

# **When the Crimes Go Beyond Price-Fixing: How Fraud and Process Crimes Complicate the Defense**

Potential Title 18 Criminal Charges That Can Be Brought in  
Conjunction with Antitrust Violations and Their Impact on the  
Leniency Process: A Checklist of Issues a Defense Attorney Should  
Consider

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In today's world, a defense lawyer needs to wear more than just his "antitrust cap," and instead must be on the look out for other potential criminal charges his client may face. More than ever before, the Antitrust Division is involved in domestic and international multi-agency task forces where information sharing among various criminal authorities is commonplace. The potential crimes a defendant may face include substantive Title 18 charges, such as fraud and conspiracy to violate the Foreign Corrupt Practices Act, as well as process charges, such as obstruction and perjury. The addition of non-antitrust crimes also creates an interesting tension in the leniency process, particularly because the Antitrust Division cannot promise to protect against prosecution by other federal agencies for crimes that are not considered integral to the commission of the antitrust offense. Thus, a defense lawyer must carefully consider the ramifications of additional non-antitrust offenses, including the possibility of criminal indictment, debarment or suspension, civil liability, and international civil and criminal exposure. This paper provides a brief survey of additional criminal statutes and issues defense counsel need to consider when retained to represent an organization or individual in an antitrust criminal matter.

## **I. Potential Title 18 Criminal Charges that Can be Brought in Conjunction with Antitrust Violations**

The different Title 18 criminal charges that can be brought in conjunction with antitrust violations are numerous. The most common substantive charges are fraud, whether it be procurement fraud, mail or wire fraud, or tax fraud. More recently, a few antitrust defendants have been charged with violations of the Foreign Corrupt Practices Act and False Claims Act. The most common criminal process charges are obstruction, perjury, witness tampering, false statements to a government agency, and misprision of felony.

## A. Potential Substantive Charges Brought in Conjunction with Antitrust Violations

### 1. Procurement Fraud

- Fraud related to government contracting can take many forms, including various activities that violate the antitrust laws (such as price fixing, bid-rigging, and market allocation).
- The National Procurement Task Force was created on October 10, 2006 to promote the prevention, early detection, and prosecution of procurement fraud. The Task Force is chaired by the Assistant Attorney General for the Criminal Division, and members include the Antitrust, Criminal, Civil, and Tax Divisions of the DOJ, FBI, Department of Justice Inspector General and other federal Inspectors General, defense investigative agencies, and federal prosecutors from United States Attorneys' offices.  
<http://www.usdoj.gov/criminal/npftf/>
- “Since the formation of the Task Force, the Antitrust Division has charged approximately 44 individuals and 14 companies with participating in bid-rigging and other fraudulent schemes involving the public procurement process. The Division has prosecuted cases involving Department of Defense purchases of night vision goggles, bunkers and structures for force protection, bottled water, military aircraft fuel, marine hoses, marine fenders and buoys, military tie down equipment and cargo securing straps, and moving services for military household goods.”  
[http://www.usdoj.gov/criminal/npftf/resource/reports/Dec08progress\\_report.pdf](http://www.usdoj.gov/criminal/npftf/resource/reports/Dec08progress_report.pdf)
- In 2007, the DOJ Civil Division and U.S. Attorney intervened in and tried a *qui tam* action, obtaining a

jury verdict that found the defendant guilty of conspiring to rig bids on contracts financed by United States Agency for International Development to construct waste water treatment facilities in Cairo. The United States will recover approximately \$90 million in damages and penalties. The case was investigated by USAID OIG and DOJ Antitrust Division. [http://www.usdoj.gov/criminal/npftf/resource/Dec08progress\\_report.pdf](http://www.usdoj.gov/criminal/npftf/resource/Dec08progress_report.pdf)

- In May 2008, Wilson Freire pled guilty to bid-rigging and soliciting and accepting kickbacks in connection with his employer's subcontracts with the Department of Defense for metal sling hoist assemblies. Friere was the third employee of Peck & Hale to plead guilty to bid-rigging that year. Peck & Hale pled guilty as well. [http://www.usdoj.gov/criminal/npftf/resource/Dec08progress\\_report.pdf](http://www.usdoj.gov/criminal/npftf/resource/Dec08progress_report.pdf)
- In its December 2008 progress report, the Task Force specifically identified areas in which resources at all level of government would be focused, including defective pricing or other irregularities in the pricing and formation of contracts and bid-rigging. The Task Force's stated goal is to continue to increase coordination and strengthen partnerships in law enforcement to combat procurement fraud. [http://www.usdoj.gov/criminal/npftf/resource/reports/Dec08progress\\_report.pdf](http://www.usdoj.gov/criminal/npftf/resource/reports/Dec08progress_report.pdf)
- The Task Force's Grant Fund Committee published a White Paper in February 2009 entitled, "A Guide to Enhancing the Grant Oversight Processes and Identifying Best Practices for Combating Grant Fraud," which recommended that agencies consider "enhanced certifications, increased training, improved communications with grant recipients, increased information sharing concerning potential fraud, and

rigorous oversight of how grant dollars are spent after they are awarded” in order to detect and prevent fraud, waste, and abuse in the grants they administer.  
<http://www.usdoj.gov/criminal/npftf/resource/reports.html>

- In June 2009, Frank A. March, CEO of a former Virginia marine products company pled guilty and agreed to a \$100,000 criminal fine and jail time for his role in a conspiracy to rig bids and allocate customers with respect to marine products purchased by the U.S. Navy, the U.S. Coast Guard, and other public and private entities. During the course of the conspiracy, the conspirators agreed to allocate contracts from the Department of Defense (DOD), the Department of Homeland Security, and others among themselves. Under the plea agreement, March has agreed to cooperate fully in the Department’s ongoing antitrust investigation. Three other executives had previously pled guilty to participating in this conspiracy in 2008.  
[http://www.usdoj.gov/criminal/npftf/pr/press\\_releases/2009/jun/06-30-09\\_frank-a-march-plea.pdf](http://www.usdoj.gov/criminal/npftf/pr/press_releases/2009/jun/06-30-09_frank-a-march-plea.pdf)
- In September 2009, an investigation conducted by the Antitrust Division’s National Criminal Enforcement Section resulted in two former Department of Defense contractors entering guilty pleas on charges that they were seeking and receiving bribes in connection with the award and performance of contracts to move and store military household goods. The charges were the first to arise from an ongoing investigation into the moving and storage of military household goods.  
[http://www.usdoj.gov/atr/public/press\\_releases/2009/249730.htm](http://www.usdoj.gov/atr/public/press_releases/2009/249730.htm)
- **Practice Tip: Issues surrounding debarment and suspension must be carefully considered because each can be debilitating to corporations that are**

**accused of fraud. The Antitrust Division has no authority to resolve debarment and suspension issues, but may intervene positively if requested to do so by a cooperating organization.**

2. Mail and Wire Fraud

- 18 U.S.C. § 1341 and §1343 (paraphrased) -- any scheme to defraud that attempts to obtain money or property by means of false or fraudulent pretenses where the mail, wire, radio, or television communication is used to execute the scheme. Violators shall be fined and/or imprisoned for not more than 20 years. If the violation affects a financial institution, the person shall not be fined more than \$1,000,000 and/or imprisoned for more than 30 years.
- The Antitrust Division charges companies and individuals with mail/wire fraud with some frequency. Examples include:
  - A New Jersey food marketing company was charged with mail fraud for submitting false and fictitious bids to a federal agency to manipulate contracts for canned foods.  
[http://www.usdoj.gov/atr/public/press\\_releases/1995/211998.htm](http://www.usdoj.gov/atr/public/press_releases/1995/211998.htm)
  - An employee of a structured steel company pled guilty to mail fraud in a scheme to defraud the Kansas Public Employees Retirement System by entering into an agreement with others to increase the price of structural steel intended for a building owned by the Retirement System.  
[http://www.usdoj.gov/atr/public/press\\_releases/1994/211868.htm](http://www.usdoj.gov/atr/public/press_releases/1994/211868.htm)

- An Arkansas attorney was charged with mail fraud in connection with a kickback scheme totaling more than \$3.5 million used to defraud a Michigan audio visual company.  
[http://www.usdoj.gov/atr/public/press\\_releases/2004/202790.htm](http://www.usdoj.gov/atr/public/press_releases/2004/202790.htm)
- **Practice Tip: Special care must be taken during internal investigations to understand the full extent of statements made, particularly in public bids to government entities.**

### 3. Tax Fraud

- DOJ antitrust investigations of offenses such as bid-rigging occasionally uncover IRS violations, including income tax evasion under 26 U.S.C. § 7201 (maximum penalty of \$100,000 and/or 5 years' imprisonment for an individual or \$500,000 for a corporation plus prosecution costs), or conspiracy to defraud the IRS under 18 U.S.C. § 371 (penalty may be a fine and/or five years' imprisonment). For example:
  - In September 2009, three individuals were indicted for their participation in fraud and kickback conspiracies related to contracts at a U.S. Environmental Protection Agency-designated Superfund site. The indictment further stated that one of the involved individuals, Gordon D. McDonald accepted kickbacks from two subcontractors, one of which fraudulently inflated their bid prices to include the amount of the kickbacks paid. According to the indictment, McDonald provided one of the bidding subcontractors with the bid prices of their competitors, allowing them to submit the highest possible bid prices

and still be awarded the sub-contracts. In addition, McDonald was charged with one count of international money laundering, two tax violations, and obstruction of justice.  
[http://www.usdoj.gov/aatr/public/press\\_releases/2009/249958.htm](http://www.usdoj.gov/aatr/public/press_releases/2009/249958.htm)

- In early 2009, Krzysztof Koczon and Mariusz Debowski pled guilty to conspiracy to aid another in filing false tax returns. The charges arose from an ongoing federal antitrust investigation of fraud, bribery, tax-related offenses and bidding irregularities relating to contracts administered by the Facilities Operations Department and the Engineering Department at NYPH and the Engineering Department at Mount Sinai. In April 2007, as part of the same investigation, Michael Theodorobeakos and two companies he co-owned pled guilty to conspiring to rig bids on the supply of maintenance and insulation services to NYPH and Mount Sinai Medical Center. Michael Vignola and Mister AC Ltd. additionally pled guilty in November 2007 to conspiring to rig bids on heating, ventilation and air conditioning services provided to NYPH and paying kickbacks to former NYPH purchasing officials. In April 2008, Aaron S. Weiner pled guilty to participating in a conspiracy where Weiner acted as a conduit in another million-dollar kickback scheme also involving one of the same former NYPH purchasing officials involved with the Vignola kickback schemes.  
[http://www.usdoj.gov/aatr/public/press\\_releases/2009/244378.htm](http://www.usdoj.gov/aatr/public/press_releases/2009/244378.htm)

- Michael Domecq was charged with conspiracy, money laundering, mail fraud, and income tax evasion for participating in a scheme to divert more than \$14 million from his company into personal offshore bank accounts. These charges were developed as a result of evidence uncovered during the Antitrust Division's prosecutions of bid-rigging, commercial bribery, and tax-related offenses in the point-of-purchase advertising and display industry.  
[http://www.usdoj.gov/atr/public/press\\_releases/2000/6401.htm](http://www.usdoj.gov/atr/public/press_releases/2000/6401.htm)
- Richard Ralston pled guilty to conspiring to defraud the IRS by assisting his former employer in filing false tax returns. The case arose from a federal antitrust investigation of bid-rigging, bribery, fraud, and tax-related offenses in the food distribution industry.  
[http://www.usdoj.gov/atr/public/press\\_releases/2001/7728.htm](http://www.usdoj.gov/atr/public/press_releases/2001/7728.htm)
- There is currently a broad ranging investigation into bid-rigging in connection with investment agreements and derivatives in the placement of municipal bonds, with possible IRS penalties involved as well. *See, e.g.,*  
<https://secure.bondbuyer.com/article.html?id=20080903GQI9OICG&queryid=1415291203&hitnum=3>
- **Practice Tip: Although traditionally not a likely source of concern, the possibility of tax fraud always lurks in antitrust investigations, and agreements to resolve antitrust violations -- from leniency agreements to plea agreements -- specifically**

**preserve the right for the government to  
launch a tax fraud prosecution.**

4. Violations of the Foreign Corrupt Practices Act (FCPA)

- FCPA: 15 U.S.C. §§ 78dd-1, et seq.: “The antibribery provisions of the FCPA make it unlawful for a U.S. person, and certain foreign issuers of securities, to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person. Since 1998, they also apply to foreign firms and persons who take any act in furtherance of such a corrupt payment while in the United States.”  
<http://www.usdoj.gov/criminal/fraud/docs/dojdocb.html>
- Conspiracy to violate FCPA: 18 U.S.C. § 371.  
Violators can be fined and/or imprisoned for not more than 5 years.
- In December of 2008, Misao Hioki pled guilty to both Sherman Act and FCPA violations related to the marine hose conspiracy. Mr. Hioki allegedly engaged in a conspiracy to suppress and eliminate competition by rigging bids, fixing prices, and allocating market shares, as well as allegedly conspiring to make corrupt payments to government officials in Latin America and elsewhere. Mr. Hioki was sentenced serve two years in jail and to pay an \$80,000 criminal fine. *See* <http://www.usdoj.gov/atr/cases/f240400/240474.htm> *and* [http://www.usdoj.gov/atr/public/press\\_releases/2008/240307.pdf](http://www.usdoj.gov/atr/public/press_releases/2008/240307.pdf).
- None of the other defendants in the marine hose conspiracy have pled guilty to a FCPA violation, and research has uncovered no other cases with both FCPA and antitrust criminal claims.

- The DOJ has been examining the intersections between the FCPA and antitrust law for at least 10 years. Former Deputy Assistant Attorney General at the Antitrust Division, Gary R. Spratling, stated in 1999: “The fact is that in today’s global economy there is a recurring intersection of conduct that violates both the Sherman Antitrust Act and the Foreign Corrupt Practices Act. A payment to a foreign official in violation of the FCPA may also be an act by an international bid-rigging, price-fixing, or market-allocation cartel in furtherance of its scheme injuring American businesses and consumers in violation of the Sherman Act. Thus, a compliance audit by a multinational firm that detects a payment potentially in violation of the FCPA may actually have detected much more: international cartel activity with additional -- indeed, likely far greater -- exposure for the firm and its executives.”

<http://www.usdoj.gov/atr/public/speeches/3981.htm>
- Spratling further stated: “Domestically, the Antitrust Division has uncovered payments to local government officials to facilitate the award of contracts allocated as a result of a bid-rigging conspiracy. Similarly, internationally, we have found evidence of payments to foreign government officials for the same purpose. In one case, the FCPA payments were discovered among two other types of corrupt payments: (1) payments to an intermediary to facilitate a conspiracy to rig bids; and (2) payments to contracting officials of companies preparing to award contracts, for the purpose of influencing the award decision (corporate bribery).”
- **Practice Tip: The most active current area of criminal enforcement in the Department of Justice is FCPA. In any international cartel matter, the**

**internal investigation must cover this possible area of exposure.**

5. Violation of the False Claims Act
  - 18 U.S.C. § 287 (paraphrased) -- whoever presents to the government any false, fictitious, or fraudulent claim shall be imprisoned not more than 5 years and shall be fined.
  - In May 2008, the Pasha Group paid \$13 million under the FCA to resolve allegations relating to a conspiracy to rig bids, fix prices, and allocate the market for the transportation of household goods belonging to military and Department of Defense personnel between Europe and the US. This case was investigated by the Defense Criminal Investigative Service of the Department of Defense Inspector General.  
[http://www.usdoj.gov/criminal/npftf/resource/reports/Dec08progress\\_report.pdf](http://www.usdoj.gov/criminal/npftf/resource/reports/Dec08progress_report.pdf)
  - **Practice Tip: While combined Sherman Act and FCA criminal prosecutions have not occurred, in a government procurement criminal investigation a putative defendant needs to assess and resolve civil FCA exposure, as well as administrative debarment and suspension issues. For those companies whose business is providing goods or services to the federal government, debarment or even suspension of the ability to sell can amount to an organizational death sentence.**

## B. Potential Process Charges Brought in Conjunction with Antitrust Violations

### 1. Obstruction of Justice

- 18 U.S.C. § 1501 to § 1520 -- Obstruction of justice consists of interfering or impeding the work of police, investigators, regulatory agencies, prosecutors, or other officials. For example, § 1510 (Obstruction of Criminal Investigations) states that “Whoever willfully endeavors by means of bribery to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator shall be fined under this title, or imprisoned not more than five years, or both.”
- An obstruction of justice charge might arise in combination with antitrust charges if it is found that defendants destroyed evidence or interfered with the investigation of antitrust charges. For example, in 2004 the DOJ charged an Arkansas fish distributor with obstruction of justice in connection with charges relating to a suspected conspiracy to fix the price of feeder goldfish sold in the U.S. The government alleged that Pool Fish Distributors intentionally delayed the production of documents subpoenaed by the grand jury. The distributor was charged under 18 U.S.C. § 1512 (see also witness tampering section). [http://www.usdoj.gov/atr/public/press\\_releases/2004/205884.htm](http://www.usdoj.gov/atr/public/press_releases/2004/205884.htm)
- In 2002, a Japanese carbon company and its California-based American subsidiary were indicted in connection with a price-fixing investigation. The obstruction charges alleged that the companies “caused the incriminating documents to be secretly removed from the headquarters of Toho USA in Menlo Park and

to be sent to the headquarters of Toho Japan in Tokyo in an effort to prevent the grand jury from receiving the subpoenaed documents.” The DOJ stated: “The Department will proceed aggressively against those who seek to impede antitrust investigations focused on protecting American consumers.”

[http://www.usdoj.gov/atr/public/press\\_releases/2002/10863.htm](http://www.usdoj.gov/atr/public/press_releases/2002/10863.htm)

- **Practice Tip: The stories of obstruction by secreting documents from the grand jury are legion. Defense attorneys should be aware that employees will sometimes hide documents at their homes or even outside, and sometimes will alter/hide their computer, in order to avoid being caught with potentially incriminating evidence. This conduct, even if it does not lead to a separate charge, has the potential to be used in sentencing.**

## 2. Perjury

- Perjury consists of statements made under oath that the speaker knows to be untrue. Under 18 U.S.C. § 1621, concerning perjury generally, perjury occurs when (a) a witness under an oath authorized by a federal statute, (b) taken before a competent tribunal, officer, or person, (c) willfully states or subscribes to any material matter, which he does not believe to be true.
- Pursuant to 18 U.S.C. § 1622, “whoever procures another to commit any perjury is guilty of subornation of perjury.”
- 18 U.S.C. § 1623, entitled “False declarations before a grand jury or court” states that the offense occurs when (a) a witness under oath (b) in any proceeding before or ancillary to any federal court or grand jury (c) knowingly makes any false material declaration or

uses any other information knowing it to contain a false material declaration. A full discussion of the differences between § 1621 and § 1623 can be found in Chapter 10 of the ABA SECTION OF ANTITRUST LAW, HANDBOOK ON ANTITRUST GRAND JURY INVESTIGATIONS (3d ed. 2002).

- The penalty for perjury, subornation of perjury, and false declarations is a fine and/or a maximum imprisonment of five years.
- In 2008, a scrap metal dealer and its owner were indicted for conspiring to allocate scrap metal suppliers in Northeast Ohio, and the company's vice president was indicted for perjury and obstruction of justice for statements he made before a federal grand jury in connection with the investigation.  
[http://www.usdoj.gov/atr/public/press\\_releases/2008/229926.htm](http://www.usdoj.gov/atr/public/press_releases/2008/229926.htm)
- In 2000, a Baltimore federal grand jury indicted the President and CEO of Wilsonart International Inc. for making false declarations before a grand jury investigating the possibility of price fixing in the high pressure laminate industry. The defendant was charged for knowingly providing false testimony about whether he participated in discussions with competitors to fix prices and limit competition.  
[http://www.usdoj.gov/atr/public/press\\_releases/2000/5014.htm](http://www.usdoj.gov/atr/public/press_releases/2000/5014.htm)
- **Practice Tip: While perjury is rarely charged in antitrust prosecutions because of the burden of proof issues, from time-to-time it is conflated with obstruction issues discussed infra.**

### 3. Witness Tampering

- Under 18 U.S.C. § 1512(b), witness tampering occurs when an individual “knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so; or engages in misleading conduct toward another person, with intent to (1) influence testimony in an official proceeding; (2) cause or induce any person to (A) withhold testimony, or withhold a record, document, or other object, from an official proceeding, (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding, (C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding, or (D) be absent from an official proceeding to which such person has been summoned by legal process; or (3) hinder, delay, or prevent the communication to a federal law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings.”
- If witness tampering occurs in connection with a criminal case, under 18 U.S.C. § 1512(j), “the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.”
- In 2004, the former CEO of Morgan Crucible Company plc was charged with obstructing the grand jury investigation of a conspiracy to fix prices for various carbon products, corruptly persuading others to

destroy or conceal documents to prevent their use by the grand jury, and witness tampering. The DOJ explains: “The indictments set out the lengths to which Norris, Emerson and their unnamed coconspirators went to thwart the antitrust investigation . . . The indictments charge that the co-conspirators created a task force to search through Morgan’s files and to remove and conceal or destroy any documents or records that they found in the files that reflected the pricing agreement it had with its competitors. According to the charges, Norris and Emerson, along with their co-conspirators, also prepared a ‘script’ for the co-conspirators to follow in the event they were questioned during the course of the investigation. According to the indictments, the ‘script’ falsely characterized the price-fixing meetings as joint venture meetings and deliberately omitted any references to the pricing discussions held with competitors. The indictments charge that the ‘script’ was given to competitors who participated in the price-fixing agreement with instructions that they follow the script to try to convince the Antitrust Division to close its investigation and to prevent the investigation in the U.S. from spreading to the European antitrust authorities. The indictments also alleged that in order to prepare themselves for questioning by investigators, the Morgan co-conspirators conducted a rehearsal at which they were questioned and cross-examined about the events described in the false script. During the rehearsal, Norris expressed his concern that certain Morgan employees involved in the price-fixing conspiracy might disclose the truth to investigators, and thereafter implemented a plan to separate those employees from the company before they were questioned, either by having them retire or making them consultants.”

[http://www.usdoj.gov/atr/public/press\\_releases/2003/201287.pdf](http://www.usdoj.gov/atr/public/press_releases/2003/201287.pdf)

- **Practice Tip: The example posed by the Norris case is admittedly unusual, but the use of code names, and falsification of travel records and documents in furtherance of a conspiracy and to prevent detection and prosecution is not. There are numerous examples where competitors hide their activities around facially ordinary trade association meetings.**

## II. Impact of Non-Antitrust Violations on the Leniency Process

When non-antitrust violations are involved, the leniency protections afforded by the Antitrust Division are more porous. In an effort to address the uncertainties, the Antitrust Division recently provided guidance on this very issue in the Model Corporate Conditional Leniency Letter and Frequently Asked Questions Regarding the Antitrust Division's Leniency Program, summarized below.

- The model corporate conditional leniency letter states, “[T]he Antitrust Division agrees not to bring any criminal prosecution against Applicant for any act or offense it may have committed prior to the date of this letter *in connection with the anticompetitive activity being reported.*” See Model Corporate Conditional Leniency Letter (Nov. 19, 2008), *available at* <http://www.usdoj.gov/atr/public/criminal/239524.htm> (emphasis added).
- The common example given for when an offense is considered to be “in connection with” a criminal antitrust violation is when mail, fax, or email is used to rig bids. This activity would normally constitute mail or wire fraud, punishable under 18 U.S.C. § 1341 and § 1343, but pursuant to the Leniency Policy would not be prosecuted. The Antitrust Division explains the connection between the antitrust violation and the non-antitrust violation as “conduct that is usually integral to the commission of a criminal antitrust violation.” See Frequently Asked Questions Regarding the Antitrust Division's Leniency Program (November

19, 2008), *available at*  
<http://www.usdoj.gov/atr/public/criminal/239583.htm>.

- The model corporate conditional leniency letter, however, also provides that “[t]he commitments in this paragraph are binding only upon the Antitrust Division, although, upon request of Applicant, the Division will bring this Agreement to the attention of other prosecuting offices or administrative agencies.” *See* Model Corporate Conditional Leniency Letter (Nov. 19, 2008), *available at* <http://www.usdoj.gov/atr/public/criminal/239524.htm>.
- Thus, it is possible that other federal or state prosecutors may decide to prosecute for adjunct criminal behavior despite the leniency agreement. For example, if in connection with the antitrust conspiracy a foreign public official is bribed in violation of the FCPA, the Antitrust Division would not prosecute a leniency applicant for this crime, but the Criminal Division of the DOJ could. However, the Antitrust Division points out that there have been no instances where a separate prosecuting agency has chosen to prosecute a leniency applicant where the adjunct criminal violation is one that is usually integral to the commission of the antitrust offense. *See* Frequently Asked Questions Regarding the Antitrust Division’s Leniency Program (Nov. 19, 2008).  
<http://www.usdoj.gov/atr/public/criminal/239583.htm>.
- As the Frequently Asked Questions guidance makes clear, “if the applicant has exposure for an antitrust and non-antitrust violation, the applicant may seek non-prosecution protection for the non-antitrust violation in a separate agreement in return for self-reporting that violation to the relevant prosecuting agency pursuant to the Department’s Principles of Federal Prosecution of Business Organizations.”  
<http://www.usdoj.gov/atr/public/criminal/239583.htm>
- **Practice Tip: What can a defense attorney do when faced with a client that has committed an antitrust violation, as well as other non-antitrust crimes that are not integral to the**

commission of the antitrust offense, such as a FCPA violation? *See generally* Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 Am. Crim. L. Rev. 1095 (2006).

- Consider entering the Antitrust Division's Leniency Program for the antitrust offense. Be aware of the Division's new requirement that in order to enter the leniency program a company must affirmatively admit that it has committed a crime and agree that it cannot and will not seek judicial review of the Division's decision to revoke the conditional leniency unless and until the company has been charged by indictment or information. *See* Model Corporate Conditional Leniency Letter (Nov. 19, 2008), *available at* <http://www.usdoj.gov/atr/public/criminal/239524>. This means that the Antitrust Division can collect incriminating information, revoke leniency, and then prosecute, without the company having any basis on which to challenge the revocation pre-indictment.
- Consider seeking deferred prosecution or non-prosecution agreements for the non-antitrust violations from all relevant criminal authorities, including the Criminal Division (Fraud, Public Integrity), Civil Division, and Tax Division. Ask the Antitrust Division to assist in obtaining protection from these other authorities.
- Consider self-reporting to relevant civil regulatory officials, such as the SEC and Department of Defense. If procurement fraud is involved, develop a strategy to resolve debarment and suspension issues.

- **If the client is a publically traded company, consider what information needs to be disclosed in filings with the SEC and the timing of such disclosures.**
- **Consider the potential civil ramifications, which can sometimes dwarf the criminal exposure.**
- **Consider the international criminal and civil ramifications and consider self-reporting to the EU, Canada, and possibly the U.K., Japan, Korea, and Australia. See generally Gary R. Spratling & D. Jarrett Arp, *Making the Decision: What to Do When Faced with International Cartel Exposure—Developments Impacting the Decision in 2008*, Presentation before the ABA and International Bar Association Seventh International Cartel Workshop (Jan 30-Feb. 2, 2008).**