The American Antitrust Institute

December 29, 2014

Honorable William J. Baer
Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear General Baer,

We are writing on behalf of the American Antitrust Institute to urge the Antitrust Division of the U.S. Department of Justice to begin making two specific enhancements to the plea agreements it enters into with corporate defendants in criminal antitrust cases:

1. First, we request that the Antitrust Division require corporate defendants in criminal antitrust cases to agree, as a condition of plea agreements, not to hire or re-hire their employees, or the employees of their co-conspirators, who served time in prison or were placed under house arrest or on probation, as a result of participating in the conspiracy. We urge that these bans be in effect for a relatively long period, such as for five years following the end of the sentences involved.

2. Second, we request that the Antitrust Division explicitly require these companies to agree not to pay the fines of convicted employees, or otherwise to reward or compensate them, directly or indirectly, for their conviction or for serving their sentence.

The Antitrust Division has long been the gold standard for antitrust enforcement globally. Nevertheless, despite its long and vigorous campaign against cartels, collusive behavior continues to occur far too often. The leniency and amnesty programs, increased fines, and increased frequency and severity of incarceration have all been extremely important improvements in enforcement policy, but there is room for further improvement.[1] We urge the Antitrust Division to institute the above policies to further the goal of general deterrence of cartel offenses. No new legislation would be needed and there would be no significant budgetary consequences. These policies are logical

[1] See John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 CARDOZO L. REV. 427 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1917657

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extensions of a long-term bipartisan agreement on the necessity of a tough anti-cartel enforcement priority.

The current system permits corporate human resources policies which imply that if corporate officials violate Section 1, usually accruing significant short-term benefits to the stockholders, the company will "take care of them" after their sentences end. Even if the individuals involved in cartel offenses never violate the antitrust laws again, if they are re-hired by a convicted company this sends the wrong signal to potential price fixers, who should have to worry more about the consequences of "taking one for the team."

You might have seen the recent article, "Confessions of a Price Fixer: Supplier Network Shelters Fugitives, Ex-Cons,"[2] which describes a case in which such a scenario apparently occurred. We suspect, sadly, that this type of situation may not be unusual, even when U.S. companies are involved. This article and similar articles suggest that companies sometimes rehire or otherwise compensate their convicted employees to help motivate them to become the company's "fall guy".

In 2010, the American Antitrust Institute probed into how often convicted companies forgive, or even reward, employees who violate the antitrust laws.[3] Using publically available information, we were able to determine the whereabouts of 35 (34%) of the 103 managers known to have received a prison sentence in cartel cases between 1995 and 2010. Of these 35, we found that nine (26%) were then re-employed by the company for which they had worked during the cartel, and another nine (26%) appeared to be working at a different company within the same industry.[4] The remaining 17 were either in prison, unemployed, employed in different industries, or deceased. Thus, roughly half went back to work for the same company or for another company in the same industry. Although our data on re-employment of offenders are not disaggregated by country, the magnitude of re-employment statistics suggests that the problem might be widespread and not just a result of the corporate culture of a few nations.

Indeed, the 52% figure probably underestimates the percentage of antitrust offenders who went to work for the same firm or industry because some convicted individuals may have reached retirement age, or returned to a firm or industry without notice of this published in a source that is easily web-accessible. Our survey may have erroneously counted such people as not having returned to their firm or industry.

Because we were unable to discover the whereabouts of 68 of the 103 who received a prison sentence, these results admittedly may be limited in their implications. But, they could well be indicative of a weakness in the current enforcement fabric. And, we should emphasize, our study is based on highly imperfect publically available information. We therefore urge the Antitrust Division to conduct its own rigorous study of the re-employment issues, using its vastly greater resources.

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[2] Available at http://www.autonews.com/article/20141116/OEM10/311179961/confessions-of-a-price-fixer

[3] For the methodology used see Connor & Lande, supra note 1, at 440-43.

[4] Our methodology was imperfect because not every cartel involves every firm in an industry.

As you know, Judge Douglas Ginsburg and FTC Commissioner Joshua Wright have advocated a greater focus on punishing the individuals who violate Section 1. They propose broad debarment for individuals convicted of price fixing and also for corporate Directors and officers who negligently failed to prevent antitrust offenses. The Ginsburg and Wright proposal would forbid them from working for any publically traded corporation for a significant period.[5]

Our proposal is much more limited. We believe convicted corporate officials certainly should be permitted to earn a living after their sentences have ended, and the Ginsburg-Wright debarment proposal would eliminate too many potential sources of employment for them. Our more targeted approach, which only forbids corporations convicted of criminal antitrust offenses from hiring individuals who also violated the antitrust laws, would further the general deterrence function of antitrust sanctions, yet allow these individuals to re-enter the work force by securing employment from any company that was not a part of the illegal scheme.

We note that the SEC often has used debarment as a sanction against securities violations even before it was given the explicit statutory authority to do so.[6] So have other federal law enforcers, including the Federal Trade Commission in consumer protection matters.[7] So has the United Kingdom as a sanction for naked price fixing.[8] There is no general principle enunciated in the U.S. Sentencing Guidelines against imposing employment restrictions on corporations that have violated the law.[9] In their recent proposal, Judge Ginsburg and Commissioner Wright state that they "are

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[5] Douglas H. Ginsburg and Joshua D. Wright, "Antitrust Sanctions," 6 Competition Policy International 3, especially at 19 (2010).

[6] Id.

[7] See, e.g., "Merchandiser Who Illegally Charged Consumers' Accounts Settles with FTC," Federal Trade Commission, January 13, 2011, http://www.ftc.gov/news-events/press-releases/2011/01/merchandiser-who-illegally-charged-consumers-accounts-settles-ftc

[8] "Debarment has already been authorized as a sanction for price-fixing in some countries, including the United Kingdom, Australia, and Sweden…. Ginsburg & Wright, supra note 5, at 6. Apparently the United Kingdom is the only nation to have actually used debarment in an antitrust case as of 2010. Id at 21.

[9] We considered urging that our proposed policy be re-enforced by also applying it directly to individuals who plead or are convicted, as well as to companies. But we hesitate to do this due to the non-binding but relevant language in §5F1.5 of the U.S. Sentencing Guidelines, which discourages placing restrictions directly on the individuals involved, except in specific situations:

"(a) The court may impose a condition of probation or supervised release prohibiting the defendant from engaging in a specified occupation, business, or profession, or limiting the terms on which the defendant may do so, only if it determines that:

(1) a reasonably direct relationship existed between the defendant's occupation, business, or profession and the conduct relevant to the offense of conviction; and

(2) imposition of such a restriction is reasonably necessary to protect the public because there is reason to believe that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which the defendant was convicted.

(b) If the court decides to impose a condition of probation or supervised release restricting a defendant's engagement in a specified occupation, business, or profession, the court shall impose the condition for the minimum time and to the minimum extent necessary to protect the public."

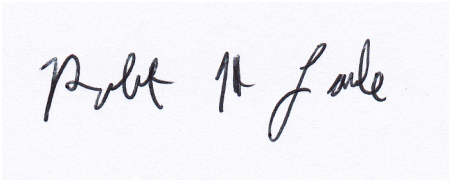
aware of no reason for which the Department needs to wait for statutory authority to get started, as did the SEC, by negotiating consent orders providing for debarment."10 We agree. *A fortiori*, there is no restriction against the Antitrust Division negotiating much more limited employment restrictions which prevent convicted corporations from employing or re-employing anyone who worked for them or their co-conspirators and who also violated the antitrust laws.

As a second, but related, matter, we believe convicted corporations explicitly should agree not to pay the fines of their convicted officials, either directly or indirectly in the form of an on-going salary, a bonus or other remuneration, or otherwise to give them compensation or a benefit for "taking a bullet for the team". We believe this already is illegal but we are not sure the laws on these issues are clear. Even if it already is illegal, corporations are more likely to refrain from undertaking this conduct if they explicitly agree not to do so, and breach of an agreement with DOJ would make this conduct easier to prosecute. Moreover, we know of no legitimate reason why corporations should not agree to this. This prohibition would not, of course, apply to ordinary legal fees that arise during the course of employment.

We urge the Antitrust Division to begin including these provisions in its negotiations with corporations in criminal Section 1 cases. If we can answer any questions about our proposals, or if you would like to discuss any aspect of them, we would be happy to meet at your convenience.

Sincerely,

Albert A. Foer
President, American Antitrust Institute



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Cc Brent C. Snyder, Deputy Assistant Attorney General

[10] See Ginsburg & Wright, supra note 5, at 22.

THE CARTELIST RE-EMPLOYMENT AND REWARD LIMITATION POLICY

I. Definitions

a. "Sentence" includes any time spend in prison, under house arrest, or on probation, by any corporate official or contractor who violates Section 1 of the Sherman Act.

b. "Corporation" shall include all parent and subsidiary companies of the company or partnerships or proprietorship that violated the Sherman Act, and shall include both for-profit and non-profit companies.

II. Any Corporation that has violated Section 1 of the Sherman Act:

a. Shall not hire, re-hire or otherwise employ or hire as an employee or contractor, directly or indirectly, any employee who worked for the Corporation when this offense was committed if this person also violated Section 1 of the Sherman Act and served a Sentence for the same or substantially the same antitrust offense; and

b. Shall not hire, re-hire, contract with, or otherwise employ, directly or indirectly, any employee who worked for another corporation that committed the same or substantially the same violation of Section 1 of the Sherman Act and served a Sentence;

c. This prohibition shall last for 5 years after the employee's Sentence has ended.

III. No Corporation that has violated Section 1 of the Sherman Act may pay, reward, compensate, or reimburse, directly or indirectly, any corporate employee or contractor who has violated Section 1 of the Sherman Act, for:

a. Any fine the employee or contractor paid as a result of this violation; or

b. Any bonus, lost wages, compensation or remuneration to the employee for pleading guilty or serving any Sentence that results from this violation; except that

c. This prohibition shall not apply to ordinary legal fees and related expenses that arise during the employee's course of employment, or to compensation and benefits that accrued while working prior to commencement of the Sentence.