one statute uncover related misconduct under the other. And in some notable instances, DOJ has charged violations of both the Sherman Act and the FCPA based on the same course of conduct. On the civil side, although the FCPA lacks a private right of action, competitors harmed by rivals who achieved their position through corrupt payments have sought to recover for conduct that violates the FCPA under the Sherman Act.

This article surveys this intersection between anticorruption and antitrust. Part II describes common attributes of the statutory schemes. Part III describes notable instances where criminal antitrust investigations spawned FCPA investigations (and vice versa), as well as instances in which firms injured by rivals' FCPA violations seek to recover for the same conduct under the antitrust laws. Part IV explains how companies can craft effective antitrust and anticorruption compliance programs that reduce the risk that employees commit either type of offense.

¹Partners, Ropes & Gray LLP. The authors would like to thank R. Daniel O'Connor for his helpful input, and David Mindell and Rebecca Schendel Norris for their assistance.

² The term “foreign official” means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization. 15 U.S.C. §§ 78dd – 2(h)(2)(A).

³ 15 U.S.C. §§ 78dd – 2(a).

II. COMMON ATTRIBUTES

The FCPA prohibits: (1) payment or offer of payment, (2) of money or anything of value, (3) to a foreign official, (4) either directly or indirectly through a third party, or (5) with a corrupt intent of unlawfully influencing an official act or decision to obtain or retain business. The Sherman Act prohibits unreasonable restraints of trade that have the requisite effects on U.S. commerce. Although one statute prohibits corrupt payments overseas, and one targets commercial conduct that harms U.S. consumers, the two statutory schemes share notable common attributes.

A. Extraterritorial Reach

First, both statutes have “extraterritorial reach”—meaning that the statutes address certain conduct occurring outside the United States. The Sherman Act, to simplify, applies to foreign conduct that causes direct, substantial, or reasonably foreseeable effects on U.S. commerce, or conduct that causes substantial intended effects on import commerce.⁴ This extraterritorial reach, confirmed in the criminal context in *United States v. Nippon Paper Ltd.*,⁵ is vitally important to criminal antitrust enforcement. According to DOJ, the vast majority of criminal fines over the past decade have been collected from international cartels.⁶

The FCPA, too, applies to overseas conduct. Indeed, by definition, conduct that violates the FCPA requires some nexus with a foreign country. In fact, the 1998 amendments to the FCPA extended the reach of the statute to foreign nationals who committed FCPA violations outside the territorial jurisdiction United States if there was any act in furtherance of the FCPA violation that occurred in the United States.⁷ The required nexus with the United States—at least according to U.S. authorities—is minimal.⁸

Second, both statutory schemes benefit from international cooperation among enforcers. Since the adoption of antitrust laws by the European Commission and numerous other jurisdictions starting in the 1990s, anti-cartel enforcement is increasingly a multi-jurisdictional endeavor. Enforcement authorities not only investigate the same conduct, but also provide assistance to one another pursuant to formal agreements. The United States benefits today from over 50 mutual legal assistances treaties that enable cooperation in gathering evidence for antitrust investigations.

International cooperation is exemplified by the “freight forwarding” investigation (discussed in greater detail below), where DOJ and its European Union counterparts conducted simultaneous raids on a number of airlines on both sides of the ocean before bringing formal

⁴See Mark S. Popofsky, *Extraterritoriality in U.S. Jurisprudence*, in 3 ISSUES IN COMPETITION L. & POL’Y 2417 (ABA Section of Antitrust Law 2008).

⁵ 109 F.3d 1 (1st Cir. 1997) (applying Sherman Act criminally to wholly foreign conduct); see also *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993).

⁶ Scott D. Hammond, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, Feb. 25, 2010, at 4-7 (“Hammond 2010”), available at <http://www.justice.gov/atr/public/speeches/255515.pdf>.

⁷ 15 U.S.C. §§ 78dd – 3(a) (“It shall be unlawful for any person...while in the territory of the United States. . . to do any other act in furtherance of [a payment in violation of the FCPA].”).

⁸See Complaint at 43, 47, 53 and 64, *SEC v. Siemens Aktiengesellschaft*, No. 1:08-cv-02167 (D.D.C. Dec. 12, 2008) (establishing jurisdiction over Siemens by virtue of unlawful wire transfers occurring in U.S. dollars through correspondent accounts in the U.S.); Information at 20(e) and 22, *United States v. Kellogg Brown & Root LLC*, No. H-09-071 (S.D. Tex Feb. 6, 2009) (including in support for jurisdiction over KBR allegations that unlawful wire transfers occurred in U.S. dollars through correspondent accounts in New York).

charges.⁹ With the enactment of anti-corruption regimes outside the United States—most notably, the United Kingdom’s Bribery Act 2010¹⁰—multi-jurisdictional cooperation in anti-corruption investigations, too, is increasing. A prime example is the 2008 investigation and then record settlement with Siemens AG that was the product of a joint investigation between U.S. and German authorities.¹¹

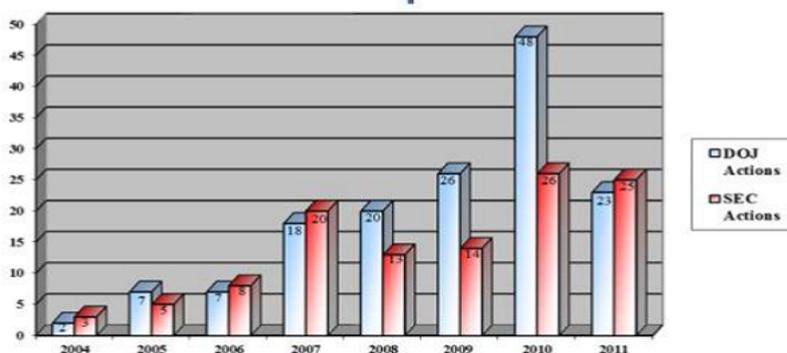
B. Risk of Significant Fines and Jail Time

Both legal regimes can lead to significant corporate fines, individual fines, and jail time. The FCPA authorizes significant penalties for violations of its anti-bribery provisions. Individuals who violate the FCPA are subject to up to five years in prison and \$100,000 in criminal fines and civil penalties up to \$10,000 for each violation; corporate entities are subject to criminal fines of up to \$2,000,000 and civil fines up to \$10,000 for each violation.¹² The Sherman Act permits incarceration of up to 10 years per offense and fines, for corporations, up to \$100 million. DOJ can seek even greater fines for violations of both statutes under a statute that authorizes recovery of double the gain, or double the loss, caused by the conduct in question.

The government has employed this authority over the last several years to collect eye-popping criminal fines for violations of both legal regimes. FCPA penalties in 2010 alone are believed to have exceeded \$1.8 billion. The charts below illustrates the number of FCPA enforcement actions, and aggregate criminal fines collected by the Antitrust Division, over the last several years.

FCPA Enforcement Actions¹³

2004		2005		2006		2007		2008		2009		2010		2011	
DOJ	SEC														
2	3	7	5	7	8	18	20	20	13	26	14	48	26	23	25



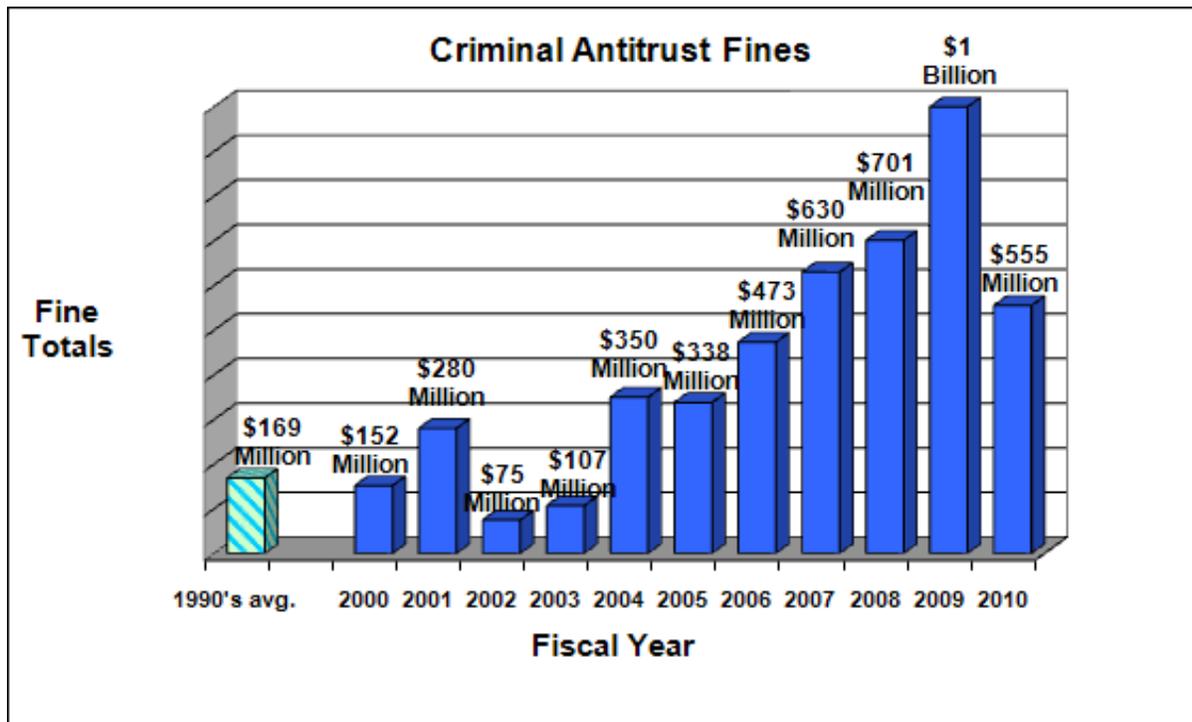
⁹Airlines raided in EU, US cargo probe, REUTERS, Feb. 15, 2006, available at <http://www.financialexpress.com/news/airlines-raided-in-cu-us-cargo-probe/51229/0>.

¹⁰ Bribery Act 2010, 2010, c. 23 (Eng.).

¹¹ Press Release, U.S. Department of Justice, *Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines* (Dec. 15, 2008) available at <http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html>.

¹² 15 U.S.C. §§ 78dd – 2(g).

¹³ Gibson, Dunn & Crutcher LLP, 2011 Year-End FCPA Update (2012), available at <http://www.gibsondunn.com/publications/Pages/2011YearEndFCPAUpdate.aspx>.

Sherman Act Criminal Fines¹⁴

C. Incentives to Self-Report Violations

Third—and in significant part explaining DOJ’s above-described success—both legal regimes reward self-reporting of violations.¹⁵ In particular, self-reporting is a critical driver of criminal antitrust enforcement around the world. Companies involved in cartel activities have a strong incentive to self-report under DOJ’s Antitrust Amnesty Program,¹⁶ which carries the promise of full immunity from criminal prosecution and single civil damages for the first cartel member to agree to cooperate fully. Later-reporting cartel members—even if only by minutes—can receive reduced criminal fines and favorable treatment for some executives, but not full immunity. Self-reporting also can lead DOJ to discover illegal activity other than the offense for which the company came forward, as DOJ will credit a company under the so-called “Amnesty Plus” policy to encourage the reporting of other illegal conduct.

¹⁴ U.S. Department of Justice, “Criminal Enforcement - Fine and Jail Charts 2000 - 2010” (2010). In addition, the Antitrust Division appears to have obtained over \$520 million in criminal fines during Fiscal Year 2011. Sharis A. Pozen, U.S. Department of Justice, Antitrust Division, Oversight Hearing on the Federal Trade Commission’s Bureau of Competition and the U.S. Department of Justice’s Antitrust Division 14 (Dec. 7, 2011), *available at* <http://www.justice.gov/atr/public/testimony/278020.pdf>.

¹⁵ Relatedly, both statutes also, in some sense, address a similar “principal/agent” problem. Although sometimes antitrust and anticorruption violations reflect deliberate corporate acts, this is often not the case. Employees who seek to improve their sales, or the performance of their business unit, can have incentives to commit misconduct that violates corporate policies. This includes corrupt foreign payments (in violation of the FCPA) and price-fixing or market divisions (in violation of the Sherman Act). Accordingly, as will be explained below, effective compliance policies designed to redress both risks have a number of common elements.

¹⁶ Available at <http://www.justice.gov/atr/public/guidelines/0091.htm> (Corporate Leniency Policy) and <http://www.justice.gov/atr/public/guidelines/0092.htm> (Leniency Policy for Individuals).

According to DOJ, the Amnesty Program has led to the detection and prosecution of more international cartels than all of DOJ's search warrants, consensual monitoring, and FBI investigations combined.¹⁷ Similarly, Amnesty Plus program is responsible for approximately half of all current international cartel investigations.¹⁸ Overall, DOJ's Antitrust Amnesty Program has resulted in nearly \$5 billion in U.S. fines.¹⁹ Numerous other jurisdictions have emulated the Amnesty Program's success and established similar amnesty or leniency policies.

There is no similar formal amnesty or leniency program for FCPA self-reporting. But DOJ has promised "tangible benefits"²⁰ and "meaningful credit"²¹ to companies that voluntarily disclose FCPA violations and then cooperate with DOJ's investigation. And, although Deputy Assistant Attorney General Greg Andres has reported that "there is no plan to adopt a leniency program for FCPA disclosures, because the department has other ways beyond self-disclosure to learn about violations,"²² DOJ's Corporate Charging Guidelines,²³ the SEC Guidelines,²⁴ and the Federal Sentencing Guidelines²⁵ all encourage and reward voluntary disclosure and cooperation. In addition, companies subject to certain federal regulations may be required to self-report.²⁶ As a result of these myriad incentives, companies frequently self-report FCPA violations and agree to pay hefty civil penalties or criminal fines. In the first three quarters of 2011 alone, DOJ resolved eight FCPA enforcement actions totaling \$289 million, all of which were based on voluntary disclosures.²⁷

¹⁷ Scott D. Hammond, *When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put A Price Tag on an Individual's Freedom?*, March 8, 2001, at 3 ("Hammond 2001"), available at <http://www.justice.gov/atr/public/speeches/7647.pdf>

¹⁸ See Scott D. Hammond, *A Summary Overview of the Antitrust Division's Criminal Enforcement Program*, Jan. 23, 2003, at 8, available at <http://www.justice.gov/atr/public/speeches/200686.pdf>.

¹⁹ Hammond 2010, *supra* note 6, at 3.

²⁰ Remarks of Alice Fisher, Assistant Attorney General USDOJ at the ABA National Institute on the FCPA, *Voluntary Disclosure Followed by Extraordinary Cooperation with the Department Results in Real, Tangible Benefits to the Company*, (Oct. 16, 2006), available at <http://www.justice.gov/criminal/fraud/pr/speech/2006/10-16-06AAGFCPASpeech.pdf>.

²¹ See Breuer: DOJ Will Give "Meaningful Credit" for Cooperation, MainJustice.com (Oct. 19, 2010), available at <http://www.mainjustice.com/justanticorruption/2010/10/19/breuer-doj-will-give-meaningful-credit-for-cooperation/>.

²² *Senators Question FCPA Enforcement Policies in Hearing*, MainJustice.com (Nov. 30, 2010), available at <http://www.mainjustice.com/justanticorruption/2010/11/30/senators-question-fcpa-enforcement-policies-in-hearing/>.

²³ Principles of Federal Prosecution of Business Organizations, § 9-28.700: The Value of Cooperation, available at <http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf>

²⁴ 17 CFR § 202.12, *Policy Statement Concerning Cooperation by Individuals in its Investigations and Related Enforcement Actions*, effective Jan. 19, 2010.

²⁵ Federal Sentencing Guidelines, § 8C2.5(f)(1)(2) (reduction in culpability score given for an effective compliance program is only applied if the conduct was self-reported).

²⁶ For example, Rule 10b-5 of the Securities and Exchange Act of 1934 (requiring disclosure of material events); FAR's Contractor Code of Business Ethics and Conduct (threatening suspension or debarment of federal contractors who fail to disclose "credible evidence" of criminal violations); and TARP (imposing an obligation on recipients to disclose "any credible evidence" of FCPA violations).

²⁷ For example, Maxwell Technologies agreed to pay \$8 million for bribing Chinese foreign officials in order to secure contracts. See <http://www.justice.gov/opa/pr/2011/January/11-crm-129.html>. And Tyson Foods agreed to pay \$4 million for masking payments to government-employed veterinarians in Mexico who were responsible for export certifications. See <http://www.justice.gov/opa/pr/2011/February/11-crm-171.html>. Both press releases note the companies' voluntary disclosure.

D. Private Follow-On Civil Liability

Conduct that violates the Sherman Act can spawn follow-on civil lawsuits in federal or state court. Indeed, DOJ cartel investigations inevitably attract direct and indirect purchaser class action litigation, as well as suits by State Attorneys General. Congress provided no similar private right of action for FCPA violations (although, as explained, the SEC can bring civil enforcement actions). Nonetheless, as described below, firms have sought to recover for the same conduct under the antitrust laws; for example, by arguing that admitted FCPA violators committed anticompetitive conduct by paying bribes to foreign officials.²⁸ Additionally, FCPA violations have served as predicate acts supporting private causes of action under the federal Racketeer Influenced and Corrupt Organizations Act (“RICO”)²⁹ and claims of intentional interference with prospective economic advantage.³⁰

Additionally, the fallout from a large-scale FCPA settlement or conviction can result in depressed stock prices for a public company, which can lead to shareholder litigation. After Siemens AG and three of its subsidiaries agreed to plead guilty to and pay \$1.6 billion in fines to U.S. and German authorities in connection with FCPA violations,³¹ a shareholder suit was filed in the Eastern District of New York alleging material false statements about its financial condition. Specifically, the complaint alleged that Siemens representations related to revenue expectations were “dependent on its corporate-wide bribery activities” and thus were knowingly false and misleading.³² The shareholder suit was eventually dismissed because the judge found the complaint lacking.³³ But the case illustrates that shareholder suits are a real risk.

III. ILLUSTRATIONS OF THE ANTITRUST AND FCPA ENFORCEMENT INTERFACE

As this last example suggests, the FCPA and Sherman Act investigations and litigation can target the same conduct or course of conduct. We describe three aspects of this Anticorruption/Antitrust interface below: (a) government investigations of conduct that itself violates both statutes; (b) government investigations under one statute that uncover related conduct that violates the other statute; and (c) civil actions under the antitrust laws seeking to recover based on violations of the FCPA.

A. Corrupt Conduct Facilitates An Antitrust Violation

Sometimes, a single course of conduct may violate both statutes. In a 1999 speech at an FCPA Conference, Deputy Assistant Attorney General Gary Spratling, who led DOJ’s criminal

²⁸See, e.g., *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1990).

²⁹ 18 U.S.C. §§ 1961-1968. See also *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1063 (3d Cir. 1988) (claim under RICO is supported by allegations that, among other things, defendant had violated the FCPA by bribing Nigerian government officials to influence the awarding of defense contracts), *aff’d on other grounds*, 493 U.S. 400 (1990).

³⁰See *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1159 (Cal. 2003) (allegations that defendant engaged in bribery and offered sexual favors to South Korean government officials to obtain military contract from South Korea supported claim for tortious interference with plaintiff’s prospective economic advantage).

³¹ Press Release, Department of Justice, *Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines* (Dec. 15, 2008) available at <http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html>.

³² Complaint at 5, *Johnson v. Siemens AG*, 09-CV-5310 (E.D.N.Y. Dec. 4, 2009).

³³ Sherry Mazzocchi, *Siemens Wins Bid To Toss Securities Class Action*, LAW 360 (Apr. 1, 2011), <http://www.law360.com/articles/236300/siemens-wins-bid-to-toss-securities-class-action>. An amended complaint was filed on May 17, 2010 that lessened the focus on the FCPA violations as the basis for the shareholder suit.

antitrust enforcement efforts and is credited with creating DOJ's amnesty policy, predicted the inevitable overlap between the Sherman Act and the FCPA caused by a growing global economy.³⁴ Spratling offered the example of a payment to a foreign official in violation of the FCPA that was made by an international cartel to further an anticompetitive scheme in violation of the Sherman Act.

Although it took almost a decade, Spratling's prediction of DOJ charges under both laws stemming from the same conduct finally occurred in 2008. The FCPA allegations did not result from a cartel making corrupt payments to state officials, as Spratling envisioned. Rather, payments in violation of the FCPA effectuated an illegal bid-rigging scheme. On December 8, 2008, DOJ filed a criminal information against Misao Hioki, the former General Manager of Bridgestone Corporation's International Engineered Products Department and a Japanese national, alleging that he conspired to violate the FCPA's anti-bribery provisions and Section 1 of the Sherman Act. Two days later Hioki pled guilty to both the FCPA and antitrust violations and was sentenced to 24 months in prison and assessed a fine of \$80,000.³⁵ The information alleged that Hioki participated in a conspiracy to rig bids, divide markets, and manipulate the price of marine hoses used to transfer oil between tankers and storage facilities. After the cartel determined which bid to allocate to Bridgestone, DOJ alleged, Hioki authorized corrupt payments to employees of state-owned companies in Latin America to secure the contracts in violation of the FCPA. Although Hioki was the ninth individual to plead guilty in this antitrust conspiracy, he was the first such defendant to plead guilty to an FCPA violation.

More recently, on October 5, 2011, DOJ filed a plea agreement with Bridgestone itself in connection with the marine hose conspiracy. Like Hioki, Bridgestone admitted violating both the Sherman Act and the FCPA and agreed to pay a \$28 million fine.³⁶

B. FCPA Investigations Can Lead to Antitrust Investigations, and Vice Versa

With DOJ vigorously seeking out criminal violations of both the FCPA and the Sherman Act, it is likely that DOJ will uncover more examples such as in *Bridgestone*—where conduct that violates the FCPA also violates the Sherman Act. But a more common scenario involves a government investigation under one statute that uncovers distinct conduct that violates the other. Indeed, even in *Bridgestone*, the company only discovered the corrupt payments during an internal investigation conducted in response to the public disclosure of ongoing antitrust investigations by DOJ and other international enforcement agencies.³⁷

DOJ and SEC investigations in the “freight forwarding” industry illustrate how an investigation initially focused on suspected violations of one statute can turn into a broader investigation under both. Unlike *Bridgestone* where the antitrust investigation led to the discovery of the FCPA violations, in *Freight Forwarding* the prosecution path worked the other way around. In 2007, subsidiaries of Vetco International Ltd., an oil services company, pled guilty to bribing Nigerian customs officials in violation of the FCPA. The bribes were made through a third party

³⁴ Gary P. Spratling, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, *International Cartels: The Intersection Between FCPA Violations and Antitrust Violations*, Address Before the American Conference Institute 7th National Conference on Foreign Corrupt Practices Act (Dec. 9, 1999).

³⁵ Plea Agreement at 14, *United States v. Misao Hioki*, No. 4:08-cr-795 (S.D. Tex. Dec. 10, 2008).

³⁶ Plea Agreement at 17, *United States v. Bridgestone Corp.*, No. 4:11-cr-00651 (S.D. Tex. Oct. 5, 2011).

³⁷ Press Release, *Bridgestone Corporation, Improper Payments to Foreign Agents* (Feb. 12, 2008), available at <http://www.bridgestone.com/corporate/news/2008021201.html>.

later identified as Panalpina.³⁸ The investigation into Panalpina led to the much wider industry inquiry that uncovered both price-fixing and further FCPA violations. Panalpina, Inc.³⁹ agreed to the most substantial penalties, settling the FCPA claims for nearly \$82 million and antitrust charges for almost \$12 million.⁴⁰

C. Conduct That Violates the FCPA Can Attract Civil Antitrust Litigation

DOJ's charging of FCPA and antitrust violations together is a relatively recent development. By contrast, civil litigants have long sought to convert FCPA violations into recovery under antitrust and unfair competition laws. One reason is the absence of a private cause of action under the FCPA.⁴¹ Another is the ability of "honest" competitors to claim an impaired competitive position as a result of a "corrupt" rival's FCPA violations. In 1990, the Supreme Court opened up this avenue of redress for private plaintiffs in *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l.*⁴² In *Kirkpatrick*, Environmental lost a bid to construct an aeromedical center for the Nigerian government after Kirkpatrick bribed Nigerian government officials to win the bid. Environmental sued after two principals at Kirkpatrick (including Kirkpatrick himself) pled guilty to FCPA violations in connection with the conduct. The Court overruled a number of lower court decisions by holding that the Act of State doctrine did not apply to civil suits based on bribery of foreign officials.⁴³

With the Act of State bar removed, private plaintiffs filed antitrust and unfair competition claims seeking to recover for similar misconduct. In one notable decision, *Lamb v. Phillip Morris, Inc.*, the Sixth Circuit allowed antitrust claims to proceed where plaintiffs alleged that the defendant made contributions to foreign charities in exchange for the foreign governments' imposition of price controls on tobacco and elimination of controls on retail tobacco products.⁴⁴ Similarly, in 2003, the California Supreme Court upheld a lower court decision finding that an FCPA violation could be used to show an act of "independent wrongfulness" which is required to plead a violation of California's Unfair Competition Law.⁴⁵ More recently, in *NewMarket Corp. v. Innospec, Inc.*,⁴⁶ a manufacturer of chemical fuel additives sued a rival under, *inter alia*, the Sherman Act and Virginia Antitrust Act, after the rival pled guilty to violating the FCPA by paying bribes to officials in Iraq and Indonesia. After the district court denied a motion to dismiss,⁴⁷ the defendant agreed to pay plaintiff NewMarket \$45 million to settle the claims.⁴⁸

³⁸See Press Release, U.S. Department of Justice, *Three Vetco Int'l Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree to Pay \$26 Million in Criminal Fines* (Feb. 6, 2007), available at http://www.justice.gov/opa/pr/2007/February/07_crm_075.html.

³⁹The charges were brought against Panalpina World Transport and its U.S. based subsidiary, Panalpina, Inc.

⁴⁰See Press Release, U.S. Securities and Exchange Commission, *SEC Charges Seven Oil Services and Freight Forwarding Companies for Widespread Bribery of Customs Officials* (Nov. 4, 2010), available at <http://www.sec.gov/news/press/2010/2010-214.htm>; Press Release, U.S. Department Of Justice, *Six Japanese Freight Forwarding Companies Agree to Plead Guilty to Criminal Price Fixing Charges* (Sept. 28, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/275452.pdf.

⁴¹See *Lamb*, 915 F.2d at 1024.

⁴²493 U.S. 400 (1990).

⁴³*Id.* at 409.

⁴⁴*Lamb*, 915 F.2d at 1027.

⁴⁵*Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1159 (Cal. 2003).

⁴⁶2011 WL 1988073 (E.D. Va. 2011).

⁴⁷*Id.* The court did dismiss claims based on the Robinson-Patman Act finding that it does not apply extraterritorially. *Id.* at 4.

Notably, on at least one occasion, the U.S. government has assisted a quasi-private antitrust claim by providing evidence obtained during a public FCPA investigation. In 1982, DOJ charged Crawford Enterprises, Inc., Ruston Gas Turbines, Inc. and a number of individuals, including high-ranking officers of both companies and Donald G. Crawford (collectively the “FCPA Defendants”), with violating the FCPA. The charges were related to bribes paid to officials with Petroleos Mexicanos (“Pemex”), Mexico’s national oil company. After Ruston pled guilty to violating the FCPA, and shortly following a grand jury indictment of Crawford Enterprises and nine individuals, the U.S. government obtained *ex parte* orders permitting the Mexican government to obtain evidence gathered by the grand jury. Some 10 months later, Pemex sued the FCPA Defendants alleging violations of the Sherman Act. The FCPA Defendants objected that their subpoenaed documents and grand jury testimony were used by Pemex to prepare the antitrust complaint.⁴⁹

IV. COMPLIANCE STRATEGIES TO REDUCE ANTICORRUPTION AND ANTITRUST RISK

As demonstrated, the criminal and civil sanctions for FCPA and Sherman Act violations can be very severe. Moreover, as also shown, it is quite possible that, depending on the circumstances, an investigation of a violation of one statute could lead to charges under the other. Accordingly, numerous companies invest in compliance policies and training. And all companies with any antitrust or FCPA exposure should maintain up-to-date compliance programs.

The value of such efforts is two-fold. First, effective policies can deter and prevent violations. Second, adequate compliance policies and training programs can avoid or reduce penalties. DOJ expects companies to have in place effective compliance and ethics programs, and the Federal Sentencing Guidelines create benefits for companies that maintain such policies and programs.⁵⁰ Under the United Kingdom’s Bribery Act 2010, a company’s sole defense is to have in place “adequate procedures.”⁵¹ And without some internal compliance program, a company would have difficulty with the early detection required to avail itself of DOJ’s amnesty program for antitrust offenses, or similar leniency regimes established around the world.

The precise elements of an effective compliance policy and program vary by company size and degree of risk. A compliance regime for a larger company with numerous divisions operating overseas, particularly in Africa, Asia, and South America, will look very different from a small company with few employees and discrete overseas operations. Nonetheless, some aspects of a successful compliance program are universal: policies should be clear, written, and easily accessible. Employees should receive regular training on the policy and annually certify knowledge of, and compliance with, the policy. Employees should have an easy and anonymous method to report suspected violations. As described below, effective anticorruption and antitrust compliance programs have overlapping elements.

⁴⁸Joe Palazzolo, *Innospec To Pay \$45 Million To End Lawsuit Over Bribery*, WSJ BLOGS, Sept. 27, 2011, <http://blogs.wsj.com/corruption-currents/2011/09/27/innospec-to-pay-45-million-to-end-lawsuit-over-bribery/>.

⁴⁹See *U.S. v. Crawford Enterprises, Inc.*, 735 F.2d 174 (5th Cir. 1984); *Petroleos Mexicanos v. Crawford Enterprises, Inc.*, 826 F.2d 392 (5th Cir. 1987). Although the Fifth Circuit remanded to the District Court on the question of whether the FCPA Defendants could seek a protective order over documents turned over to the grand jury, it appears the civil suit was allowed to proceed.

⁵⁰ Federal Sentencing Guidelines, § 8C2.5(f).

⁵¹ Bribery Act 2010, 2010, c. 23, § 7 (Eng.).

A. Elements of an Effective Anticorruption Compliance Program:

- A clearly stated corporate policy prohibiting corrupt payments to anyone and requiring written approval prior to non-U.S. government officials being given any “thing of value.”
- Training and education for employees that includes an explanation of the FCPA, Bribery Act 2010, and any other applicable local anticorruption laws, as well as examples illustrating the application of anticorruption laws to everyday business activities.
- Easily accessible manuals that outline anticorruption policies for common business interactions, as well as due diligence checklists for use in contemplating agreements with foreign business partners.
- Institution of a hotline or special website as a confidential reporting mechanism.
- Identification of procedures and personnel responsible for investigating possible violations.
- Regular anticorruption compliance reviews and audits of training records.
- Written certifications of anticorruption compliance from relevant employees and foreign representatives.
- Development of anticorruption representations and warranties for use in agreements with agents and other third parties.
- Review of the company’s agreements with third parties, to ensure that anticorruption representations and warranties are in place.

B. Elements of an Effective Antitrust Compliance Program:

- A written antitrust compliance policy that provides clear instruction on interactions with competitors, especially with respect to hard-core violations and trade association meetings.
- As appropriate, a description of the principles applicable to relationships with customers and suppliers.
- Instruction as to the potential applicability of the competition law of multiple jurisdictions to conduct that causes effects in numerous countries, and on the application of the U.S. antitrust laws to overseas conduct.
- Enumeration of forbidden topics of communication (e.g. bid or pricing information), information for personnel of the serious potential criminal and civil penalties for non-adherence, encouragement to report violations, and a culture of antitrust compliance.
- A training program that involves frequent re-training, especially for sales force personnel and individuals attending trade association meetings.
- A system to report and document interactions with competitors.
- Mechanisms to easily and anonymously report suspected misconduct.

Of course, there will be times when attempts at ensuring compliance fails—and companies will confront the possibility of suspected FCPA or antitrust violations. If these allegations arise internally, as opposed to through a government investigation, companies ought to conduct prompt investigations into the allegations and determine whether a violation has occurred. Numerous best practices, outside the scope of this article, can guide companies in

conducting such investigations.⁵² As noted above, a prompt, thorough investigation is necessary to take advantage of DOJ's amnesty and related leniency programs for self-reporting.

V. CONCLUSION

Antitrust and anticorruption often are thought of as separate spheres. But the increasingly international character of cartel offenses, the striking rise in FCPA enforcement, and notable examples of DOJ charging violations of both statutes demonstrate that companies that operate internationally should consider both legal regimes together in formulating compliance programs. Companies should develop compliance policies aimed to address conduct that risks violations of both sets of laws. Companies must take into account the risk that self-reporting an antitrust violation may spawn an FCPA investigation. And companies that plead guilty to FCPA violations, depending on the circumstances, might take into account the risk of follow-on antitrust civil antitrust litigation. With an increasingly interconnected global economy, and DOJ's continued focus on enforcement of both legal regimes, we can expect more examples of the intersection of antitrust and anticorruption in the years to come.

⁵²See INTERNAL CORPORATE INVESTIGATIONS, AMERICAN BAR ASS'N (Barry F. McNeil & Brad D. Brian eds.; 3d ed. 2007).