

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

UNITED STATES OF AMERICA	)	Criminal No. 1:16-CR-00078
	)	
	)	Filed: August 9, 2016
v.	)	
	)	Violation: 15 U.S.C. § 1
HITACHI AUTOMOTIVE SYSTEMS, LTD.	)	
	)	
	)	Judge: Michael R. Barrett
	)	
Defendant.	)	
	)	

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**DEFENDANT’S SENTENCING MEMORANDUM**

**I. INTRODUCTION**

Hitachi Automotive Systems, Ltd. (“HIAMS”) is scheduled to appear before this Court for sentencing on February 16, 2017, at 10:00 am. HIAMS adopts the United States’ and the United States Probation Office’s (“Probation Office”) summary of offense and fine methodology, including the calculations under the United States Sentencing Guidelines (“U.S.S.G.,” “Sentencing Guidelines,” or the “Guidelines”). *See* United States Sent. Mem. at 3-5, Doc. 18 at PageID 100-102; Final Presentence Investigation Report (“Presentence Report”) ¶¶ 25-32, 86-100. Further, pursuant to the Fed. R. Crim. P. 11(c)(1)(C) Plea Agreement between the parties, *see* Plea Agreement ¶ 9(b), Doc. 3 at PageID 16, HIAMS does not oppose the United States’ recommendation of a fine amount of \$55.48 million.<sup>1</sup>

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<sup>1</sup> While the Probation Office recommends a fine of \$58.5 million, *see* Presentence Report at Recommendation, in its Addendum to the Report, it notes that this recommended fine amount “does not take into account any cooperation provided by the defendant as this information would be provided independently by [the United States].” *See* Addendum to the Presentence Report at 2-3. As detailed in the United States’ Sentencing Memorandum, HIAMS has provided extensive cooperation to the Department of Justice. *See* United States Sent. Mem. at 9, Doc. 18 at PageID 106. In addition, while HIAMS does not oppose the United States’ recommendation regarding the fine amount, its silence on this issue should not be taken as an endorsement of the bases underlying the United States’ recommendation.

The sole area of disagreement between HIAMS and the United States is regarding the recommendation of a term of probation.<sup>2</sup> The United States and the Probation Office have recommended a term of probation of two years. *See* United States Sent. Mem. at 1, 18, Doc. 18 at PageID 98, 115; Presentence Report at Recommendation. However, for the reasons set forth below, HIAMS respectfully asks the Court to exercise its discretion and impose no term of probation.

**II. PROBATION IS NOT WARRANTED UNDER THE FACTORS SET FORTH IN U.S.S.G. § 8D1.1 OR 18 U.S.C. § 3553 BECAUSE HIAMS HAS A PROVEN TRACK RECORD OF EMPLOYING A COMPREHENSIVE COMPLIANCE PROGRAM AND THERE ARE NO COMPELLING FACTORS PRESENT WARRANTING THIS EXCEPTIONAL SANCTION**

The touchstone of the probation analysis is necessity. 18 U.S.C. § 3553(a) provides that the Court shall impose a sentence that is “sufficient, but not greater than necessary” to comply with the purposes of sentencing. Likewise, the Commentary to the Sentencing Guidelines provides that a term of probation “should be sufficient, but not more than necessary, to accomplish the court’s specific objectives in imposing the term of probation.” U.S.S.G. § 8D1.2, cmt. 1.

Probation is not a necessary sanction for HIAMS because HIAMS has a proven and effective compliance and ethics program, which the United States has acknowledged as having the hallmarks of an effective compliance policy, and which the Probation Office has recognized as comprehensive. *See* U.S.S.G. § 8D1.1(a)(3); United States Sent. Mem. at 13, Doc. 18 at PageID 110; Presentence Report at Recommendation. Moreover, probation is not necessary because HIAMS has made changes to its compliance program in order to reduce the likelihood of future criminal conduct. *See* U.S.S.G. § 8D1.1(a)(6). The Presentence Report recognizes that

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<sup>2</sup> The United States has made several characterizations regarding the timeliness of HIAMS’s cooperation in the shock absorbers investigation. HIAMS does not agree with all of these characterizations, but as they are not relevant to the analysis of the probation factors they are not addressed in this memorandum.

“[i]n looking at the tenets of U.S.S.G § 8D1.1, HIAMS has satisfied many of the requirements needed to avoid the imposition of a term of probation,” and “meets the majority of the criteria outlined at U.S.S.G § 8D1.1.”<sup>3</sup> See Addendum to the Presentence Report at 2. After an extensive investigation and site visit, the Presentence Report concludes that “the company’s culture has completely changed regarding compliance issues and [it is] dedicated to preventing any future violation of antitrust laws.” Presentence Report ¶ 50. Under the Sentencing Guidelines analysis and the principles underpinning it, probation is therefore not warranted.

Probation is also not otherwise necessary to accomplish one of the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) (referenced in § 8D1.1(a)(8)), as HIAMS has already demonstrated a commitment to compliance and respect for the law during the several years the compliance program has operated since the conduct at issue in this case ended in 2011. Further, the Japanese Government, through the Japan Fair Trade Commission (“JFTC”) has evaluated and approved elements of HIAMS’s compliance program and the Court should give due weight to its conclusions. Finally, probation is a rare sanction in corporate antitrust cases, reserved for egregious offenders, and, just as similarly situated defendant Kayaba Industry Co., Ltd., (“Kayaba”) did not receive probation, neither should HIAMS. See *United States v. Kayaba Indus. Co., Ltd.*, 15-cr-00098 (S.D. Oh.).

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<sup>3</sup> Chapter 8, Part D of the Guidelines states that the court shall order a term of probation for one of eight specified reasons. This Sentencing Memorandum individually addresses Sections 8D1.1 (a)(3) and (6), and asserts that neither subsection is a basis for probation in this case. The remaining subsections are inapplicable to this matter and are not relevant to the Court’s analysis. Specifically, there is no restitution or community service, § 8D1.1(a)(1), or the need to safeguard HIAMS’s ability to make fine payments, § 8D1.1(a)(2). Sections 8D1.1 (a)(4), (5), and (7), relating to prior criminal adjudications and sentences with no fine component, are equally inapplicable given the facts of this case.

A. **HIAMS's Compliance and Ethics Program, Which Has Been in Place Since 2011, is Comprehensive and Effective and Exceeds the Standards Set Forth in U.S.S.G. § 8B2.1**

Under U.S.S.G. § 8D1.1(a)(3), the Court shall order a term of probation if an organization of fifty or more employees does not have an effective compliance and ethics program in place. Relatedly, U.S.S.G. § 8D1.1(a)(6) provides that probation shall be ordered if necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct. U.S.S.G. § 8B2.1 sets forth the standards for evaluating whether an organization has an effective compliance and ethics program. HIAMS's compliance program meets each of the main elements required under the Sentencing Guidelines, as is recognized by the Presentence Report. *See* Presentence Report at Recommendation (“HIAMS has implemented a comprehensive compliance program and is working diligently to ensure future violations do not occur.”) Importantly, however, HIAMS's program not only meets these standards today, but it has been meeting these standards for the past six years. As discussed below, the more recent changes and improvements to the compliance program have simply *enhanced* the otherwise sufficient program. The Court should credit the fact that HIAMS continues to improve its program, as this is a mark of a self-reflective and compliance-oriented company.

1. **HIAMS's Compliance Program is Not Untested—the Central Architecture of the Program has been in Operation For At Least Six Years, Coinciding with the End of the Offense Conduct in 2011**

HIAMS's compliance program is not first being implemented in response to the resolution in this case; rather, the core elements and basic structure of HIAMS's compliance program have been in place for several years, with the essential architecture of the program coming into place in 2010 and 2011, at approximately the same time the conduct underlying the offense in this case ended. In 2010 HIAMS promulgated its Code of Conduct and Compliance Rules. *See* Presentence Report ¶ 52. It was also in this year that the modern-day Compliance

Promotion Organization was established. *See* Presentence Report ¶ 59. In 2011, the rules regarding competitor contact, including reporting requirements, were first promulgated. *See* Presentence Report ¶ 56. As discussed below, though there have been improvements and expansions of these elements in recent years, the key elements of the compliance program have been in operation for some time.

The comprehensive and “impressive” nature of the compliance program is unquestioned by the Probation Office. *See* Presentence Report at Recommendation. The United States similarly acknowledges that HIAMS has “stepped up efforts to design and implement an enhanced compliance program to detect and ultimately prevent violations [of] the antitrust laws by fostering a corporate culture of compliance,” and details several of the improvements made to the program in recent years. United States Sent. Mem. at 12, Doc. 18 at PageID 109. Below are the essential elements of HIAMS’s compliance activities that have been in place for several years. HIAMS’s compliance program easily satisfies the requirements of U.S.S.G. § 8B2.1, and therefore HIAMS respectfully submits to the court that probation is not warranted under U.S.S.G. § 8D1.1(a)(3) or § 8D1.1(a)(6).

- a) *HIAMS has established standards and procedures to prevent and detect criminal conduct – § 8B2.1(b)(1)*

HIAMS has enacted written standards and protocols designed to detect, deter, and prevent problematic conduct, including by enacting guidelines and company rules such as: (1) a Code of Conduct (first enacted in 2010); (2) Compliance Rules (first enacted in 2010); and (3), given the nature and risks of the industry, specific policies related to competitor contact (first enacted in 2011). The rules prohibiting competitor contact provide limited exceptions for specific and legitimate purposes, for which approval must be obtained in advance, and a report documenting the contact must be submitted afterwards. *See* Presentence Report ¶¶ 52-58.

- b) *HIAMS has implemented a worldwide compliance promotion organization, which features the full support and active involvement of senior executives – § 8B2.1(b)(2)*

In 2010, in order to permeate the compliance culture throughout the organization, HIAMS developed a “Compliance Promotion Organization,” which is a multi-tiered structure, with involvement at many levels of the company, in Japan and globally. The Compliance Promotion Organization is a worldwide structure, which features the full support and active involvement of senior executives, with duties and roles assigned at various levels of the company, including a Compliance Committee which is overseen by a Chairman, who is the President and CEO of the company. *See Presentence Report ¶¶ 59-60.*

- c) *HIAMS has created and publicized an effective whistleblowing system – § 8B2.1(b)(5)(C)*

Since 2009, HIAMS has had in place an internal reporting procedure, referred to as the Hot Line Policy, which allows any member of the organization to report suspected criminal violations, breaches of rules and regulations, and other wrongdoing, anonymously and without fear of retaliation. HIAMS publicizes the hotline to employees in various ways, including by publishing references to the hotline in training materials and by posting easily accessible and visible links on HIAMS’s and its affiliate Hitachi Automotive Systems Americas, Inc.’s intranet. HIAMS employees can also avail themselves of the whistleblowing hotline of parent company Hitachi, Ltd. *See Presentence Report ¶¶ 61-62, 74.*

- d) *HIAMS has created a comprehensive training program – § 8B2.1(b)(4)*

HIAMS has created a comprehensive training program, which communicates all aspects of the compliance program, and which involves all levels of employees, and is tailored appropriately to employees’ roles. One key facet of HIAMS’s training programs is that they are interactive and require employee involvement. Rather than simply sending training materials to

employees, or even hosting in-person lectures, several aspects of HIAMS's training program are interactive in nature, requiring employees to grapple with the concepts presented. For example, employees are asked to fill out self-assessment checklists and to engage in workplace discussions, the latter of which involve the use of carefully crafted and substantive discussion prompts designed to promote in-depth discussion of compliance issues. *See* Presentence Report ¶¶ 66-67.

- e) *HIAMS has developed creative and impactful ways of disseminating compliance information beyond training, such as through interactive workshops and computer pop-up messages – § 8B2.1(b)(4)*

In addition to standalone training programs, HIAMS also employs a number of activities that serve to educate on compliance topics as well as to further embed compliance as company culture. Two of these initiatives are “Corporate Ethics and Compliance Month” (each October), and “Compliance Day” (one day each July). Compliance Month was first instituted in 2009. (Compliance Day was added in 2015.) These activities collectively involve the circulation of compliance-oriented messages, workplace discussions regarding compliance themes, compliance-themed computer pop-up messages, and the administration of compliance oaths, among other activities. *See* Presentence Report ¶¶ 68-70.

- f) *HIAMS engages in structural and targeted auditing – § 8B2.1(b)(5)(A) and § 8B2.1(b)(5)(B)*

At regular intervals, HIAMS engages in *structural* auditing, to make sure that the compliance program is being institutionalized effectively, by employing many methods to evaluate its processes and controls, such as by tracking employee participation in training, evaluating pre-approval reports regarding competitor contact and tracking post-event notifications, and re-examining company rules and assessing their accessibility. Additionally, HIAMS engages in *targeted* auditing, to monitor and evaluate specific activity of key

departments and personnel to ensure that wrongdoing is detected. *See* Presentence Report ¶¶ 71-72.

An assessment of the compliance program as it existed as of 2011 would yield a finding of a robust and comprehensive compliance program.<sup>4</sup> A term of probation is therefore not warranted on this basis. As detailed below, however, HIAMS has continued to improve its program, making probation even less necessary.

2. HIAMS Has Made a Number of Improvements to Its Compliance Program in Recent Years; Rather than Suggesting the Compliance Program is New, Improvements to the Program are Required under U.S.S.G. § 8B2.1(b)(7) and § 8B2.1(c) and Illustrate a Continued Commitment to Compliance

As noted throughout the Presentence Report, HIAMS has made a number of enhancements to its compliance program in recent years. The Sentencing Guidelines require organizations to take steps after identifying criminal conduct, and in connection with periodic assessments, to take steps to “design, implement, or *modify* each requirement” of its compliance program. U.S.S.G. § 8B2.1(b)(7) and § 8B2.1(c) (emphasis added). Rather than suggesting HIAMS’s compliance program is not fully mature, these enhancements illustrate that HIAMS engages in critical self-evaluation and is committed to constant improvement of its compliance program.

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<sup>4</sup> The United States has urged the Court to consider, for the purpose of accepting the fine recommendation, the fact that HIAMS did not “uncover and report the conduct charged in this case when it was under investigation in the first case.” United States Sent. Mem. at 6, Doc. 18 at PageID 103. While HIAMS does not take issue with the United States’ reliance on this fact to arrive at a fine recommendation, HIAMS respectfully submits that it has no bearing on the probation analysis. The Sentencing Guidelines explicitly recognize that “[t]he failure to prevent or detect the instant offense does not necessarily mean that the [compliance] program is not generally effective in preventing and detecting criminal conduct.” U.S.S.G. § 8B2.1(a). Even by the Department of Justice’s own guidelines, the standard for evaluating a compliance program is “whether the program is *adequately designed* for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives.” United States Dep’t of Justice, U.S. Attorneys’ Manual § 9-28.800 “Corporate Compliance Program,” cmt. [2015], available at <https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations> (emphasis added). The U.S. Attorneys’ Manual recognizes that “no compliance program can ever prevent all criminal activity by a corporation’s employees.”

In other words, the recent enhancements to HIAMS's compliance program did not change the basic structure of the program, rather they serve to amplify key aspects of the program and to improve its efficiency and effectiveness. HIAMS's willingness to constantly assess the effectiveness of its program and make improvements as needed also demonstrates that its compliance program is not a "paper" program. Below are the recent enhancements to the compliance program:

- 2015 enhancement to competitor contact reporting procedures – § 8B2.1(b)(1): As mentioned above, HIAMS's competitor contact rules have been in place since 2011. In 2015, in an effort to increase the efficiency of these procedures, HIAMS created a new electronic system that includes a centralized database that allows applicants seeking preapproval for competitor contact, supervisors, and those with authority to approve the requests to easily check their status. The electronic system also reduces omissions as it automatically prompts individuals to complete required post-contact reports after having contact with competitors. *See* Presentence Report ¶¶ 56-58.
- 2013, 2014, and 2015 enhancement and expansion of compliance promotion organization – § 8B2.1(b)(2): In 2013, HIAMS expanded the Compliance Promotion Organization, which had been operating since 2010, by creating the position of Chief Compliance Officer, and, in 2014, it further expanded the organization by creating a Compliance Department, which is led by a full-time director. Similarly, in 2015, HIAMS continued its overseas expansion and formalization of its compliance program by creating a "Regional Chief Compliance Officer" program, which was created in order to establish region-specific compliance organizations at each of HIAMS's regional headquarters. *See* Presentence Report ¶¶ 59-60.

- 2014 and 2016 enhancements to whistleblowing policy – § 8B2.1(b)(5)(C): HIAMS has expanded on the whistleblowing program, enacted in 2009, by instituting on two occasions Special Confession Programs (in 2014 and 2016), which encouraged employees to report wrongful conduct using a “carrot and stick” approach. If employees reported relevant conduct they would receive amnesty (in 2014) or possible commutation (in 2016) for their past actions; if they failed to report conduct, they would face strict disciplinary measures. *See* Presentence Report ¶¶ 63-65. This approach is consistent with the requirements of § 8B2.1(b)(6).
- Expansion of training activities – § 8B2.1(b)(4): HIAMS has provided training to its employees for several years as part of its compliance activities. In recent years, the frequency of training has increased and the number of individuals receiving training has expanded. As stated above, in addition to Compliance Month, which has existed since 2009, HIAMS added Compliance Day in 2015. *See* Presentence Report ¶¶ 66-70.
- 2013 expansion of auditing activities – § 8B2.1(b)(5)(A) and § 8B2.1(b)(5)(B): Though auditing has been a part of HIAMS’s compliance activities for several years, in 2013 HIAMS made improvements to its audit methodology and increased the frequency of auditing. HIAMS’s audit methodology, adopted in 2013, has been approved by the JFTC. *See* Presentence Report ¶¶ 50, 71-72.

HIAMS’s continuous evaluation and improvement of its compliance activities indicates its commitment to maintaining a world-class compliance program. HIAMS submits to the Court that it is a *positive* undertaking for HIAMS to continue to make improvements to its compliance program. The improvements and enhancements in recent years are just that; and though HIAMS

strives to make its compliance program better each year, this does not negate the fact that it has had a mature compliance program in place for at least six years.

3. As a Result, HIAMS Has Completely Changed the Company Culture Regarding Compliance

U.S.S.G. § 8B2.1(a) requires that, in order for a company's compliance program to be considered effective, it must "exercise due diligence to prevent and detect criminal conduct" and "promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law." HIAMS has fulfilled both of these requirements, as recognized by the Probation Office. In recent years, due to the implementation of its modern-day compliance program beginning around 2011, the numerous enhancements as described above, and the company's encouragement to its employees to comply with antitrust (and other) laws, HIAMS's culture has completely changed regarding compliance issues. *See* Presentence Report ¶ 50. The company is dedicated to preventing any future violation of antitrust laws. *See id.* The culture shift has come directly from the highest level of the company, including top management personnel. *See id.* A HIAMS document cited by the United States, *see* United States Sent. Mem. at 11, Doc. 18 at PageID 108, in which the company's top management acknowledged to its employees in a training program the flaws in the past culture, is clear evidence that the critical change in culture has been coming from the top down for the past several years. Notably, the change in the company's culture occurred *after* the conduct at issue in this matter concluded in 2011.

**B. Probation is Not Otherwise Necessary to Accomplish One of the Purposes of Sentencing Set Forth in 18 U.S.C. § 3553(a)(2)**

Besides the Sentencing Guidelines' probation factors relating to an organization's compliance program, the Guidelines provide that the Court shall order a term of probation "if necessary to accomplish one or more of the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2)." U.S.S.G. § 8D1.1(a)(8). Neither the United States nor the Probation Office claims any deficiency in HIAMS's compliance program; rather, the basis for the probation recommendation seems to rest primarily on this catch-all sentencing provision, and a desire to ensure that HIAMS continues its compliance efforts. *See* Addendum to the Presentence Report at 2; Presentence Report at Recommendation ("HIAMS has implemented a comprehensive compliance program and is working diligently to ensure future violations do not occur. However, given that this is not their first antitrust violation and the fact that their compliance program is relatively new, the recommended term of probation will serve to ensure they continue with their impressive compliance program and continue to implement these strategies moving forward."). In relevant part, § 3553(a)(2) provides that a sentence should promote respect for the law, afford adequate deterrence, and protect the public from future crimes. U.S.S.G. §§ 3553(a)(2)(A)-(C).<sup>5</sup> Respectfully, in this case, probation is not necessary to accomplish one of the articulated purposes of sentencing nor is it necessary to ensure HIAMS continues on a path to success; rather, HIAMS has *already demonstrated* a commitment to compliance and respect for the law during the many years the compliance program has operated in order to prevent the reoccurrence of criminal violations since the conduct at issue in this case ended. Further, the proposed fine amount will be one of the top 55 Sherman Act fines in history.<sup>6</sup> HIAMS's

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<sup>5</sup> 18 U.S.C. § 3553(a)(2)(D), regarding provision of educational or vocational training, medical care, or other treatment of the defendant, is not relevant in the context of a corporate defendant.

<sup>6</sup> *See* <https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more>.

collective punishment for its two antitrust sentences, for conduct that ended by 2011, would place it in the top 15 on this list. HIAMS fully acknowledges the seriousness of the penalty, which has a serious impact on its business and reputation.

Were this a case where HIAMS engaged in consecutive criminal conduct,<sup>7</sup> or where HIAMS newly implemented a compliance program in response to this investigation, then probation might be appropriate, in order to ensure the successful implementation of a program and to promote continued adherence to the law. *See, e.g.*, U.S.S.G. § 8D1.1(a)(3). However, as discussed above, this is *not* such a case. Rather, HIAMS has had a successful compliance program in place for several years, with the critical components being in place since 2011, the year the conduct at issue ended. Since this time, HIAMS's compliance program has been improved and strengthened, consistent with the requirements of U.S.S.G. § 8B2.1 (b)(7) and § 8B2.1(c); however the core of the program has been in place and operating effectively for at least six years.

HIAMS fully agrees with the Probation Office's finding that "[i]n recent years, the company's culture has completely changed regarding compliance issues and [it is] dedicated to preventing any future violation of antitrust laws." Presentence Report ¶ 50. Therefore, rather than needing to rely on a term of probation to ensure that HIAMS continues to execute its

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<sup>7</sup> The conduct charged in the present case occurred during the same time period as the conduct charged in a previous case, affecting various automotive parts, which resulted in HIAMS entering into a guilty plea in 2013. *See* U.S. v. Hitachi Automotive Systems, Ltd., No. 2:13-CR-20707 (E.D. Mich. Nov. 6, 2013). As such, HIAMS is not a recidivist, a fact recognized by the United States and the Probation Office. *See* Plea Agreement ¶ 9(a)(ii), Doc. 3 at PageID 16; United States Sent. Mem. at 6, Doc. 18 at PageID 103; Presentence Report ¶ 93; Addendum to the Presentence Report at 2. The United States has urged the Court to consider, for the purpose of accepting the fine recommendation, HIAMS's prior resolution, along with antitrust cases involving other entities that include "Hitachi" as part of their names. *See* United States Sent. Mem. at 6-7, Doc. 18 at PageID 103-104. HIAMS respectfully clarifies for the Court that the list of entities cited by the United States does not include any that could be considered part of the HIAMS organization. The entities may be related in some way to HIAMS's parent company, Hitachi, Ltd., through stock ownership, joint venture, or as a wholly owned subsidiary, but none have any meaningful relationship to HIAMS. Moreover, two of the entities are separately listed on the Tokyo Stock Exchange. Therefore, HIAMS submits that the emphasis on U.S.S.G. § 8C2.8(a)(7), which refers to "any prior civil or criminal misconduct *by the organization* other than that counted under §8C2.5(c)" (emphasis added), is misplaced and should have no impact on the probation analysis.

compliance program going forward, HIAMS's "dedicated" and "diligent" actions over the past six years demonstrate its commitment to the successful implementation of its compliance program going forward; therefore, no term of probation is necessary. Even if the Court should decide that probation is appropriate, in no case could a term of two years be justified.

**C. Principles of International Comity Suggest that Due Weight Be Given to the Japanese Government's Evaluation and Approval of HIAMS's Compliance Activities**

HIAMS respectfully asks the Court to give due weight to the fact that the compliance and antitrust violation prevention activities of HIAMS, a Japanese corporation, have already been closely scrutinized and supervised by the JFTC. The United States and the Government of Japan are parties to a mutual agreement concerning antitrust enforcement, which recognizes that "[e]ach Party shall give careful consideration to the important interests of the other Party throughout all phases of its enforcement activities, including decisions regarding the initiation of enforcement activities, the scope of enforcement activities and the nature of penalties or relief sought in each case."<sup>8</sup> This principle is aptly applied here.

As noted in the Presentence Report, HIAMS's compliance program consists of elements approved by the Japanese antitrust regulator and enforcement agency, the JFTC. *See* Presentence Report ¶ 50. Following the conclusion of the JFTC's investigation of HIAMS in 2012,<sup>9</sup> it issued an order, in part, requiring HIAMS to create an implementation plan of measures to prevent the reoccurrence of such illegal activities. The JFTC thoroughly reviewed HIAMS's plans to disseminate guidelines on compliance to its employees, for ongoing training of its

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<sup>8</sup> Agreement Between the Government of the United States of America and the Government of Japan Concerning Cooperation on Anticompetitive Activities (Oct. 7, 1999), Art. VI, 1, *available at* <https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/3740.pdf>.

<sup>9</sup> HIAMS reached resolutions with the JFTC in 2012, related to conduct in a line of business that was at issue in the 2013 U.S. guilty plea. *See* <http://www.jftc.go.jp/en/pressreleases/yearly-2012/nov/individual-000507.html>.

employees, and for periodic auditing. The JFTC subsequently approved HIAMS's plans in early 2013. *See* Presentence Report ¶ 50.

As part of the JFTC supervision, HIAMS not only had to submit its plan for approval, but it also had to submit a report to the JFTC detailing other activities it performed in accordance with the JFTC order, such as confirming that its Board of Directors has passed a resolution affirming: (i) that it had ceased collaborating with its competitors regarding the products investigated by the JFTC; and (ii) that it would independently carry out its business without engaging in any similar conduct; (iii) that it sent out the required notices to its customers and other perpetrators of the violations informing them of the Board resolution, and (iv) that it had notified its nearly 10,000 employees about the Board resolution.

Therefore, HIAMS requests that the Court not impose probation on HIAMS, given the Japanese Government's previous approval and oversight of its compliance activities.

**D. HIAMS Should Not Receive Probation, Which is a Rare Sanction in Antitrust Cases, as It Would Create a Disparity in Sentencing**

18 U.S.C. § 3553(a)(6) provides that, in determining a particular sentence, the Court shall consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” In October 2015, Kayaba was sentenced in connection with a violation of 15 U.S.C. § 1, for anticompetitive activity involving the same shock absorbers that are at issue in this matter. *See* Judgment, *United States v. Kayaba Indus. Co., Ltd.*, 15-cr-00098 (S.D. Oh., Nov. 2, 2015), Doc. 26 at PageID 1-3. HIAMS's compliance program appears to contain or exceed the elements of Kayaba's program, as outlined by the United States. *See* United States Sent. Mem. and Mot. for a Downward Departure Pursuant to U.S.S.G. § 8C4.1, *United States v. Kayaba Indus. Co., Ltd.*, 15-cr-00098 (S.D. Oh., Oct. 5, 2015), Doc. 21 at PageID 86-87. For example, HIAMS has adopted the practices

outlined in Kayaba's program, such as: (1) directing change from top management; (2) creating various new compliance policies and a dedicated compliance office and staff; (3) administering training, with associated self-awareness quizzes; (4) establishing and promoting an anonymous reporting system; and (5) engaging in monitoring and auditing. Not only did Kayaba receive no term of probation, it was given credit for having a strong compliance program, even though it appears to have been implemented in large part *after* the start of the investigation. *See id.* HIAMS respectfully submits that just as probation was not necessary for Kayaba, it is equally not necessary for HIAMS.

Finally, the fact that Kayaba did not receive a term of probation highlights a related consideration for the court; namely, that probation is an extremely rare sanction in antitrust cases. The Department of Justice's Antitrust Division has noted that a company is a candidate for probation where it "has no preexisting compliance program or makes no efforts to strengthen a compliance program that has proved ineffective."<sup>10</sup> Conversely, "companies that can demonstrate they have adopted or strengthened existing compliance programs may be able to avoid probation."<sup>11</sup> Therefore, HIAMS requests that the Court apply that same standard here, recognizing that, in the case of a corporate defendant with a robust and effective compliance program, probation is not necessary.

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<sup>10</sup> Brent Snyder, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, "Compliance is a Culture, Not Just a Policy," Sept. 9, 2014, at 8-9, available at <https://www.justice.gov/atr/file/517796/download>.

<sup>11</sup> *Id.* at 9.

### III. CONCLUSION

For these reasons, HIAMS requests that the Court impose a sentence requiring it to pay a fine of \$55.48 million, in line with the United States' recommendation, payable within 15 days of judgment, no term of probation, and no order of restitution.<sup>12</sup>

Respectfully submitted,

/s/ Matthew J. Jacobs

Matthew J. Jacobs  
Craig P. Seebald  
Katherine C. Kim  
Brian D. Schnapp  
Vinson & Elkins LLP  
555 Mission Street, Suite 2000  
San Francisco, CA 94105  
Tel: (415) 979-6900

Jeffrey R. Teeters  
Wood Lamping LLP  
600 Vine Street, Suite 2500  
Cincinnati, OH 45202  
Tel: (513) 852-6050

Counsel for Hitachi  
Automotive Systems, Ltd.

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<sup>12</sup> As the United States acknowledges, see United States Sent. Mem. at 1-2, 16, Doc. 18 at PageID 98-99, 113, pursuant to 18 U.S.C. § 3663, restitution is not mandatory for violations of 15 U.S.C. § 1, and in light of the availability of civil causes of action that potentially provide for a recovery of a multiple of actual damages, see 15 U.S.C. § 15, the United States and HIAMS recommend that the sentence not include a restitution order.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

UNITED STATES OF AMERICA	)	Criminal No. 1:16-CR-00078
	)	
	)	Filed: August 9, 2016
v.	)	
	)	Violation: 15 U.S.C. § 1
HITACHI AUTOMOTIVE SYSTEMS, LTD.	)	
	)	
	)	Judge: Michael R. Barrett
	)	
Defendant.	)	
	)	

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 7, 2017, I caused the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

1. Carla M. Stern ([carla.stern@usdoj.gov](mailto:carla.stern@usdoj.gov)); and
2. Daniel W. Glad ([daniel.glad@usdoj.gov](mailto:daniel.glad@usdoj.gov))

Respectfully submitted,

/s/ Matthew J. Jacobs  
Matthew J. Jacobs  
Craig P. Seebald  
Katherine C. Kim  
Brian D. Schnapp  
Vinson & Elkins LLP  
555 Mission Street, Suite 2000  
San Francisco, CA 94105  
Tel: (415) 979-6900

Jeffrey R. Teeters  
Wood Lamping LLP  
600 Vine Street, Suite 2500  
Cincinnati, OH 45202  
Tel: (513) 852-6050

Counsel for Hitachi  
Automotive Systems, Ltd.