



Department of Justice

STATEMENT OF

**BILL BAER
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION
U.S. DEPARTMENT OF JUSTICE**

BEFORE THE

**SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES**

FOR A HEARING ENTITLED

OVERSIGHT OF THE ANTITRUST ENFORCEMENT AGENCIES

PRESENTED

MAY 15, 2015

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Chairman Marino, Vice-Chairman Farenthold, Ranking Member Johnson, and distinguished members of the subcommittee, thank you for inviting me to appear before you today to discuss the work of the Antitrust Division of the Department of Justice. It is a privilege, as always, to appear with my friend, Federal Trade Commission Chairwoman Ramirez. Together we work to ensure that consumers benefit from competitive markets.

When Attorney General Robert F. Kennedy appeared before this very subcommittee in 1961, he said, “The principles of free enterprise which the antitrust laws are designed to protect and vindicate are economic ideals that underlie the whole structure of a free society.” He got that right. When competitive markets function properly, consumers see lower prices and higher quality goods and services. The antitrust laws ensure the integrity of those markets by preventing behavior, consolidation, or barriers that limit competition. Sound antitrust enforcement encourages innovators to innovate and disrupters to disrupt, and provides American consumers with the benefits of dynamic competition.

The Antitrust Division remains committed to carrying out its law enforcement mission in a vigorous, transparent, even-handed, and fact-based fashion. I continue to believe that antitrust is a law enforcement function that transcends both party and politics.

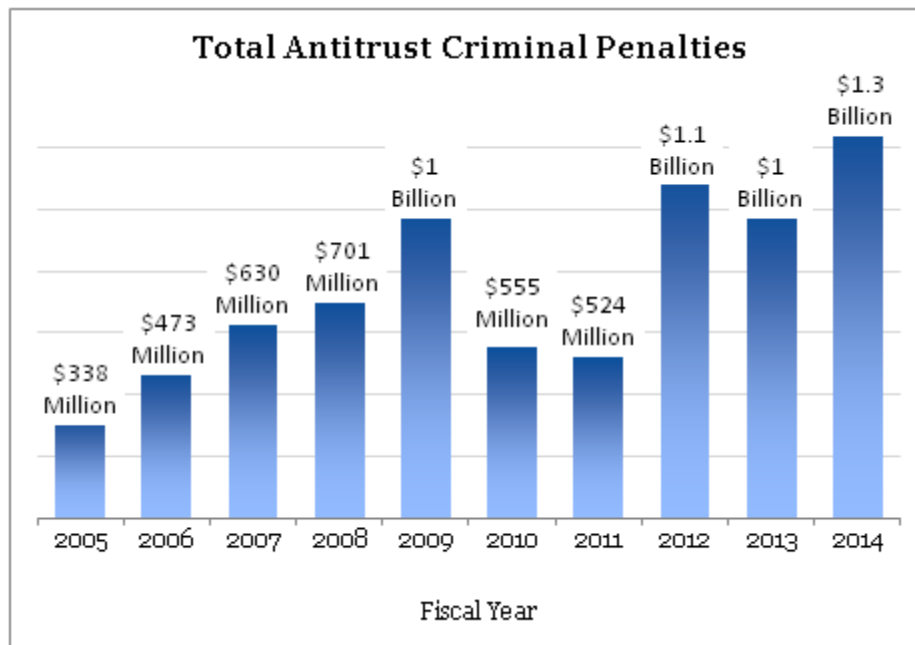
Since my last appearance before this subcommittee, the Antitrust Division has pursued behavior and transactions that threaten to injure competition and the American consumer. In just the last couple of weeks, Deutsche Bank agreed to own up to its involvement in a criminal conspiracy to rig the London Interbank Offered

Rate (LIBOR), a key benchmark interest rate. Comcast and Time Warner Cable abandoned a merger that risked making Comcast an unavoidable gatekeeper for internet-based services that rely on a broadband connection to reach consumers. Beyond these headline-making cases, the division continues to focus on antitrust enforcement in markets that matter to consumers on a daily basis – goods purchased online and at the grocery store, media and entertainment, communications, consumer electronics, health care, transportation, agriculture, energy, and financial services.

The Antitrust Division appreciates that fiscal resources are limited. The division uses the resources entrusted to us by Congress to provide a real return on investment for American consumers, businesses, and taxpayers. For Fiscal Year 2016, the President requested that the Antitrust Division receive an appropriation of \$165 million, a 1.7% inflationary increase over 2015. It is a good value proposition. Roughly 50 percent of our funding is offset by Hart-Scott-Rodino (HSR) premerger filing fees paid by companies planning to merge. In addition, the criminal fines we obtain, which are deposited in the Crime Victims Fund, are routinely more than 10 times our annual direct appropriation.

Cartel Enforcement

Let me begin with our efforts to uncover and prosecute cartel behavior, which the Supreme Court has described as “the supreme evil of antitrust.” Price fixing and bid rigging stop competition in its tracks and lead to higher prices for consumers. To give you an idea of the volume of commerce involved in cartel misdeeds, last year we obtained nearly \$1.3 billion in criminal fines and penalties, the largest amount ever in a single fiscal year.



Criminal misconduct in financial markets remains a major focus. Since 2009, the division has obtained 122 convictions and more than \$2 billion in fines and penalties from prosecution of collusion and fraud affecting municipal bond investment instruments, benchmark interest rates, and real estate and tax lien auctions. As I mentioned earlier, Deutsche Bank and its London subsidiary recently agreed to pay \$775 million in criminal penalties for its participation in a conspiracy to rig the LIBOR, a leading benchmark interest rate used in financial products and transactions around the world. This illegal conduct undermined the integrity and the competitiveness of financial markets everywhere. As a result of the department's LIBOR investigation, conducted jointly by the criminal and antitrust divisions, thus far banks have paid more than \$1.3 billion in fines and penalties and 12 individuals have been charged, three of whom have pleaded guilty.

Using technology to manipulate pricing is a growing concern. We recently secured a guilty plea in a case involving two companies using complex algorithms to fix prices for poster art online. American consumers have the right to a free and fair marketplace online, as well as in brick and mortar businesses.

Our investigation into the auto parts industry continues. There, pervasive price fixing, bid rigging, and market allocation have done serious harm to U.S. automakers and consumers. This is the largest criminal investigation in the Antitrust Division's history and to date has resulted in charges against 35 companies and 52 individuals.

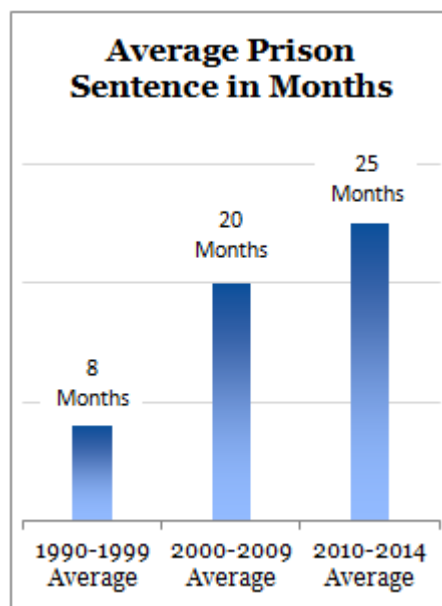
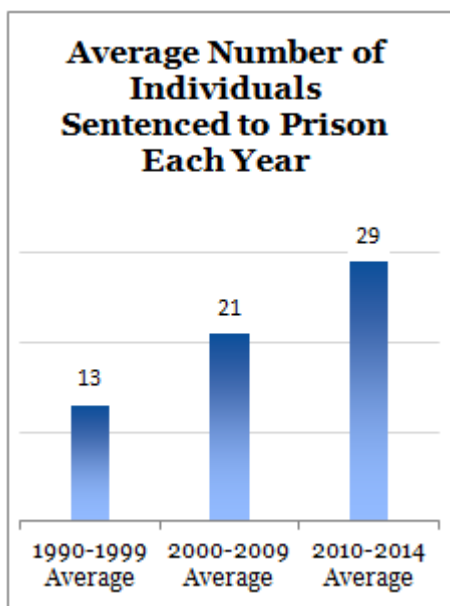
Thus far, 30 executives and 35 corporations have pleaded guilty or agreed to do so and to pay more than \$2.5 billion in criminal fines.

Last year the Ninth Circuit Court of Appeals heard appeals involving our pursuit of price fixing of liquid crystal display (LCD) panels and affirmed the convictions we obtained against AU Optronics, its U.S. subsidiary, and two top executives at the company. The court also affirmed the record-setting \$500 million criminal fine imposed on the company and the executives' substantial jail sentences. This decision reinforced prior court rulings that price-fixing cartels that significantly affect U.S. commerce cannot escape the reach of U.S. antitrust enforcement by operating overseas.

In addition to pursuing major national and international cartels, we continue to prosecute local criminal conspiracies. In recent years we have charged over 100 individuals in four states, Alabama, California, Georgia, and North Carolina, for conspiring at local real estate foreclosure auctions. These schemes often involved payoffs in exchange for agreements not to compete in public auctions. The conspiracies depressed auction prices and literally stole money from distressed homeowners and their lenders.

In our investigations we focus on holding both companies and individual wrongdoers accountable and have succeeded in obtaining guilty pleas and winning convictions against high-ranking executives. In Fiscal Year 2014 alone, 44 executives and 18 companies were charged with price-fixing, bid-rigging, and fraud offenses.

These individual wrongdoers are going to jail, and for increasing periods of incarceration. Between 2010 and 2014, the average number of individuals sentenced to prison increased 38 percent and the average sentence increased from 20 months to 25 months when compared with the previous five year period.



Foreign nationals do not escape responsibility when they conspire to injure American consumers from afar. We prosecute foreign companies and their executives, and seek extradition of foreign nationals who attempt to evade the jurisdiction of the U.S. courts. Last year, working with our international partners and Department of Justice colleagues, an Italian national was extradited from Germany for participating in a conspiracy to rig bids, fix prices, and allocate market shares for marine hose sold in the U.S. We also extradited a Canadian national charged with conspiracy to defraud the Environmental Protection Agency’s cleanup of certain Superfund sites in New Jersey.

Throughout, the FBI has been a critical partner in the division’s pursuit of cartels. We appreciate the FBI’s support and expertise in our investigations, and we will continue to work together to detect and prosecute criminal antitrust violations.

Aggressively pursuing criminal price-fixers benefits competition and consumers in multiple ways – it stops the illegal conduct, puts others engaged in similar behavior on notice that they may be our next target, and sends a strong signal to those contemplating price fixing to deter them from committing the crime in the first place. Moreover, and this is sometimes overlooked, it reinforces the antitrust compliance culture of the vast majority of companies who work hard to get it right.

Civil Enforcement

Like the criminal program, our civil enforcement efforts protect U.S. consumers from threats to competition. Here too, the business community benefits from vigorous

antitrust enforcement against those who fail to play by the rules. Our record sends a strong message that the antitrust division will challenge those who engage in conduct that stifles competition or pursue mergers that may substantially lessen competition.

In the past two months, three major mergers were abandoned after the division expressed serious competitive concerns. You are all familiar with the outcome of the Comcast/Time Warner Cable merger which would have created a market where one company provided almost 60% of high speed internet access. The division's antitrust concerns also led to the recent abandonment of a \$10 billion merger between two of the largest makers of semi-conductor manufacturing equipment, Applied Materials Inc. and Tokyo Electron Ltd. This result preserves competition and future innovation for the development of machinery used to make the memory and logic chips that power smart phones, tablets, computers and many other products. We also blocked a merger between National Cinemedia Inc. and Screenvision LLC— the only two significant cinema advertising networks in the U.S., which provide preshow advertisements at movie theaters. In March, on the eve of trial, the parties called off the merger. As a result, competition between these two companies will continue to benefit advertisers, movie theaters, and moviegoers.

When I last testified before this subcommittee the division was litigating three important civil antitrust actions. We have had notable success in them all. In the American Express case, the district court held that the company's anti-steering rules preventing merchants from using competition to help keep credit card swipe fees down were illegal. It recently entered an injunction ordering American Express to eliminate the rules, benefiting merchants who pay more than \$50 billion in credit card "swipe fees" annually, as well as the consumers who ultimately bear these costs. With this outcome, American Express joins Visa and MasterCard in being prevented from enforcing rules that restrict credit card competition, and retailers and consumers will benefit.

We also won our challenge to Bazaarvoice, Inc.'s acquisition of PowerReviews, Inc., its only significant rival in the business of providing ratings and review software to shopping websites. The resulting remedy – which required Bazaarvoice to divest PowerReviews' business – restored competition so that online retailers and manufacturers would continue to benefit from a competitive market.

Finally, we resolved our lawsuit against a joint venture between Coach USA and City Sights LLC that eliminated competition and raised prices for hop-on, hop-off bus tours in New York City. In addition to remedying ongoing competitive harm, our joint settlement with the New York Attorney General required the defendants to give

up \$7.5 million in profits they obtained from the operation of their illegal joint venture.

The division also forced merging parties to surrender ill-gotten profits obtained through unlawful premerger coordination. Flakeboard America Limited and SierraPine, two makers of particleboard widely used in furniture and kitchen cabinets, ultimately abandoned their merger because of the competitive concerns we raised. We also held Flakeboard accountable for violating the antitrust laws by agreeing to close one of SierraPine's facilities during the pendency of our merger investigation. We insisted as a term of settlement that Flakeboard surrender its ill-gotten profit associated with its law violations.

Previously, I testified about merger challenges involving beer and airlines. Let me report to you on how the settlements we obtained are working out for the American consumer. In January 2013, the division filed suit to stop Anheuser-Busch InBev's (ABI) proposed acquisition of Grupo Modelo, the largest and third-largest firms selling beer in the United States. We reached a settlement that required the companies to divest Modelo's entire U.S. business and create an independent, fully integrated and economically viable competitor. This structural remedy is paying off for the American consumer. Constellation – the new owner – has begun offering new products, bringing competition to segments of the market that Grupo Modelo had previously ignored. Constellation is also increasing capacity and, according to its executives, continues to grow its U.S. sales faster than the market as a whole.

Airline competition is vital to American travelers. Consumers are benefiting from the divestitures we required as a condition of the American Airlines-US Airways merger. At Reagan National, the carriers who acquired slots divested by American have added capacity and introduced more than 40 additional departures each day, including service to 14 new airports. In addition, slot and gate divestitures at LaGuardia, O'Hare, and Dallas Love Field have triggered new service to more destinations.

Competition in agricultural markets remains a focus because of its importance to both farmers and consumers. Last year the division required a divestiture in the Tyson Foods-Hillshire merger to preserve a competitive market for hog farmers to sell their products. We also sued to block a joint venture between several flour millers. The settlement ensured flour milling operations in California, Texas, and Minnesota remained competitive in order to keep prices low for wheat flour-based products such as bread, cookies, and crackers.

The division recognizes that competitive health care markets serve to keep prices in check, improve quality, and spur innovation. We challenge anticompetitive conduct by both providers and insurers. In our case against Blue Cross Blue Shield of Michigan, the division challenged anticompetitive “most favored nation” clauses that inhibited hospitals from negotiating competitive contracts with other insurers. We also worked closely with the Massachusetts Attorney General on the investigation into the acquisition of South Shore Hospital by Partners HealthCare. The merger was later abandoned and, as a result, competition between these hospitals will continue to benefit consumers and other payers. Through effective enforcement, antitrust guidance, and competition advocacy, we help providers and insurers direct their creativity towards innovative ways to offer low cost, high quality health care that benefits patients while preserving competition.

Advocacy and Interagency Collaboration

Competition advocacy and collaboration are important elements of effective antitrust enforcement. We regularly work with the FTC to hold public workshops to provide a forum for open discussion on the most challenging and cutting-edge competition issues of the day. Recent workshops have focused on health care, conditional pricing practices, and patent assertion entities. In addition to the FTC, we cooperate with the Federal Communications Commission and the Departments of Transportation, Health and Human Services, Commerce, and Agriculture, among others, to ensure that public policy represents sound competition principles.

We also have forged strong partnerships with state attorneys general. In the last six years, we have partnered with 49 state attorneys general, the District of Columbia, and Puerto Rico, including 17 states in the American Express case and 33 states in our case against Apple for conspiring to fix prices for e-books.

Consumers and businesses benefit from the division’s ongoing collaboration with foreign competition authorities. We work with fellow enforcers from many jurisdictions – both bilaterally and in organizations like the Organisation for Economic Co-operation and Development and the International Competition Network – to share best practices, strengthen the bonds that link the international antitrust enforcement community, and promote sound antitrust policy. We are proud to export our principles of procedural fairness, transparency, and nondiscriminatory enforcement.

Aiding Business Community Antitrust Compliance and Reducing Burdens

We appreciate the value that antitrust guidance can provide to industry as new business models and technologies emerge. For example, last April, we issued a joint policy statement with the FTC to clarify that properly designed cyber threat information sharing is not likely to raise antitrust concerns. We subsequently issued a business review letter stating that the division would not challenge a proposal by a company seeking to offer a cyber intelligence data-sharing platform that allows members to share threat and incident data about cyber attacks.

The division also issued a business review letter in response to a request from the Institute of Electrical and Electronics Engineers, Inc. (IEEE), a standard setting organization, regarding a proposed update to its patent policy. This letter continued our effort to provide guidance that facilitates the development of procompetitive patent policies by standard setting organizations. We think this type of guidance exemplifies good government and we will continue to provide it when asked to do so.

While vigilant antitrust enforcement makes our markets more competitive and saves consumers money, we appreciate that dealing with antitrust enforcers can be expensive and time consuming. We work hard to make enforcement as efficient as possible without compromising our mission. Improving electronic discovery is one promising avenue for reducing the burdens our investigations can impose. For example, our website includes a model civil electronic production letter that helps parties understand and plan for productions to the division, making the process more predictable and less burdensome.

Further, the division has been a pioneer among government agencies in using predictive coding methods in large volume document productions. Predictive coding is a technology-assisted document review that, when used properly and with appropriate safeguards, can more quickly and accurately identify relevant documents, saving the parties time and money, while providing the division the documents it needs to effectively conduct its investigations.

Finally, last March the division announced a new streamlined procedure for parties seeking to modify or terminate old antitrust settlements and litigated judgments entered before 1980. We are not going to object to eliminating a decree that has clearly outlived its usefulness. In those cases, parties no longer have to offer an elaborate justification and the division does not need to invest scarce resources in getting to the obvious answer.

Conclusion

The Antitrust Division's dedicated public servants continue to work hard to make sure that American consumers and businesses reap the benefits of our free-market economy. We use our tools – criminal and civil enforcement, together with focused and effective competition advocacy – to do so. We are committed to ensuring that the American consumer continues to benefit from vigorous competition for products and services. I am honored to be part of this hard-working team.