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# Strategic, Legal, and Ethical Issues in Providing Separate Counsel to Employees in Cartel Investigations

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# Cartel Investigations: Background and Trends

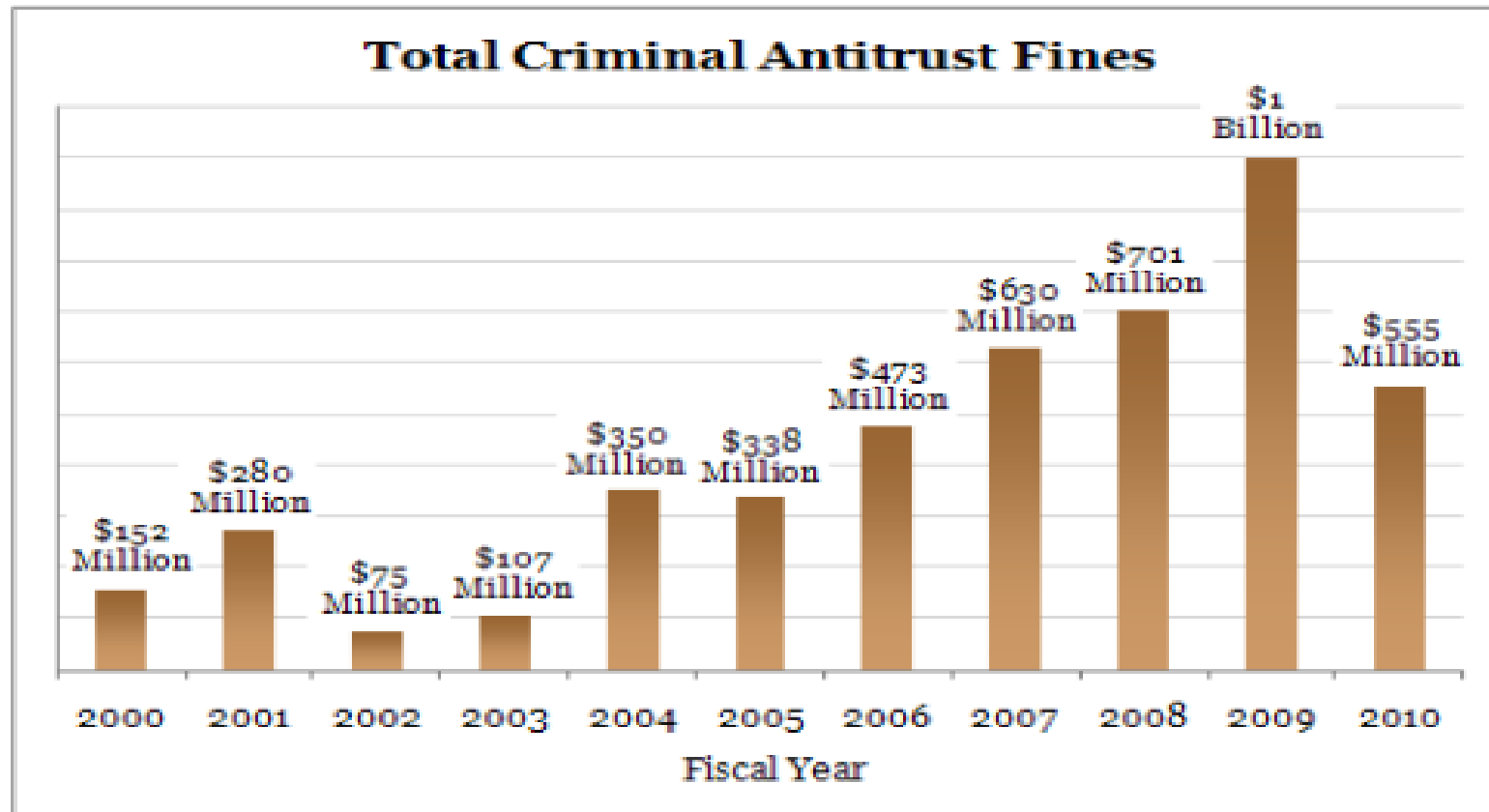
- Cartel conduct carries the risk of huge monetary penalties and jail sentences
  - Individuals: up to 10 years in prison and \$1M, or double the gain/loss
  - Entities: up to \$100M, or double the gain/loss
  - Private Lawsuits: treble damages plus attorneys' fees & costs
- Outside the U.S.
  - EU: aggressive enforcement and large fines
  - Criminal penalties in U.K., Australia, Brazil
- Multi-national coordination of cartel investigations is increasing

# Cartel Investigations: Background and Trends

- Amnesty Applicants Dominate Investigations
  - Ringleaders can seek amnesty all over the world
  - Amnesty Plus generates new investigations
- Other Common Sources for DOJ Investigations
  - Whistleblowers/Disgruntled employees
  - Customer complaints
  - Documents that come to light in other investigations (*i.e.*, merger review)
- How will the company learn about the investigation?
  - Dawn raids
  - Grand jury subpoenas
  - News media

# DOJ Antitrust Division – Trends

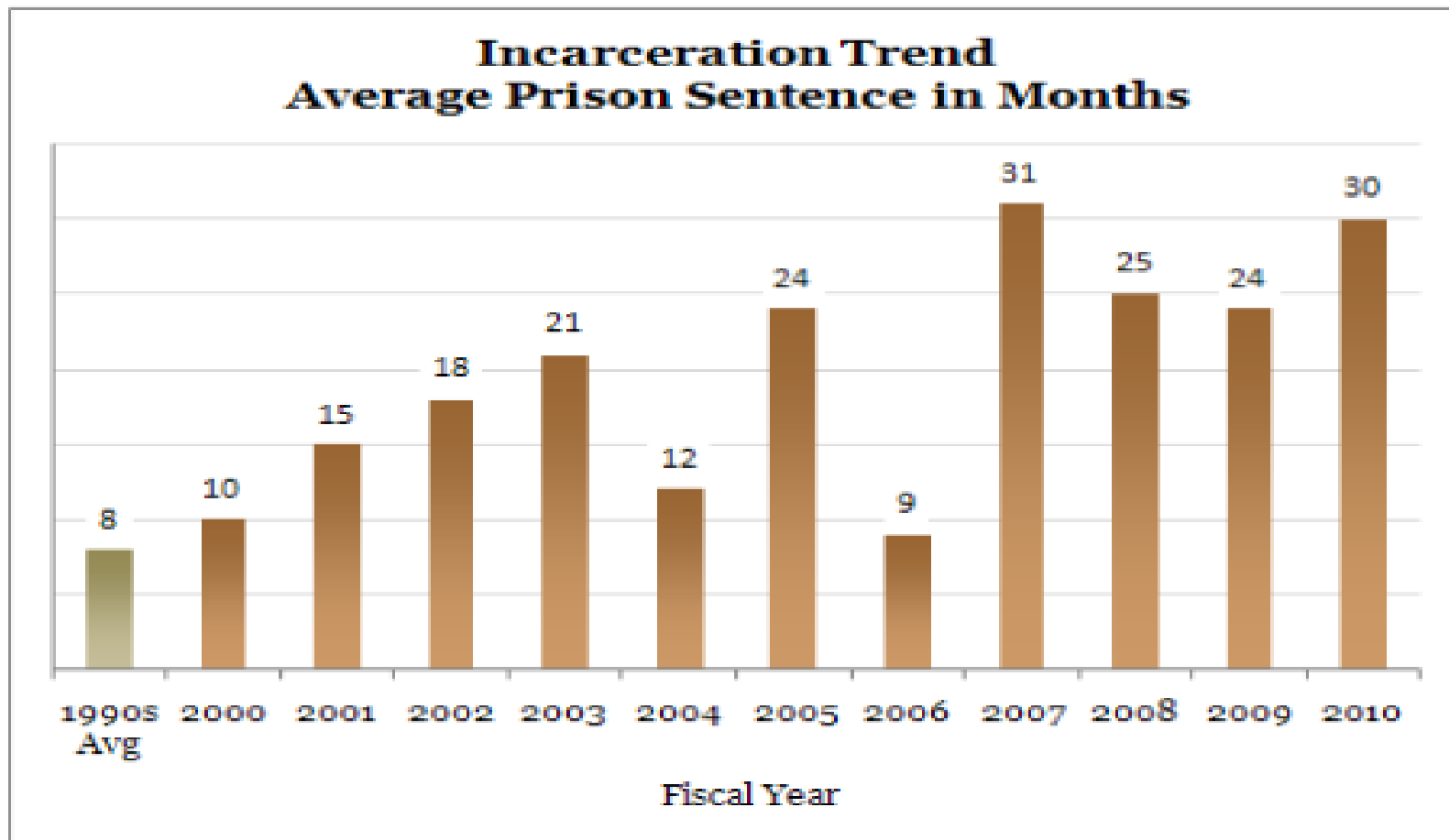
- Criminal fines are increasing



Source: DOJ Antitrust Division Annual Report

# DOJ Antitrust Division - Trends

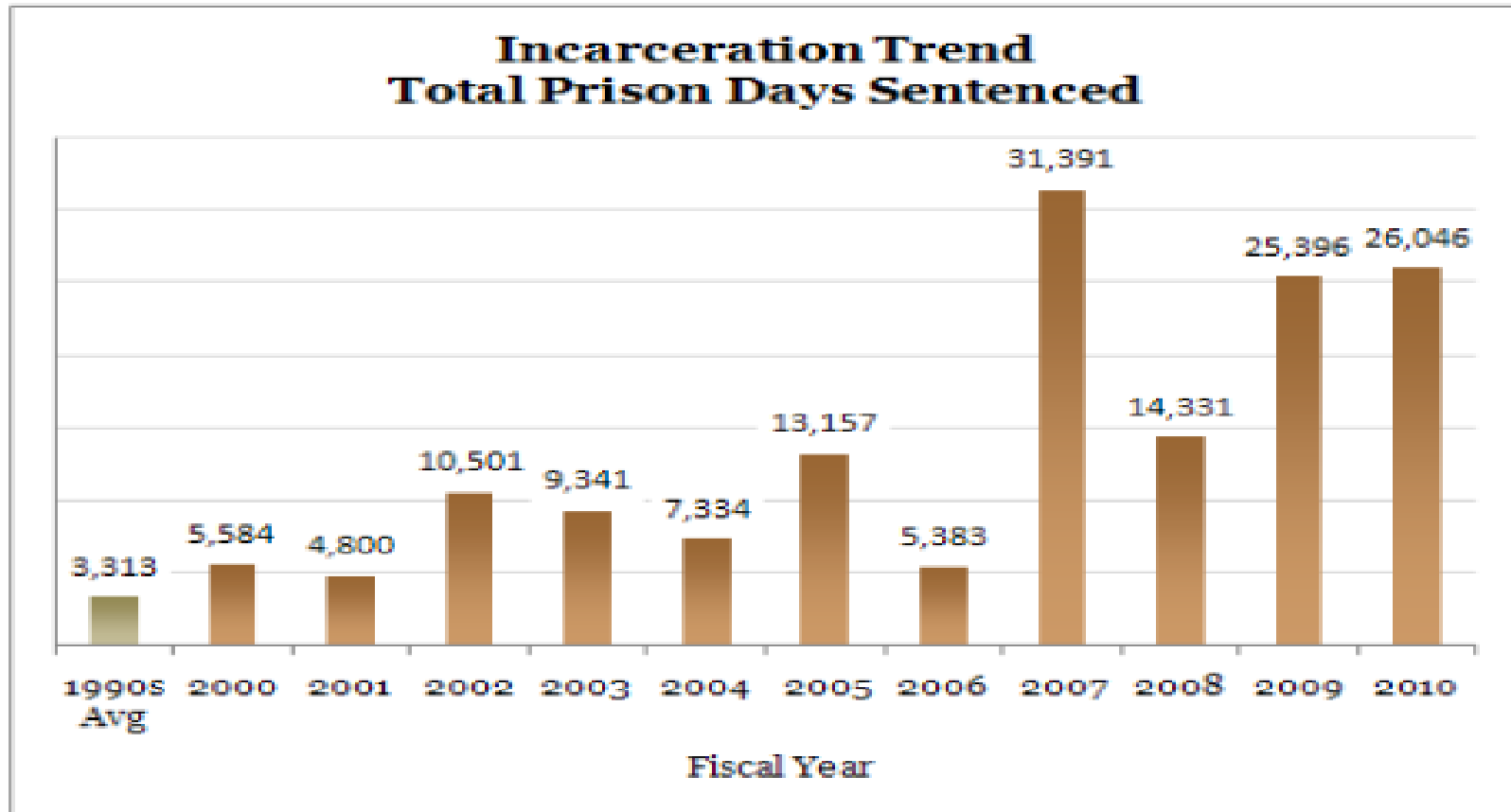
- Jail time is increasing



Source: DOJ Antitrust Division Annual Report

# DOJ Antitrust Division – Trends

- Jail time is increasing



Source: DOJ Antitrust Division Annual Report

# First Steps for Company Counsel

- Depends on scenario
  - Anonymous tip
  - Internal whistle-blower
  - Grand jury subpoena
  - Amnesty applicant
- Advising employees about a possible investigation
  - The 3 most likely questions: (1) Do I need a lawyer? (2) Who will pay for the lawyer? (3) Will the company only pay for a lawyer from a pre-approved list?
- Preservation – general and specific

# First Steps for Company Counsel

## Mayer Brown LLP Resources:

- *Preparing for and Responding to Government Antitrust Investigations* (June 2010)
  - Available at [www.wlf.org/publishing](http://www.wlf.org/publishing)
- *The First 72 Hours of a Government Investigation: A Guide to Identifying Issues and Avoiding Mistakes* (Nov. 2009)
  - Email Jeremy Fegley at [jfegley@mayerbrown.com](mailto:jfegley@mayerbrown.com)
- *Securities Investigations: Internal, Civil and Criminal* (Nov. 2010)
  - Order at [www.pli.edu](http://www.pli.edu)



## Why Separate Counsel?

- Conflicts can arise when an employee is a whistleblower, amnesty applicant, or faces criminal exposure
- DOJ's current policy is to exert strong pressure on investigation targets to provide separate counsel

# Privilege Considerations

- Privilege varies by jurisdiction
  - What law governs?
  - In some states, only an attorney’s communications with the “control group” are privileged
- Who is the client?
- Former employees
  - Communications that were privileged during employment likely retain privileged status after employee leaves the company
  - Courts are divided as to whether post-employment communications with a former employee are privileged.

# Privilege Considerations – International Law

- Privilege laws in foreign countries may differ significantly from U.S. law
- Not always clear which country's privilege laws apply
- Employee communications with in-house lawyers will not be treated as privileged in certain countries
- *Akzo Nobel* (Sept. 2007) – No uniform support among EU member states for giving in-house lawyers the same privilege rights as outside counsel

# Potential Privilege Pitfalls with Separate Counsel

- Beware waiver!
- What happens when a company in a joint defense decides to work out a deal with the government?
- What happens when an individual employee of a company in a joint defense decides to work out a deal with the government?

# Legal & Strategic Issues for Company Counsel

- Response to DOJ request that company retain separate counsel
  - Should you push back?
  - How hard?
- Coordinating with separate counsel
- Paying for separate counsel
- What if an officer/employee retains her own counsel?

# Legal & Ethical Issues for Company Counsel

- Can the company monitor the costs of separate counsel, and if so, how?
- Is there a limit on the number of separate counsel the company must pay for?
- How should the company handle apparent overbilling?
- Dealing with whistleblower employees/officers
- Dealing with employees/officers with criminal exposure

# Questions

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