

ANTITRUST TRADE AND PRACTICE

Expert Analysis

Another Record-Breaking Year In Antitrust Criminal Enforcement

By any statistical measure, fiscal year 2012 was a banner period for criminal enforcement at the Department of Justice's Antitrust Division. In FY 2012, the Antitrust Division collected a record \$1.1 billion in criminal fines for antitrust violations, breaking the previous high of \$1 billion during FY 2009.¹ FY 2012 also saw a record set for total prison days sentenced for individual antitrust offenders, with sentences averaging 25 months.² The increases came during a year when headline-grabbing criminal convictions were secured in several major economic sectors such as the \$3.7 trillion municipal bonds derivatives market and the \$70 billion market for LCD screens.

Criminal Enforcement

Potentially crippling criminal liability for Sherman Act violations gives the Justice Department a large stick with which to deter unlawful anticompetitive behavior. While only individuals can be sent to prison, both corporations and individuals can be convicted of criminal antitrust violations and subjected to significant criminal fines for those offenses.³ Individuals convicted of violating the Sherman Act face a maximum penalty of 10 years imprisonment and a \$1 million fine; companies can be fined up to \$100 million.⁴ The maximum fine for a Sherman Act charge can, however, exceed both of these

NEAL R. STOLL and SHEPARD GOLDFEIN are partners at Skadden, Arps, Slate, Meagher & Flom. EVAN KREINER, an associate at the firm, assisted with the preparation of the column.



By
**Neal R.
Stoll**



And
**Shepard
Goldfein**

metrics, as the cost may be increased to twice the loss suffered by the victims of the crime or twice the amount gained from the violation.

To enhance the deterrent impact of the antitrust laws, the Justice Department seeks "to hold culpable individuals accountable by seeking jail sentences."⁵ In addition to imprisonment, the Justice Department vigorously pursues criminal fines against both guilty individuals and corporations. The Justice Department has averaged over \$750 million in fines imposed per year since 2009.⁶ These criminal penalties are in addition to exposure to treble damages awarded to private citizens impacted by the anticompetitive behavior.

Due to the severity of potential criminal and civil liability, the Justice Department generally seeks criminal sanctions only for egregious activities that constitute per se violations of the antitrust laws.⁷ With the erosion of the conduct that constitutes a per se violation over the past half century, such behavior is limited to patently illegal actions such as hard-core horizontal price fixing (imagine executives from competing

companies meeting in secret to set prices), and horizontal division of customers and territories. Less blatant violations of the antitrust laws usually will not be subject to criminal enforcements.

Because cartel activity is so hard to detect, the most potent weapon in the Justice Department's criminal enforcement arsenal is its leniency program. Under this program, individuals and corporations involved in illegal antitrust activity can escape criminal penalties if they are the first members of a cartel to report the activity and they assist the Justice Department in any subsequent investigation and litigation. The department's leniency program is credited with initiating or aiding investigations that yielded 90 percent of the \$5 billion in fines collected from antitrust violations since FY 1996.⁸

In FY 2012, the Antitrust Division collected a record \$1.1 billion in criminal fines for antitrust violations, breaking the previous high of \$1 billion during FY 2009.

2012 Highlights

During FY 2012, the Justice Department filed 67 criminal cases, a decrease from the 90 criminal cases filed in FY 2011, but on par with the annual average since FY 2009. Despite the decrease in the number of cases filed, the Justice Department collected a record \$1.1 billion in criminal antitrust

finer.⁹ Almost half of this amount came from a \$500 million fine levied against AU Optronics for price-fixing in the LCD market. In addition to these fines, the Justice Department secured a record high in total prison days sentenced, with the average violator receiving 25 months in jail.

These achievements came as the Justice Department has maintained a very public commitment to bringing cases in industries deemed critical to the economic recovery. For instance, a multiyear investigation into bid-rigging in the municipal bond market culminated in the conviction of three employees at GE Funding early in 2012. Each defendant received a three- or four-year prison sentence.¹⁰ While the GE Funding convictions were for wire fraud, not Sherman Act violations, the broader antitrust investigation has resulted in hundreds of millions of dollars in fines collected from a variety of major investment providers such as Bank of America, J.P. Morgan Chase, and UBS.

In addition to the municipal bond market bid-rigging convictions, the Justice Department also secured a major litigation victory in its multiyear criminal probe of price-fixing in the \$70 billion LCD screen market. LCD screens are used in everything from computer monitors to TV screens. In March 2012, a jury convicted two former executives of AU Optronics Corporation and the corporation itself of price-fixing. These convictions led to a record-tying \$500 million fine levied against the corporation and three-year prison terms for each executive.¹¹ The conspiracy operated between 1999 and 2006 and involved Asian manufacturers and their U.S. affiliates conspiring to artificially inflate prices for LCD screens.

The Justice Department has also been actively prosecuting fraud and bid-rigging conspiracies in mortgage foreclosure auctions in many states, including North Carolina, Alabama, and California. Most recently, the department notched guilty pleas from eight individuals and two companies involved in such a scheme in Alabama.¹² These conspiracies typically involve several real estate investors who designate one member to bid and win a public foreclosure auction, following which the rest of the members hold a secret auction at which they bid at prices above the public auction price. The Justice Department prosecutes these

schemes vigorously, contending that they depress the auction price and home values surrounding foreclosed homes.

Explanations for Uptick

There are a few potential explanations for the significant increase in criminal fines and prison sentences obtained during FY 2012 and the rest of President Barack Obama's first term. The first observation is that the Justice Department is pursuing criminal sanctions with more vigor under President Obama than it did under President George W. Bush. During Obama's first term, the department brought more criminal cases per year and sought prison sentences more frequently than during Bush's tenure. Moreover, during the first three full fiscal years of the Obama administration, there has been a five-month increase in the average length of prison sentences issued per year than from FYs 2000-2009 (from 20-25), and the average total prison days sentenced per year has increased by more than 10,000 days (from 12,722 to 23,398).¹³

While these results comport with Obama's promise of more vigorous antitrust enforcement, it likely does not provide the full explanation. Against the increase in numbers is the sentiment that criminal antitrust enforcement (as opposed to merger review) is largely professionalized and varies little between administrations.¹⁴ Two factors other than a more vigorous criminal program under Obama can explain the noticeable increase in criminal enforcement metrics. First, the rise in the length and frequency of prison terms for white-collar crimes in general may account for a large portion of the recent increase in the length and frequency of antitrust sentences. The last several years have witnessed a widening acceptance of the need for often severe jail sentences for white-collar crimes. Moreover, judges may be particularly keen on meting out harsh sentences for those found guilty of antitrust violations during an economic recession and the immediate recovery therefrom.

Second, the small sample size of antitrust prosecutions—for instance, only 67 criminal cases were filed in FY 2012—likely skews results from year to year. The average and total length of prison sentences can vary by wide margins from year to year depending not on the current administration's antitrust policy, but on the rather randomized closing of certain cases. One recent example of an outlier skewing annual statistics is the

record \$500 million fine in the AU Optronics case. This fine constitutes nearly half of the Justice Department's record \$1.1 billion haul in FY 2012. Concerning prison sentences, the numbers can be skewed by surprisingly long sentences in individual cases. For instance, in 2011, an individual in an otherwise unremarkable case of price-fixing in a local market for cement was sentenced to four years in prison. This sentence matched the longest prison sentence ever imposed for an antitrust violation.¹⁵

Whatever the cause, FY 2012 was another year of record numbers for criminal enforcement by the Justice Department. William Baer's year-end confirmation by the Senate as Assistant Attorney General of the Justice Department's Antitrust Division, coupled with potentially big settlements in high-profile cases such as the LIBOR rate-fixing scandal, FY 2013 promises to give FY 2012 a run for the money.



1. Melissa Lipman, "DOJ Hits Record \$1.1B Criminal Antitrust Fines in 2012," *Law 360*, Dec. 18, 2012, available at <http://www.law360.com/articles/402588>.

2. Melissa Lipman, "DOJ Hits Record \$1.1B Criminal Antitrust Fines in 2012," *Law 360*, Dec. 18, 2012, available at <http://www.law360.com/articles/402588>.

3. See 15 U.S.C. §1 (2006).

4. See 15 U.S.C. §1 (2006).

5. Scott D. Hammond, "The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades," Feb. 25, 2010, available at <http://www.justice.gov/atr/public/speeches/255515.htm>.

6. See Department of Justice, Criminal Enforcement Fine and Jail Charts Through Fiscal Year 2012, available at <http://www.justice.gov/atr/public/criminal/264101.html>.

7. Gregory J. Wereden, Scott D. Hammond and Belinda Barnett, Deterrence and Detection of Cartels: Using All the Tools and Sanctions, March 1, 2012, available at <http://www.justice.gov/atr/public/speeches/283738.pdf>.

8. Scott D. Hammond, "The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades," Feb. 25, 2010, available at <http://www.justice.gov/atr/public/speeches/255515.htm>.

9. Melissa Lipman, "DOJ Hits Record \$1.1B Criminal Antitrust Fines in 2012," *Law 360*, Dec. 18, 2012, available at <http://www.law360.com/articles/402588>.

10. Chad Bray, "Three Sentenced in Bid-Rigging Case," *The Wall Street Journal*, Oct. 18, 2012, available at <http://online.wsj.com/article/SB10000872396390444734804578064903311016908.html>.

11. James O'Toole, LCD Maker Hit With \$500 Million Antitrust Fine, Sept. 20, 2012, available at <http://money.cnn.com/2012/09/20/technology/lcd-tv-fine/index.html>.

12. Press Release, Department of Justice, Two Alabama Real Estate Investors and Their Company Plead Guilty to Conspiracies to Rig Bids and Commit Mail Fraud for the Purchase of Real Estate at Public Foreclosure Auctions (Dec. 12, 2012), available at http://www.justice.gov/atr/public/press_releases/2012/290188.htm.

13. See Department of Justice, Criminal Enforcement Fine and Jail Charts Through Fiscal Year 2012, available at <http://www.justice.gov/atr/public/criminal/264101.html>.

14. See Daniel L. Crane, "Has the Obama Justice Department Reinvented Antitrust Enforcement?" 65 *Stan. L. Rev. Online* 13 (2012), available at <http://www.stanfordlawreview.org/online/obama-antitrust-enforcement>.

15. See *United States v. VandeBrake*, 679 F.3d 1030 (8th Cir. 2012).