Department of Justice

STATEMENT

OF

WILLIAM J. BAER
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

HEARING ON

"OVERSIGHT OF THE ENFORCEMENT OF THE ANTITRUST LAWS"

PRESENTED ON

APRIL 16, 2013

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Chairman Klobuchar, Ranking Member Lee, and distinguished members of the Subcommittee, thank you for inviting me to appear before you today to discuss the work of the Antitrust Division. I have been at the division for just a short time, but I am honored to be part of the proud and successful tradition of antitrust enforcement at the Department of Justice. I am also privileged to be sitting next to Federal Trade Commission Chair Ramirez. She is an exceptional public servant and a friend. We will work together closely on behalf of American consumers.

Competition is the cornerstone of our nation's economic foundation. It makes our economy vibrant, innovative, and resilient. The antitrust laws serve to promote and protect a robust free-market economy by prohibiting anticompetitive agreements, conduct, and mergers that distort market outcomes. Vigilant antitrust enforcement ensures that consumers reap the benefits of competitive markets.

We can all agree that firms should not be able to distort the economic choices available to consumers or to sellers in upstream markets. We appreciate this subcommittee's consistent and active interest in and strong support of vigorous and effective law enforcement.

When markets are working, consumers benefit from lower prices and higher quality goods and services. The focus of the division's enforcement resources has been, and will continue to be, addressing competition issues that threaten to deny consumers those benefits. The division devotes substantial attention to the products consumers use every day—the items we buy at the grocery store, media

and entertainment, communications, consumer electronics, and new technologies—as well as other goods and services that have a significant impact on our nation's economy, including health care, agriculture, transportation, energy, and financial services.

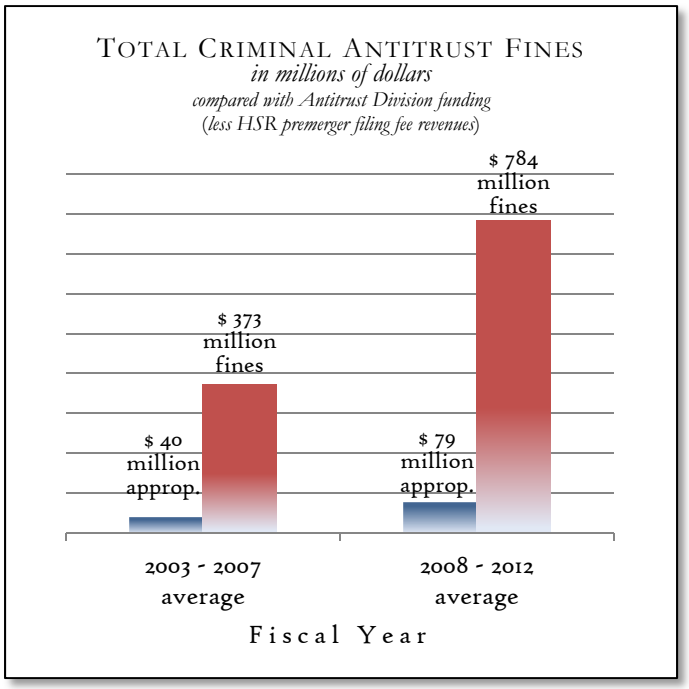
The tools we have at our disposal are varied, and include:

- criminal enforcement against hardcore antitrust violations—price fixing, bid rigging, market allocation, and other cartel behavior—which are subject to fines and imprisonment;
- challenging mergers that would raise prices and harm quality and innovation;
- halting behavior by companies that may result in monopolization or other serious harm to consumers; and
- working closely with our colleagues at the FTC and in other federal agencies, and with state and international authorities to promote free markets and consumer interests.

Let me start with our efforts to uncover and prosecute cartel behavior. Price fixers and bid riggers do serious and demonstrable harm to consumers. Criminal prosecution of those wrongdoers is critical to our mission. We target domestic and international cartels that rob consumers of their hard-earned dollars. We prosecute both corporate and individual wrongdoers (whether foreign or domestic). In Fiscal Year 2012 alone, the division filed 67 criminal cases. We charged 16 corporations and 63 individuals. The Division obtained criminal fines totaling over 1.1 billion dollars and courts sentenced 45 individuals to jail terms that average just over two years per defendant.

Aggressively pursuing criminal price fixers benefits consumers in multiple ways. The specific price fixing is eliminated, other wrongdoers are put on notice they may be next and are dissuaded from continuing their illegal conduct, and those contemplating price fixing realize the serious downsides and are deterred from committing the crime in the first instance. This results in lower prices for consumers, whether it is on computers, televisions, automobiles, shipping, hospital services, or numerous other products and services purchased every day.

American consumers and taxpayers are well-served by these efforts. In the last ten fiscal years, the division has obtained criminal fines averaging nearly $580 million per year. That is almost 10 times our average annual appropriation of $60 million (net of the division's share of offsetting collections of Hart-Scott-Rodino fees collected by FTC). The last five fiscal years are even more impressive, with an average of nearly $785 million in criminal fines versus an average appropriation of about $79 million (again, net of HSR fees). These fines do not go to the Antitrust Division, but rather are contributed to the Crime Victim's Fund, helping those victimized by crimes throughout our country.



Protecting Consumers Across Important Sectors of the Economy

The division's accomplishments detailed below illustrate how our work has a tangible and enduring impact in the markets that matter most to American consumers' pocketbooks. Our most recent merger lawsuit challenged Anheuser-Busch InBev's (ABI) proposed acquisition of Grupo Modelo. The division's complaint alleges that this deal would merge the largest and third-largest firms selling beer in the United States, the world's second largest beer market. The division concluded that this acquisition would lead to higher prices, and since U.S. consumers spend tens of billions of dollars annually on beer, even small price increases result in sizeable harm to consumers.

High Technology and Telecommunications

Many Americans use cell phones as well as other electronics that feature an LCD screen (including most TVs and computers). The division's criminal investigation into liquid crystal display (LCD) panels uncovered long-running price-fixing conspiracies that have resulted in every family, school, business, and charity that

bought notebook computers, monitors, and LCD televisions paying unjustified, inflated prices during the course of the conspiracies. $23.5 billion worth of price-fixed thin-film transistor LCDs came into the United States in finished monitors and notebook computers, and the division's expert estimated the overcharges on those panels exceeded $2 billion. Our prosecution of these wrongdoers resulted in the conviction of eight companies and 12 executives. Fines totaled nearly $1.4 billion, and the guilty executives received jail terms ranging from six months to three years.

Cartels put consumers at risk, but so can anticompetitive mergers. In 2011, after close coordination with the Federal Communications Commission (FCC), the Antitrust Division filed a lawsuit to block a transaction that would have combined two of the only four wireless carriers with nationwide networks, AT&T Inc. and T-Mobile USA Inc. This deal threatened to reduce competition significantly in the wireless market, raising prices for hundreds of millions of Americans and reducing consumer choice. The parties abandoned the merger in the face of the division's challenge.

Financial Services

Illegal behavior in the financial sector also threatens economic harm for many American consumers. The Antitrust Division's efforts here include an ongoing investigation into fraud and price fixing involving municipal bonds. To date, 20 former industry executives have been prosecuted for their roles in conspiracies involving re-investment contracts for the proceeds of municipal bonds. By manipulating the competitive bidding process, the conspirators cheated cities and towns out of money for important public works projects. The division, working closely with other federal and state enforcers, has obtained nearly $745 million in restitution, penalties, and disgorgement to federal and state agencies.

Often we work in partnership with dedicated FBI teams to uncover financial fraud. For example, we are pursuing jointly with the FBI bid rigging and fraud in local real estate markets. We have uncovered conspiracies around the country to rig bids at real estate foreclosure and tax lien auctions, preventing lenders and distressed homeowners from getting competitive prices or interest rates. To date, this initiative has resulted in charges against 53 individuals and two companies around the country.

When mergers involving financial services firms put consumers at risk of higher prices, we move to block them. In 2011, the division convinced a federal district court judge to block H&R Block's proposed acquisition of TaxACT, a digital, do-it-yourself tax preparation provider. The transaction would have left American taxpayers with only two major providers of this service in a market in which the top three firms have 90% of all sales. TaxACT was a particularly aggressive competitor, and its loss would have led to higher prices, lower quality products, and less innovation. The court's opinion in this case serves as a valuable precedent in future division cases because the court relied on the revised 2010 Horizontal Merger Guidelines throughout.

Transportation

American consumers who buy a car, purchase products that have been shipped by air or sea, or purchase an airplane ticket expect the benefits of competition. Effective antitrust enforcement helps make that expectation a reality.

The division's ongoing auto parts matter is the widest-ranging criminal investigation in division history. We have uncovered conspiracies spanning over a decade and involving numerous auto parts suppliers. These companies have rigged bids and fixed prices for critical parts of autos sold in the U.S.—including safety systems such as seatbelts, airbags, steering wheels, antilock brake systems, instrument panel clusters, and electric wire harnesses. Thus far, nine corporations have admitted their participation and paid fines of more than $800 million, and 12 executives have pleaded guilty and have been sentenced to serve significant prison sentences. The investigation continues.

We have uncovered and prosecuted cartels involving all modes of transportation for shipping services. Increases in shipping costs influence the prices of virtually all goods. In the division's investigation into price fixing in the air cargo industry, more than $1.8 billion in criminal fines were imposed and a total of 22 airlines and 21 executives were charged. In addition, the division's ongoing criminal investigation into conspiratorial conduct in the market for coastal water freight transportation services has resulted in convictions against three companies and six individuals and $46 million in criminal fines.

In July 2012, the division required United Technologies Corporation (UTC) to divest certain assets used in the production of electrical power systems and aircraft engine control systems in order to proceed with its acquisition of Goodrich

Corporation—the largest merger in the history of the aircraft industry, valued at $ 18.4 billion. The division determined that the acquisition, as originally proposed, likely would have resulted in higher prices, less favorable contractual terms, and less innovation in the manufacture and sale of several critical aircraft components used on virtually all modern commercial, business and military aircraft. Higher prices for these critical components would have translated into higher costs for the military, businesses and consumers.

As this Subcommittee is well aware, antitrust issues involving air transportation continue to be front and center for the division. On December 11, 2012, Delta Air Lines and Virgin Atlantic Airways Ltd. announced an agreement for a proposed joint venture on flights between North America and the U.K., and on February 14, 2013, US Airways and American Airlines announced a proposed merger that would create the world's largest airline. The division currently is conducting thorough investigations of both of these transactions.

Health Care

Antitrust plays an important role in protecting competition in health care provider and insurance markets.

One area of focus for us and for the FTC is so-called "most favored nation clauses" (MFNs). Such provisions potentially distort the competitive process by raising the costs of health insurance and hospital services, preventing other insurers from entering the market, and discouraging discounts. In 2010, the Antitrust Division filed a lawsuit challenging Blue Cross Blue Shield of Michigan's (BCBSM) use and enforcement of MFNs in its contracts with Michigan hospitals. These provisions required hospitals to charge BCBSM no more than they charge its competitors or to charge competitors more than they charge BCBSM, making it harder for its rivals to compete and survive. In addition to this lawsuit, in 2012 the division and the FTC held a workshop on MFN clauses that examined how MFNs can present competitive concerns in health insurance markets and in a number of other industries.

This combination of enforcement and public discussion has shined a spotlight on the problems MFNs can cause, leading a number of states to take a hard look at these practices: On March 18, 2013, the State of Michigan enacted a statute to ban the use of MFNs in health care provider contracts, becoming the latest in a growing list of states that statutorily restrict or prohibit such provisions.

Illegal contractual behavior can raise health care costs as well. In 2011, the division challenged a Texas hospital's use of exclusionary contracts with health insurers to maintain market power in its local market. United Regional Health Care System of Wichita Falls had entered into a number of contracts with insurers that imposed a significant pricing penalty on those insurers if they contracted with a competing facility in the local region. The impact of these contracts was to slow or prevent expansion and entry by other health care providers, likely leading to higher insurance premiums and health care costs in the Wichita Falls area.

Advocacy, Interagency Collaboration, and Public Workshops

Effective enforcement is central to the division's mission to protect competition, but we can achieve positive results for American consumers in other ways as well. For example, the Department of Justice and the Department of Agriculture (USDA) conducted a successful series of workshops in 2010 in locations around the U.S., focusing on seeds and crops, livestock, dairy, and the agriculture supply chain and monopsony. We appreciated the participation and support of members of this committee in the workshops. The agriculture workshops allowed both agencies to listen to and learn from farmers, ranchers, cooperatives, processors, and retailers. Through new efforts, USDA and the department's Antitrust and Civil Divisions have successfully tapped opportunities for harnessing each other's expertise, expanded the scope of our coordination, and hence improved enforcement of laws designed to protect producers. Thanks to the workshops, we gained a more complete and detailed understanding of the agriculture sector. Last year, we released a report that discusses the division's learning from the workshops. The division will continue to work hard in conjunction with USDA to better ensure that farmers and processors reap the benefits of competitive agriculture markets and that consumers pay competitive prices for food.

In the telecommunications sector, policy efforts go hand in hand with the division's enforcement efforts. [Earlier this month], the division filed at the FCC comments on our nation's policies regarding public allocation of spectrum, a key input for cellular and broadband services and other communications applications. In these comments, the division concludes that rules that ensure that smaller nationwide networks will have an opportunity to acquire substantial low-frequency spectrum—which they currently lack—could improve the competitive dynamic among nationwide carriers and benefit consumers. The division will continue to work with the FCC as it crafts its policies on spectrum holdings to help ensure

these industries are as competitive as possible and use spectrum efficiently.

With the importance of technology in our daily lives, we are focused on the role of competition and its interface with intellectual property. This requires close collaboration with other interested parts of the government. For example, the department and the U.S. Patent and Trademark Office jointly issued a Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments, which concluded that in most circumstances it would be inappropriate for a patent holder to seek injunctive relief in a judicial proceeding or seek an exclusion order if it has promised to license the patent on fair, reasonable and non-discriminatory terms. In 2012, the division and the FTC jointly conducted a workshop to study the growth of and antitrust risks associated with patent assertion entity (PAE) activities. Workshops such as this provide a forum for open discussion on what are among the most challenging and cutting-edge competition issues of the day.

International Cooperation and Coordination

The division's activities benefit from effective and increasing interaction and coordination with a host of other government entities. International case cooperation has been frequent and fruitful during the past few years. During 2011-2012, the division cooperated on civil matters with a number of non-U.S. competition agencies, including those in Australia, Brazil, Canada, Colombia, the European Union (EU), Germany, Japan, Mexico, South Africa, and the United Kingdom.

International case cooperation is particularly important to our criminal enforcement program. Cooperation with our sister agencies around the world allows for coordinated raids in international cartel investigations, helping to preserve crucial evidence. Recent criminal investigations where we have worked with international enforcers include our auto parts investigation, where we are working with our counterparts in Japan, the EU, and Canada, among others, and our air cargo cases, where we have worked with the Australian Competition and Consumer Commission, the European Commission, the New Zealand Commerce Commission, the U.K. Office of Fair Trading, and other agencies.

Finally, the division recently has signed important memoranda of understanding (MOUs) with foreign antitrust enforcers. In particular, in 2011, the Department of Justice and the FTC signed an MOU on Antitrust Cooperation with the three

Chinese antimonopoly agencies. The division continues to strengthen its relationship with these agencies through endeavors such as the first Joint Dialogue on competition policy among all signatories to the MOU at the senior official level, which was held in Washington, D.C., on September 24-25, 2012. And on September 27, 2012, the Department, the FTC, the Indian Ministry of Corporate Affairs, and the Competition Commission of India signed an MOU on Antitrust Cooperation setting forth provisions for increased communication and cooperation on policy and enforcement matters.

Conclusion

The Antitrust Division's dedicated public servants are working hard to vigorously enforce the antitrust laws for the benefit of American consumers. We use our tools—criminal and civil enforcement, together with focused and effective competition advocacy—to ensure that consumers get the full advantage of our free-market economy. We have been and we need to continue to be effective and efficient at protecting competition for products and services that consumers use every day and in industries that have a significant impact on our nation's economy. I am honored to be part of this hard-working team and to be associated with a law enforcement mission that is delivering real benefits to American consumers.