



Curran Tomko Tarski LLP

## Corporate Compliance, Risk Management & Internal Controls



### **Tighten Employment, Ethics & Internal Controls Policies & Practices To Minimize DOJ & Other Antitrust Exposures**

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U.S. businesses should review the adequacy of their existing antitrust Federal Sentencing Guidance Compliance policies and internal controls in light of a series of recently announced antitrust enforcement actions recently announced by the Department of Justice (DOJ). U.S. and other businesses and their employees and agents who engage in prohibited antitrust activities face substantial criminal and civil penalties in actions brought by the DOJ, civil judgments brought by private plaintiffs, or both. To effectively manage these exposures, businesses and leadership must ensure that their organization has in place appropriate employment, corporate ethics and internal controls and procedures for preventing, investigating and redressing potential violations. The management and discipline of employees and other service providers that violate these and other compliance policies is an increasingly important responsibility of human resources and other management leaders.

On April 20, 2009, DOJ announced that two subsidiaries of the Swedish company Trelleborg AB, one based in Virginia and the other in France, have agreed to plead guilty and pay a total of \$11 million in criminal fines for participating in separate conspiracies affecting the sales of marine products sold in the United States and elsewhere. The plea agreements are among at least 9 major antitrust enforcement actions announced by the DOJ since the first of the year, including the longest sentence yet imposed for an antitrust criminal conviction.

#### **Trelleborg Engineered Products Inc. & Trelleborg Industries S.A.S. Plea Agreements**

The plea agreement resolves a two-count felony charge filed in U.S. District Court in Norfolk, VA, against Virginia Harbor Services Inc., formerly known as Trelleborg Engineered Products Inc. (VHS/TEPI), a manufacturer of foam-filled marine fenders, buoys and plastic marine pilings headquartered in Clearbrook, VA. Foam-filled marine fenders are used as a cushion between ships and either fixed structures, such as docks or piers, or floating structures, such as other ships. Foam-filled buoys are used in a variety of applications, including as channel markers and navigational aids. Plastic marine pilings are substitutes for traditional wood timber pilings and are often used in port and pier construction projects in conjunction with foam-filled fenders. According to the charges, VHS/TEPI participated in a conspiracy between December 2002 and August 2005 to allocate customers and rig bids for contracts to sell foam-filled marine fenders and buoys, and also participated in a separate conspiracy between December 2002 and May 2003 to allocate customers and rig bids for contracts to sell plastic marine pilings. Under the terms of the plea agreement, which is subject to court approval, VHS/TEPI has agreed to pay a \$7.5 million criminal fine and to cooperate fully in the Department's ongoing antitrust investigation. To date, six individuals and two corporations have pleaded guilty or agreed to plead guilty in the Antitrust Division's ongoing investigation of fraud and collusion in the marine fenders and pilings industries.

In addition, a one-count felony charge was filed today in U.S. District Court in Fort Lauderdale, FL., against Trelleborg Industries S.A.S. (TISAS), a manufacturer of marine hose headquartered in Clermont-

Ferrand, France. TISAS is charged with participating in a conspiracy from at least as early as 1999 and continuing until as late as May 2, 2007, to allocate market shares, fix prices and rig bids for contracts to sell marine hose to purchasers in the United States and elsewhere. Marine hose is a flexible rubber hose used to transfer oil between tankers and storage facilities. Under the terms of the plea agreement, which is subject to court approval, TISAS has agreed to pay a \$3.5 million criminal fine and to cooperate fully in the Department's ongoing antitrust investigation. To date, three corporations have pleaded guilty or agreed to plead guilty in the Antitrust Division's ongoing investigation in the marine hose industry. Twelve individuals have also been charged to date, nine of whom have pleaded guilty.

The plea agreements announced this week are part of a continuing DOJ investigation, which already lead to five former executives of TISAS and VHS/TEPI entering guilty pleas to participating in the conspiracies charged. Former VHS/TEPI president, Robert B. Taylor, was sentenced in January, 2008 to serve 24 months in prison and pay a \$300,000 criminal fine. Former VHS/TEPI chief financial officer Donald L. Murray was sentenced in March, 2008 to serve 18 months in prison and pay a \$75,000 criminal fine. William Alan Potts, a former vice president of VHS/TEPI, was sentenced in June, 2008 to serve six months in prison and six months in home detention, and to pay a \$60,000 criminal fine. Former TISAS executives Christian Caleca and Jacques Cognard were each sentenced in December, 2007 to serve 14 months in prison and to pay criminal fines of \$75,000 and \$100,000, respectively.

### **Other Recent Antitrust Enforcement Activities**

The plea agreements announced are the latest in a series of antitrust enforcement actions recently taken by the DOJ. Since the first of the year alone, DOJ also has announced a series of other major antitrust enforcement actions, including, for instance:

On April 9, 2009, DOJ announced that Cargolux Airlines International S.A., Nippon Cargo Airlines Co. Ltd. and Asiana Airlines Inc. had plead guilty and agreed to pay a total of \$214 million in criminal fines to settle price fixing charges.

- ✓ On March 31, a San Francisco federal grand jury indicted Hitachi Displays Ltd. executive Sakae Someya with conspiring with unnamed co-conspirators to suppress and eliminate competition by fixing the price of Thin Film Transistor-Liquid Crystal Display (TFT-LCD) panels sold to Dell Inc. for use in notebook computers. With this indictment, four companies and eight individuals have been charged in the Department's ongoing antitrust investigation into the TFT-LCD industry and more than \$585 million in fines have been imposed as a result;
- ✓ On March 10, Somey's employer, Japanese electronics manufacturer Hitachi Displays Ltd., agreed to plead guilty and pay a \$31 million fine for its role in a conspiracy to fix prices in the sale of TFT-LCD panels sold to Dell Inc.
- ✓ On February 10, 2009, a federal grand jury in San Francisco indicted former Chairman and Chief Executive Officer of Chunghwa Picture Tubes Ltd. with conspiring with others to suppress and eliminate competition by fixing prices, reducing output and allocating market shares of color display tubes (CDTs) to be sold in the U.S. and elsewhere. The indictment also charges C.Y. Lin with conspiring with others to suppress and eliminate competition by fixing prices for color picture tubes (CPTs) to be sold in the U.S. and elsewhere.
- ✓ On February 3, 2009, a San Francisco federal grand jury indicted two former executives from Chunghwa Picture Tubes Ltd. (Chunghwa) and one former executive from LG Display Co. Ltd. (LG) for participation in a global conspiracy to fix prices of Thin Film Transistor-Liquid Crystal Display (TFT-LCD) panels.
- ✓ On January 1, 2009, former high-level shipping executive Peter Baci was sentenced to serve the longest jail sentence ever imposed for a single antitrust charge, 48 months in jail, and to pay a \$20,000 criminal fine for his role in an antitrust conspiracy involving the transportation of goods to and from the continental United States and Puerto Rico by ocean vessel by agreeing to allocate customers, agreeing to rig bids submitted to government and commercial buyers, and agreeing to fix the prices of rates, surcharges, and other fees charged to customers. Related antitrust charges remain pending in the U.S. District Court in Jacksonville against three other shipping executives: R. Kevin Gill and Gregory Glova, of Charlotte, N.C. and Gabriel Serra, of San Juan, Puerto Rico. A

related obstruction of justice charge is also pending against a fifth shipping executive, Alexander Chisholm, of Jacksonville.

- ✓ On January 22, 2009, three air cargo carriers, LAN Cargo S.A. (LAN Cargo), Aerolinhas Brasileiras S.A. (ABSA), and EL AL Israel Airlines Ltd. (EL AL), plead guilty and agreed to pay criminal fines totaling \$124.7 million for their roles in a conspiracy to fix prices in the air cargo industry, the Department of Justice announced. Under the plea agreements, LAN Cargo, a Chilean company, and ABSA, a Brazilian company that is substantially owned by LAN Cargo, have agreed to pay a single criminal fine of \$109 million. EL AL, an Israeli company, has agreed to pay a criminal fine of \$15.7 million. According to the charges against the airlines, each airline engaged in a conspiracy in the United States and elsewhere to eliminate competition by fixing the cargo rates charged to customers for international air shipment.
- ✓ Under a plea agreement announced January 15, 2009, Chang Suk "C.S." Chung, a Korean LG executive, Chieng-Hon "Frank" Lin, a Taiwanese former executive from Chungwha, and Chih-Chun "C.C." Liu and Hsueh-Lung "Brian" Lee, Taiwanese current employees of Chungwha, agreed to serve a term of imprisonment, pay a criminal fine and assist the government in its ongoing TFT-LCD investigation.

### **Businesses & Business Leaders Must Have Effective Internal Controls & Compliance Practices**

These DOJ actions and a host of others in recent years provide examples of DOJ's willingness to investigate and prosecute price-fixing, bid-rigging and other antitrust violations. The felony penalties associated with federal antitrust violations bring antitrust sanctions within the purview of the Federal Sentencing Guidelines. As a result, businesses that fail to take adequate steps to prevent or redress antitrust violations risk vicarious liability for violations committed by their employees or agents. Furthermore, business leaders investigating suspected violations must exercise caution to appropriately investigate and redress alleged or suspected violations to both protect themselves and their organization against liability based on allegations of endorsement by tolerance, potential cover up or other misconduct in connection with the investigation and redress process. At the same time, timely investigation, oversight and redress can substantially mitigate these liability exposures under the Federal Sentencing Guidelines. Accordingly, to prevent and position themselves and their organizations to defend against potential antitrust complaints, businesses and business leaders should both adopt appropriate policies prohibiting their organizations and its employees and agents from engaging in price-fixing, bid rigging and other anticompetitive practices prohibited by federal or state antitrust laws, as well as establish and administer well-documented training and oversight practices to prevent, detect and redress potential or attempted violations of these policies.

To effectively manage these exposures, businesses and leadership must ensure that their organization has in place appropriate procedures for preventing, investigating and redressing potential violations. Among other things, businesses and their leaders should be certain their organization:

- ✓ Has up to date policies in place and a process to monitor regulatory and enforcement developments for necessary updates;
- ✓ Can demonstrate that it is appropriately administering well-documented audit, training and enforcement practices to prevent and redress potential violations as part of its corporate ethics and human resources practices;
- ✓ Uses appropriate vendor selection, contracting, audit and oversight processes to promote compliance by business partners, agents and others with which it does business;
- ✓ Has identified experienced counsel and developed a process for engaging counsel to assist in the audit of ongoing compliance efforts as well as the timely conduct of internal investigations of possible infractions within the scope of attorney-client privilege;
- ✓ Designated an ethics or compliance officer, or other appropriate party to receive and investigate suspected compliance concerns and reports;
- ✓ Has effective privacy, investigations, employment and other policies and procedures to enable the business to investigate, discipline and defend employment actions against employees or other workers for improper conduct;

- ✓ Has appropriate processes and procedures for responding to government investigations and private compliance complaints;
- ✓ Promptly investigates and responds to reports of infractions or other compliance concerns in an appropriate and well documented manner.

### **Curran Tomko Tarski LLP Attorneys Can Help**

Curran Tomko and Tarski LLP and its attorneys have significant experience assisting businesses and business leaders to establish, administer, enforce and defend antitrust and other compliance and internal control policies and practices to reduce risk under federal and state antitrust and other laws covered by the Federal Sentencing Guidelines. If you need assistance with these or other compliance concerns, wish to inquire about arranging for compliance audit or training, or need legal representation on other matters please contact Cynthia Marcotte Stamer, CTT Labor & Employment Section Chair, at [cstamer@cttlegal.com](mailto:cstamer@cttlegal.com), 214.270.2402; Edwin J. Tomko, CTT White Collar Crime Section Chair, at [etomko@cttlegal.com](mailto:etomko@cttlegal.com), 214 270-1405, Lea Courington, [lcourington@cttlegal.com](mailto:lcourington@cttlegal.com), 214 270-1412, or any of the other following members of the Curran Tomko Tarski LLP team experienced in these and other internal controls matters:

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### **Other Helpful Resources & Other Information**

We hope that this information is useful to you. Curran Tomko Tarski LLP offers a variety of updates, publications, training and other resources to assist its business clients and their leaders meet their legal and operational challenges. If you or someone else you know would like to receive future updates about developments on these and other concerns, please be sure that we have your current contact information (including your preferred e-mail) by creating or updating your profile at [here](#). You can access other recent updates and other informative publications and resources provided by Curran Tomko Tarski LLP attorneys, get information about their briefings and speeches, and review highlights of their experience and credentials at [www.cttlegal.com](http://www.cttlegal.com).

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