

CARTEL PROSECUTION: STOPPING PRICE FIXERS AND PROTECTING CONSUMERS

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS

OF THE

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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

	Page
Klobuchar, Hon. Amy, a U.S. Senator from the State of Minnesota	1
Lee, Hon. Mike, a U.S. Senator from the State of Utah	3

WITNESSES

Witness List	31
Baer, William J., Assistant Attorney General, Antitrust Division, U.S. Department of Justice	4
Ronald T. Hosko, Assistant Director, Criminal Investigative Division, Federal Bureau of Investigation, Washington, DC	4
prepared statement by Messrs. Baer and Hosko	33
Salzman, Hollis, Partner & Co-Chair, Antitrust and Trade Regulation Group, Robins Kaplan Miller & Ciresi, LLP, New York, New York	18
prepared statement	43
Hockett, Christopher B., Chair, Section on Antitrust Law, American Bar Association, and Partner, Davis Polk & Wardwell, LLP, Menlo Park, California	20
prepared statement	47
Levenstein, Margaret C., Research Scientist, Institute for Social Research, Adjunct Professor of Business Economics and Public Policy, Ross School of Business, University of Michigan, Ann Arbor, Michigan	21
prepared statement	60
Rosman, Mark, Partner, Wilson Sonsini Goodrich & Rosati, Washington, DC ..	23
prepared statement	67

QUESTIONS

Questions submitted by Senator Klobuchar for Hon. William Baer	78
Questions submitted by Senator Klobuchar for Ronald Hosko	79
Questions submitted by Senator Klobuchar for Margaret Levenstein	80
Questions submitted by Senator Klobuchar for Mark Rosman	81
Questions submitted by Senator Klobuchar for Hollis Salzman	82

QUESTIONS AND ANSWERS

Responses of Hon. William Baer to questions submitted by Senator Klobuchar	83
Responses of Ronald Hosko to questions submitted by Senator Klobuchar	88
Responses of Margaret Levenstein to questions submitted by Senator Klobuchar	91
Responses of Mark Rosman to questions submitted by Senator Klobuchar	92
Responses of Hollis Salzman to questions submitted by Senator Klobuchar	98

MISCELLANEOUS SUBMISSIONS FOR THE RECORD

Letter to Hon. Eric Holder from Senators Stabenow, Schumer, Brown, Klobuchar, Levin, Cardin, and McCaskill; September 30, 2013	104
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THURSDAY, NOVEMBER 14, 2013

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST, COMPETITION
POLICY, AND CONSUMER RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:48 p.m., in Room SD-226, Dirksen Senate Office Building, Hon. Amy Klobuchar, Chairman of the Subcommittee, presiding.

Present: Senators Klobuchar, Blumenthal, and Lee.

OPENING STATEMENT OF HON. AMY KLOBUCHAR, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Chairman KLOBUCHAR. Good morning, and I am pleased to be here with Ranking Member Senator Lee. Today we are going to be discussing criminal enforcement against the most egregious type of antitrust violation, and that is price fixing. The concept is simple. Under the law competitors cannot get together and form a cartel to agree on what prices to charge their consumers. Price fixing is not only a crime; it is also a tax on businesses, consumers, and innovation.

Price fixing can come in various forms. It can involve agreements to set an actual price or agreements to limit output. It can involve agreements not to compete, such as rigging a competitive bidding process or dividing up a market between competitors.

There is absolutely no business justification for this conduct. Cartels have no purpose other than to rob consumers. As Justice Scalia wrote in a 2004 Supreme Court decision, cartels are “the supreme evil of antitrust.”

Anyone who bought a TV, computer, or other device with an LCD screen between roughly 2001 and 2006 was a victim of price fixing. I do not know if they know that, but they were. Executives from several manufacturers of LCDs met secretly in a hotel room where they hatched a scheme to fix the prices of LCDs for major computer and TV makers in the U.S. and around the globe. They continued to meet for years until one of the cartel members, fearing detection, notified the DOJ’s Antitrust Division in order to avoid criminal liability by cooperating with prosecutors. So far, the Justice Department has locked up 13 executives and fined participating companies a total of \$1.39 billion. Yes, that is a billion. Not an “M,” a “B” for billion.

Over the past two years, the Department of Justice has been uncovering an extensive network of price fixing in the auto parts industry—again, something that most Americans may not know, but does affect them and should matter to them. Between 2003 and 2010, Japanese auto part makers rigged the bids to fix prices on five billion dollars in auto parts sold in the United States, everything from seat belts to starter motors to ignition coils and other essential vehicle components. This means that car makers here in the U.S., including GM, Ford, Chrysler, and the U.S. subsidiaries of Honda, Mazda, Nissan, Toyota, and Subaru paid artificially high prices for parts included in cars sold to 25 million Americans. The companies involved have been fined more than \$1 billion, and 17 executives have been sentenced to jail time.

The Antitrust Division's work on criminal cartels over the past two decades is a true success story. The evolution of its Corporate Leniency Program, which offers leniency to the first cartel member to report criminal conduct, has clearly helped to unmask major international cartels. However, despite tough fines and jail sentences, the DOJ continues to discover more and more of these cartels.

So we need to ask important questions: Is enforcement as effective as it can be in deterring price fixing? With the DOJ's budget tightening due to sequestration, is there a risk that cartels will get away with even more with their bad conduct? Is DOJ's focus on large international cartels coming at the expense of going after more of the localized domestic cartels?

We will also ask the ultimate question that most consumers might be asking: How does this impact me? How do consumers, the victims of price fixing, get their money back?

The Antitrust Division collects extensive fines on behalf of the government, and they go to a worthy cause: the Crime Victims Fund. Under the antitrust laws, consumers who are harmed by cartels must seek restitution for the higher prices they paid in private litigation. Retailers from Best Buy—that is our local company; I thought I would add that in—retailers from Best Buy on down to Mom-and-Pop stores who sold TVs and computers, auto makers who installed price-fixed auto parts, and consumers who bought these products all have to go to court and get their money back.

To make sure that consumers have an incentive and ability to bring these cases as well as to deter price fixing, antitrust law holds price fixers liable for treble damages, or triple the amount they ripped off from their victims.

Congress has acknowledged the critical role that private suits play when it comes to protecting consumers from criminal price fixing. In 2004 and again in 2010, Congress passed bipartisan legislation that provides an incentive to convicted price fixers to cooperate with the Justice Department and private litigants in exchange for being liable for only single as opposed to treble damages for their illegal conduct. We need to make sure that this system is working and that road blocks are not being put up to prevent businesses and consumers from getting the redress that they deserve.

As a former prosecutor, cracking down on white-collar crime was always a priority of mine, as it is now heading up the subcommittee of the antitrust group. And when it comes to price fix-

ing, crime quite literally pays. Companies can make hundreds of millions of dollars for as long as they can if they keep all their co-conspirators in line and under wraps. But by having strong laws on the books against price fixing, tough government enforcement, and the opportunity for victims to get redress, we send the message to corporate boardrooms across the globe that price fixing and bid rigging will not be tolerated and it will not pay.

I look forward to hearing from our witnesses about the good work that they are doing, and I will turn it over to Senator Lee for his opening statement.

**OPENING STATEMENT OF HON. MIKE LEE, A U.S. SENATOR
FROM THE STATE OF UTAH**

Senator LEE. Thank you, Madam Chair. Thanks to both of you for joining us today.

Cartels cost Americans many billions of dollars every single year. Each time a consumer pays for a product or for a service that has been affected by price fixing, bid rigging, or market allocation, that consumer is necessarily paying a premium that in some fashion or another enriches persons who are engaged in criminal conduct.

Cartel activity has no redeeming value, no virtue. There is widespread agreement among Republicans and Democrats that cartels should be vigorously pursued and severely punished, and there is certainly absolute agreement between Senator Klobuchar and myself on this point.

Our hearing today will focus on what has worked well in cartel enforcement and potential areas for improvement in that area. The Department of Justice, working together with the FBI, has a very impressive record of prosecuting cartels.

In recent years, the Antitrust Division has averaged almost \$1 billion in criminal fines. The average prison sentences for defendants guilty of engaging in cartel activity has also increased.

But while these accomplishments are noteworthy, it is very important for us to remember that the government must not rest on its laurels. Some commentators suggest that criminal fines, however large they might be, may not be sufficient to deter criminal activity by corporations, and in some instances they may end up punishing shareholders more than the truly guilty actors.

Others have raised concerns regarding the difficulty of discovering cartels by means other than pursuant to the government's Leniency Program. The Leniency Program has been hugely successful, but it has some limitations. It depends on bad actors fearing that there is a reasonable chance that they will actually get caught. It also depends on a bad actor turning itself in before the cartel has done too much harm to consumers.

I look forward to discussing the ways in which the government can detect and prosecute cartels, even in those instances in which a guilty company has neither the incentive nor the courage to come forward.

I also look forward to discussing a few other aspects of cartel enforcement that may well merit some consideration. I have heard concerns expressed about the current policy with respect to providing defendant companies some sort of credit for having implemented a compliance program. I have also heard concerns about

the potential for double fines for transactions that affect both the U.S. and a foreign jurisdiction.

Finally, I believe the Antitrust Division and Mr. Baer deserve a tremendous amount of credit for implementing a new policy in April of this year by which the names of persons carved out of a settlement are not made public in an indictment.

As a final note that is not directly related to this hearing, I am carefully reviewing the Division's proposed settlement with American Airlines and U.S. Airways and intend to follow up with the Department of Justice by letter regarding that particular transaction.

I look forward to hearing from the witnesses, and thank you both for being able to help.

Chairman KLOBUCHAR. Thank you very much.

I would like to introduce our distinguished first panel of witnesses. Our first witness is Mr. William Baer. Mr. Baer was sworn in as the Assistant Attorney General for the Department of Justice Antitrust Division in January of this year. Prior to his appointment, he was a partner at Arnold & Porter and head of the firm's antitrust practice group and director of the FTC's Competition Bureau.

Our second witness is Mr. Ronald Hosko. Mr. Hosko was named the Assistant Director of the Criminal Investigative Division for the Federal Bureau of Investigation in July 2012. Previously he served as a special agent in charge of the Washington Field Office Criminal Division.

I thank you both for appearing at our Subcommittee's hearing today, and I think you brought a really cool-looking chart—don't you think?

Senator LEE. Absolutely.

Chairman KLOBUCHAR. So we are looking forward to hearing about that, and I think I would ask you to rise and I will swear you in. So raise your right hands. Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. BAER. I do.

Mr. HOSKO. I do.

Chairman KLOBUCHAR. Thank you. All right. Well, let us get started.

Mr. Baer.

STATEMENT OF WILLIAM J. BAER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE; AND RONALD T. HOSKO, ASSISTANT DIRECTOR, CRIMINAL INVESTIGATIVE DIVISION, FEDERAL BUREAU OF INVESTIGATION, WASHINGTON, DC

Mr. BAER. Thank you, Chairman Klobuchar, thank you, Ranking Member Lee. I appreciate you inviting me to appear before you today, and I am very pleased to be seated alongside Assistant Director Hosko. The FBI, as you said, Chairman Klobuchar, is a key and longstanding partner in the Justice Department's success in battling cartels. Working together, we think we can and will continue to make a difference for American consumers.

Spotlighting cartel misconduct is the right focus for the Subcommittee. Price fixing, bid rigging, and other criminal antitrust crimes cause direct and unambiguous harm to U.S. consumers. Effective enforcement by the FBI and the Antitrust Division restores competition and returns markets to competitive levels, resulting in lower prices for consumer goods and consumer services.

In this last Fiscal Year just completed, the Division filed 50 criminal cases. We charged 21 companies and 34 individuals for crimes affecting tens of billions of dollars of U.S. commerce. The Division obtained criminal fines totaling just over \$1 billion, and courts sentenced 28 individuals to jail terms that averaged more than two years per defendant. American taxpayers are well served by effective cartel enforcement.

In just the past five fiscal years, the Antitrust Division averaged about \$850 million in criminal fines per year versus the average appropriation of about \$85 million, minus some money we get from Hart-Scott-Rodino merger filing fees, but the direct appropriation on average was \$85 million, the fines on average \$850 million. And as the Chairman noted, these fines do not go to the Antitrust Division. They go to the Crime Victims Fund, which helps victims of all types of crime throughout the United States.

In recent years, our efforts have resulted in a dramatic increase in exposing the world's largest price-fixing cartels. We have successfully prosecuted cartels involving air transportation, obtaining \$1.8 billion in criminal fines. Liquid crystal displays, the LCD panels, that go into everything consumers buy to watch on an iPad or a TV, we obtained more than \$1.4 billion in fines there. And most recently, as we will talk about, the auto parts matter where to date we have obtained \$1.6 billion in criminal penalties.

Those fines do not tell the whole story. To be sure, criminal penalties make cartel behavior less attractive for companies. But it is also the threat of jail time for the company officials responsible for injuring consumers that is itself a powerful deterrent. That threat is real. Today more individuals involved in cartel activity are being jailed for longer periods of time than ever before. In the 1990s, our average jail sentence for an antitrust crime was about eight months. Today the average prison sentence is 25 months, over a threefold increase.

Successful prosecution of large international cartels obviously poses significant challenges to the FBI and to us, with documents, witnesses, and wrongdoers often located outside the U.S. We have a shared commitment with enforcers around the world to fighting international cartels, and we work closely together in trying to overcome those challenges.

Last month, Attorney General Holder described our ongoing auto parts investigation and how it exemplifies ways in which the Division and the FBI together cooperate with our foreign counterparts. This is the largest criminal investigation the Antitrust Division has ever pursued, both in terms of its scope and the potential of volume of commerce affected by the conduct. The investigation included FBI search warrants executed on the very same day in the United States as dawn raids were conducted elsewhere around the world. And today the cooperation with our international counterparts con-

tinues. It includes enforcers from Japan, Canada, Korea, Mexico, Australia, and the European Commission.

What do we have to show thus far for our efforts? To date, we have charged 21 companies and 21 executives. All 21 companies have either pleaded or agreed to plead guilty. The immediate victims of those companies are automotive manufacturers such as Ford, GM, Chrysler, Honda, Toyota, Nissan, Subaru, Mazda, and Mitsubishi. And as you can see from the chart that is stage left, to my right, the conspiracies covered a wide variety of parts, including important safety systems such as seat belts, airbags, and antilock brakes.

The cases filed to date involve conduct affecting over \$8 billion in auto parts sold to car manufacturers in the United States, and those are parts used in more than 25 million cars purchased by American consumers. The multiple conspiracies we charged in September affected auto companies manufacturing in 14 different States.

Cartels involving components of finished products are not unique to the automobile industry. For example, our long-running joint investigation with the FBI into LCD flat panels uncovered long-running price-fixing conspiracies that affected computer manufacturers like Hewlett-Packard, Dell, and Apple. In turn, those conspiracies injured families, schools, businesses, charities, and government agencies that purchased the notebooks, the laptops, the computer monitors that incorporated the LCD panels into their products. We had a trial last year against one of the corporate conspirators, AUO, and we offered evidence showing that the conspirators increased their margin on each product by an average of \$53. That meant every flat panel shipped into the United States had an inflated price of as much as \$53. That stat alone tells us how the cartel behavior we are trying to attack imposes real costs on the direct purchasers and in turn on U.S. consumers.

We have also prosecuted successfully cartels in the financial services industry involving municipal bonds where we worked together with the FBI, the SEC, the Comptroller of the Currency, the Federal Reserve, and a working group of 20 different State Attorneys General. There the implicated have paid about \$750 million in restitution, penalties and disgorgement, and 20 individuals have been charged; 19 have either been convicted in trials or pleaded guilty.

While our enforcement efforts do focus to a significant extent on large-scale national and international cartels, we appreciate that there is local and regional impact that we need to pay attention to. For example, the Division continues to uncover collusive schemes among real estate speculators aimed at eliminating competition at real estate foreclosure auctions. With the assistance of the FBI and folks at HUD, we are looking at bid rigging and fraud in local markets in Alabama, California, Georgia, and North Carolina. To date, we have already brought charges against 64 individuals and three companies. That bad behavior involved more than 3,400 foreclosed homes, and it has caused more than \$23 million in loss primarily to mortgage holders.

Together, the FBI and the Antitrust Division's dedicated public servants are working hard to hold both companies and individuals

responsible for cartel behavior. The American consumer is the beneficiary of those efforts.

Thank you, and I look forward to responding to your questions. Chairman KLOBUCHAR. Thank you very much, Mr. Baer.

Mr. Hosko.

Mr. HOSKO. Good afternoon, Chairwoman Klobuchar and Ranking Member Lee. I appreciate the opportunity to appear before you today and for your continued support of the men and women of the FBI.

The FBI has forged a strong partnership with DOJ's Antitrust Division which has resulted in successful prosecutions in very significant cases. The international relationships, diverse scope, and broad intelligence network of the FBI uniquely positions us to join our DOJ colleagues in addressing these criminal matters that often have a global reach.

There is no doubt that collusion within the global economy undermines the U.S. market and harms U.S. consumers. The FBI is absolutely committed to investigating domestic antitrust violations. Recognizing the potential economic impact of broader multinational conspiracies, the FBI has aligned its international criminal investigative programs, including antitrust, to detect and investigate price fixing and other illicit conduct by foreign cartels.

In 2008, we formed the International Corruption Unit to manage antitrust, Foreign Corrupt Practices Act, and international fraud against the government as well as money-laundering investigations that involve systemic commercial corruption or complicity of foreign officials.

The alignment recognized the need for shared and enhanced expertise in multinational criminal investigations, productive relationships with foreign partners, and the application of proactive techniques to identify sophisticated conspiracies. The body of information and intelligence generated by these cases provides a broader understanding of illicit commercial activity within regions, countries, and industries.

A second element, the Foreign Corrupt Practices Act, prohibits bribery of foreign public officials by U.S. and certain foreign businesses for commercial advantage. Partnering with DOJ's Criminal Division, the FBI investigates allegations of illegal commercial bribery around the world. Since the Act itself does not apply to corrupt foreign officials, committed foreign partners add tremendous value to our efforts.

Through parallel investigations, both the companies' representatives and corrupt officials can be brought to justice. To enhance cooperation in this area, the FBI recently implemented the International Foreign Bribery Task Force. It is a partnership of law enforcement counterparts from the United Kingdom, Canada, and Australia, and fosters enhanced information sharing and investigative cooperation in foreign bribery matters.

The recent addition of international money-laundering investigations to the international corruption portfolio provides yet another avenue for us to identify public and commercial corruption. For example, a kleptocracy investigation might reveal the target not only looted his nation's treasury but accepted bribes from U.S. companies to allow for access to markets and resources.

During the country's engagements in Afghanistan and Iraq, hundreds of functions historically performed by military personnel were privatized. As a result, the FBI and our partners observed complex and wide-ranging fraud schemes related to government contracting. In 2005, we launched the International Contract Corruption Initiative to evaluate the crime problem, engage the numerous law enforcement agencies sharing jurisdiction, and develop a mutually reinforcing strategy to address the problem. As a result of these efforts, the FBI joined eight other federal law enforcement agencies in forming the International Contract Corruption Task Force, which focuses on fraud and corruption related to U.S. military, reconstruction, and humanitarian aid in Afghanistan and Iraq.

Using forward-deployed agents to conduct assessments of corruption and fraud allegations, we developed viable cases and directed domestic field offices to coordinate prosecutions. Many of the schemes we uncovered involved military and civilian personnel responsible for some element of the contracting process. Examples included payment of bribes in exchange for issuing government contracts and kickbacks to facilitate theft of diesel fuel using scores of tanker trucks. Individuals involved were not only criminally derelict in their duty; in some cases they may have aided the enemy.

As this is in most cases white-collar crime, the primary motivating force was greed.

Interagency cooperation contributes greatly to the success of this initiative and others. A joint operations center staffed by representatives from the eight participating agencies and collocated within our International Corruption Unit provides vital information sharing, deconfliction of cases, and analytic support to deployed investigators.

Despite resource challenges across the government, we have achieved meaningful success in countering antitrust and other international corruption. Clearly there is more to be done, but through coordination with committed foreign and domestic partners and by effectively prioritizing, the FBI is positioned to combat the most egregious offenders.

In conclusion, I thank you both for this opportunity to discuss our programs, and I look forward to answering your questions.

[The prepared statement of Messrs. Baer and Hosko appears as a submission for the record.]

Chairman KLOBUCHAR. Thank you very much. Thank you to both of you.

I did want to put on the record a statement from Senator Levin of Michigan. As you know, Detroit is home to the auto industry, the State of Michigan, very important, and it is a good statement about the concerns that he has about price fixing and the good work that needs to continue to be done. So, with that, I will enter Senator Levin's statement in the record.

[No statement from Senator Levin was submitted for the record.]

Chairman KLOBUCHAR. Mr. Baer, before I get into the cartel issues, I want to ask about something that Senator Lee mentioned in his statement, and that is the settlement of the U.S. Airways and American Airlines merger.

As we all know from the news this week—and you know better than all of us up here—the settlement calls for divestiture of slots at two slot-constrained airports—that would be Reagan and LaGuardia—and two gates at each of five other large airports. The Justice Department’s complaint, as I recall, was broad. It said the merger would create some major problems for competition, and there were fare issues as well as risk of increases in baggage and change fees, something I have been involved in in the past in terms of trying to eliminate that or reduce it.

Do you think that the divestitures address all of these problems? And what do you see is coming out of this for the rest of the country in addition to the areas where the slots were divested?

Mr. BAER. Thank you, Chairman Klobuchar. We do think this settlement is going to result in a net improvement in the competitive situation for U.S. air passengers. Why do I say that? Right now, we have had develop over the years what our complaint refers to as a relatively cozy oligopoly between the four major legacy carriers. And what we are trying to do in terms of this settlement is enable the group of carriers who are low-cost, effective competitors to be able to offer more opportunity, more seats at more competitive fares than ever before.

In coming to that as an acceptable resolution to the litigation we filed to block the merger, we looked hard at what happened in airports around the country when low-cost carriers did get a foot in the door. When United had to give up its slots at Newark three years ago when it merged with Continental, Southwest picked up about 30 slots and was able to enter that market. It, within short order, was able to fly nonstop to six cities and offer consumers extraordinarily competitive fares in many of those cities.

Just an example, from Newark to St. Louis, Southwest within a matter of months had increased the number of seats available to consumers by twofold, 100 percent. Fares dropped on average—this is not just the Southwest fare but the competitor fare—dropped on average by 27 percent. These low-cost carriers do have and can have a meaningful impact, but it is not just on the nonstop traffic that they add. They then can connect city to city, city to city to city, one-stop traffic, and offer consumers more meaningful competition on those fares than they are getting today.

As we looked at that hard evidence—and this is just but an example—Jet Blue was able to obtain a few slots to obtain a presence here at DCA, and it had a dramatic effect on seats available up to Boston and the prices charged for those seats.

So enabling some folks who now are constrained because they do not have access to slots, they do not have access to gates around the country to be more competitive, we are going to change the competitive dynamic that the legacy carriers are facing today. They are going to have to respond, and they do respond—

Chairman KLOBUCHAR. Do you think that would help, though, with the change fees and the baggage fees and some of these other issues that go to areas that are not even included in your slot-divested areas?

Mr. BAER. Well, we can see from the ads that not all carriers are alike in terms of how they handle baggage fees. For example, they compete on that dimension. But because a carrier like Southwest

is very limited today in the points where it can go to, it does not offer that national competition that it will be able to offer on a much broader platform if this deal goes through, if the court accepts our proposed settlement and divestitures.

Chairman KLOBUCHAR. Okay. Just one more question. I know you are focused on these low-cost carriers, and we love having low-cost carriers there as a competitive force. But they do not always serve some of those small and medium-size cities like I have in my State. I do not think we have Jet Blue going to Bemidji or, you know, places like that.

One question I had is the divestiture bidding process. Will all airlines be able to participate? And as I understand it, the DOJ has acknowledged that some small and medium-size communities will lose service as a result of these divestitures. And if that is the case, shouldn't we allow some of the carriers that might compete more readily for those flights to be able to compete for those slots?

Mr. BAER. Thank you, Madam Chair. We do not know that anyone is going to lose service, and, in fact, you know, we are not a regulator. We do not decide where people fly and where they do not fly. But we were conscious in negotiating the settlement in making sure that none of the slots that were surrendered by American and U.S. Airways were the small-plane commuter slots that are designated to fly to small and medium-size communities. We set those aside, let them keep them in order to keep open the opportunity for them to fly to those small and medium-size communities where, as you say, the low-cost carriers are, at least today under the current configuration, unlikely to fly. And, separately, the Department of Transportation and the merging parties—American and U.S. Air—entered into an agreement in which U.S. Air and American in the new American configuration agreed to continue to use those commuter slots to serve small and medium-size communities and medium-size hubs.

Chairman KLOBUCHAR. But are all airlines going to be able to participate? Just yes or no.

Mr. BAER. That is the first part of the question. The answer is, "Yes, but," if I may, and the "but" simply is that we will talk to anybody who can come in and convince us that they are going to compete those assets aggressively and effectively. Based on our experience, we have some concerns about whether the legacy carriers are really going to offer that competitive dynamic. So we will talk to them. If they do not like where we end up going, they have an opportunity to object in court to the settlement. But we will hear them, we will listen to them. That is what we do.

Chairman KLOBUCHAR. Okay. Well, I just think the goal of an auction should be to select carriers that can both effectively compete, as you point out, on price with the new American Airlines, but also serve those small and medium-size communities that could lose service as a result of the divestiture. So I am sure there will be more ahead on that.

But let us get to auto parts and cartels and other things. We noted that the DOJ has posted impressive wins in prosecuting cartels, yet year after year, even as more and more larger fines and prison sentences are imposed, there still seem to be more and more cartels uncovered. Is price fixing not being deterred? Or are we just

becoming better at detecting it? And I guess the follow-up question would be: What new innovations is the DOJ looking at despite limited constraints with funding? Which I will get to in a minute. What other ideas do you see ahead for cartel enforcement?

Mr. BAER. Senator, we think we are getting better at detection, and both you and Senator Lee mentioned the Leniency Program as one vehicle by which we are able to get companies to self-report bad conduct. That is successful both on a national and local level and on an international level.

In addition, by cooperating with helping educate our fellow competition enforcement agencies around the world on the evils of cartels, we have actually achieved remarkable convergence in the last 20 years, agreement that these things should be prosecuted vigorously, that other governments should establish leniency programs to encourage self-reporting, and that seems to be working.

Chairman KLOBUCHAR. Very good. On the resource issue I just mentioned, last week Preet Bharara, the U.S. Attorney for the Southern District of New York, raised serious concerns about the Justice Department's underfunded budget. He said, "People are going to start getting away with bad conduct. Victims are going to be able to be vindicated. In my mind, it is something of a tragedy."

Do you share this concern? And do you have enough resources to maximize detection and prosecution of cartels?

Mr. BAER. We will work as effectively as we can with every dollar Congress entrusts to us, every taxpayer dollar. That is our job.

At the same time, the combination of sequestration and the need to impose a limitation on hiring until that process sorts itself out means we have actually many fewer prosecutors going after anti-trust crimes today than we did three years ago. We have gone from about 124 down to about 84. As you know, based on your experience, that kind of reduction cannot help but have an impact.

Chairman KLOBUCHAR. And does that include the ones that were eliminated because of the closure of the field offices in places like Cleveland, Atlanta, Dallas, and Philadelphia?

Mr. BAER. We offered the opportunity for all those people to transfer. Some did, some—

Chairman KLOBUCHAR. Right. Many positions were eliminated, I—

Mr. BAER. No, the positions were not eliminated, but with a hiring freeze in place, we are limited in our ability to go out and recruit replacements.

Chairman KLOBUCHAR. Right.

Mr. BAER. Hopefully when we get that issue resolved, we can get back to our normal hiring practice.

Chairman KLOBUCHAR. Well, right, and I would love to, as we talked about in the hallway, replace sequestration, and I have some ideas on how we can do it right now, and I am hopeful we are going to do something about this going forward with the budget negotiations while still bringing our debt down, because I am afraid we are going to lose out for consumers in the long term if we do not have people going after cartels like these. But as I mentioned, some of these field offices did close down, most likely because of budget issues.

Do you think that it is harder to go after some of these local—you know, where people might be more willing to come forward about price fixing at an auto dealer shop or all kinds of things when you do not have those?

Mr. BAER. We hope not. Part of what we do, in addition to our Leniency Program, is we do considerable outreach, particularly with other government officials at the federal, State, and local level, helping particularly federal procurement officials understand where they might be seeing a suspicious pattern of bidding behavior, and they will know who to come to at the FBI or over at the Antitrust Division.

I learned this morning that over the past four years or so we have actually done briefings and education for over 20,000 civil servants at various levels of government to help them help us. That is one way we can enrich the process. But it is a challenge doing outreach at the level we would like to do with the resources currently available to us.

Chairman KLOBUCHAR. Okay. Do you want to follow up at all, Mr. Hosko?

Mr. HOSKO. I would share the U.S. Attorney's and Mr. Baer's concern and my Director's concern about the resource restrictions that we are facing. In the past 12 years, the FBI shifted approximately 1,200 agents out of the criminal programs to address the counterterrorism threat, and that was hundreds of agents out of our white-collar crime program. With each of those agents that is not in this strata of our work, that is an opportunity for some person who wants to conspire unlawfully to commit crimes that we are talking about here today, the whole range of white-collar crime.

There are hundreds of Internet frauds that are being conducted today that we cannot touch, nor could we ask to have prosecuted because we do not have the sufficient numbers of people to conduct the investigations or to have them prosecute it.

So this is another piece of that market, the white-collar crime market broadly, that without FBI agents there and without somebody else filling that void—it might be State and local law enforcement effectively trained to fill the void and take the cases—there is going to be a gap, and that gap presents an opportunity for price fixers and predators.

Chairman KLOBUCHAR. Very good. I do not know if you know, but Mr. Comey, Director Comey, and I went to law school together. We were in the same class.

Mr. HOSKO. I did not know that.

Chairman KLOBUCHAR. Yes, there you go. So I will report back to him that you are doing a good job, Mr. Hosko.

Mr. HOSKO. Thank you.

[Laughter.]

Chairman KLOBUCHAR. But also I have appreciated—and you can tell him this—that he has been out front on how many FBI agents this is going to mean if this continues with the sequester. I think the number is—what is it, 2,000?

Mr. HOSKO. It is roughly 3,500 personnel.

Chairman KLOBUCHAR. 3,500, okay.

Mr. HOSKO. And I think it bears mentioning that we need smarter FBI agents, and among the first things that we turned off in Fis-

cal Year 2013 was training. So our opportunity to get together with prosecutors, with partners, and with our own work force to make them smarter on these subjects got flattened last year because of the impacts of sequester on our budget. We need a smarter work force, a more agile work force, and these impacts will take us in the other direction.

Chairman KLOBUCHAR. All right. Good. Well, I have gone on awhile here, so I am going to give it over to Senator Lee to ask as many questions as he wants. Thank you very much to both of you.

Senator LEE. Thank you very much.

First of all, on the airline issue, I am pleased to hear you discuss the bidding process for the slots made available under the terms of the settlement agreement. That is an issue that, as you know, Senator Klobuchar and I have been concerned about, and that is an issue that we opined about in our letter that we sent to you a few months ago. And I continue to share, of course, Senator Klobuchar's view that the bidding process should be open and competitive, and so I look forward to following up on that by letter.

Mr. Baer, with respect to some concerns that I have had about people coming to me and indicating that there is a potential for U.S. companies to be fined for the same conduct, I wanted to raise some of those concerns with you. There is some potential, as I understand it, for a company, including a U.S. company, to be fined twice for the same conduct related to a cartel. Such double counting, as I understand it, would arise in a context in which both the United States and a foreign government stand convinced that the same transaction had an impact on its own customers, on its own consumers within that country.

I know this can be complex, and it can be really difficult to ascertain in any given context for any given activity. But I just wanted to ask you what the Division can do, if anything, to ensure that companies, including and especially U.S. companies, are not made subject to double fines for the same transaction in a cartel investigation.

Mr. BAER. Thank you, Senator. First, in determining what a fine amount should be in the United States, we are guided by the U.S. Sentencing Guidelines, which require us to take a look at the volume of affected commerce involving the United States. So in calculating our fines, we are looking not at the worldwide sales, but we are looking at the sales that have a connection to the United States and potential adverse impact on U.S. consumers. And then we work out a fine under a formula under the Sentencing Guidelines.

In terms of trying to make sure, though, that people are not getting hit two, three, four, or five times around the world for the same thing, we have begun working quite closely with other enforcers, talking about methodology where we can, we have got confidentiality issues in terms of Rule 6(b) about what we can share, but talking about approaches so that the cartel offense is properly penalized but not overly penalized, that this just does not become a tool for everybody to get dollars. So it is a legitimate concern, but we are focused on it.

Senator LEE. Okay. And you think the procedures you have in place are adequate to address that?

Mr. BAER. Yes, sir.

Senator LEE. Okay. As I understand it, the Department does not currently have in place a mechanism whereby a company's own compliance program can be taken into account when discussing settlement for illegal cartel activity. Is that the case?

Mr. BAER. I think there is a misperception out there. When we are looking at the fine that we are going to demand from a cooperating company, we do look at the cooperation they provided, that is, the self-confession, even if they are not in under the Leniency Program; but we also take a look at—and in private practice I have benefited from this when I represented corporations—the quality and extent of the in-house compliance program. But it goes to the size of the fine, not whether the misconduct occurred or not, and that is where sometimes I think there may be a misunderstanding out there in the business community that I need to work on.

Senator LEE. Okay. So it does exist, it can be taken into account, it is routinely taken into account. It just relates to the severity of the fine and not whether or not an action should be brought.

Mr. BAER. That is correct, although routinely taken into account does not mean we routinely credit it because we have really got to look at whether it was something that is on paper or that is real.

Senator LEE. Right, or whether it is something that is there largely to cover up the fact that something funny might be going on behind the scenes.

Mr. BAER. Yes, sir.

Senator LEE. Do you think the extent to which you take it into account is adequate? Does it adequately reward—I do think there are tremendous benefits to be born—to the extent to which any company believes that by having a pretty robust, honest, and aggressive internal compliance program, to the extent they believe that they will benefit from doing that, I think they will do it. And the more we can do to incentivize companies to do this, the better off I think we are going to be, because we are going to—obviously whenever we are operating in the world of government, we are dealing with finite resources—resources that can become more finite over time with things like sequestration and things like that. And so the more we can get people to police themselves rather than requiring you to police them, the better off we are going to be.

Do you think the extent to which you take that into account currently adequately incentivizes that?

Mr. BAER. Senator, I think the key incentive is the penalties that people pay if they do not comply, if corporations and their officers are involved in the misconduct. I have been practicing in this area for many years, and part of the time in the private sector, and one reason why I think we are seeing fewer U.S. corporations involved in antitrust misconduct is that the level of awareness within the corporate community, particularly in the U.S., has risen over the last 20 years. The consequences are so severe.

So I do think the threat of bad outcomes is motivating better front-end attention being paid by both lawyers and by the company execs.

Senator LEE. What about the types of penalties, not just the magnitude of the penalty but the types of penalties available? Are those adequate?

Mr. BAER. I believe they are. You know, it is always hard to tell what you are deterring and not deterring and what you are overdetering. But these are huge penalties. Companies are worried about them. They are worried about the treble damage consequences that come on top of an antitrust violation. And one measure of whether it is working properly is the number of companies who are coming in and voluntarily self-confessing. You know, if the first one in does get leniency for itself as a company and cooperating employees, but it still faces civil penalties, and the other companies rush in because they know we are going to respect the fact they got in early and owned up and give them a downward adjustment in what they would otherwise have to pay, I think it is working pretty well. I do not think we need more authority than we have now.

Senator LEE. Including authority to make someone ineligible to serve on a corporate board in the future?

Mr. BAER. I think the thought of going to jail is a pretty powerful deterrent absent having other authority.

Senator LEE. Thank you very much.

Thank you, Madam Chair.

Chairman KLOBUCHAR. Thank you very much.

We have been joined by Senator Blumenthal, someone who knows a little bit about prosecuting wrongdoers.

Senator Blumenthal.

Senator BLUMENTHAL. Thank you. I want to first thank Senator Klobuchar and Senator Lee for having this hearing—very, very important and significant not only to the profession—and I thank you, Assistant Attorney General Baer, for your professional involvement over many years in this area of law—but also to the American people, and particularly as institutions become bigger and people lose confidence and trust in the workings of the marketplace as those institutions become bigger and more powerful, I think the work that you do is ever more important.

And I want to begin with the Leniency Program, which really works only because you have done effective enforcement in the past. In other words, as you aptly described it, the fear or apprehension—in other words, the deterrent effect of past prosecutions—is what drives the Leniency Program at the end of the day.

And my concern is that most of the cases that are brought today, I think, from what I have seen, are generated exclusively from firms that have decided to come forward and seek leniency applications. And I know that resources are a consideration, that enforcement requires more than just issuing a subpoena. You have to have experts and litigators and economists to evaluate what comes through a subpoena, as well as other sources of evidence, to bring that investigation to trial and then to pursue the trial.

I am worried that the success of the Leniency Program combined with budget constraints that your Division faces will in effect give you incentives to pursue only the companies that come forward—the low-hanging fruit, for lack of a better term—and the large dollar amount in our international cartels that come to your attention through the Leniency Program, and perhaps forgo the smaller but equally harmful domestic cartels that require more Department of Justice resources if there is nobody coming forward. And needless

to say, as I know from personal experience, some of the most egregious and harmful of the cartels may have nobody coming forward. So maybe to get your general reaction to those concerns.

Mr. BAER. I share the concerns, and we are paying attention to it. The majority of our case leads come from leniency but not all. We have successfully just last month prosecuted bid rigging at a Superfund site in New Jersey, hospital procurement fraud in the State of New York. We talked in my prepared—our joint prepared remarks about our cooperative efforts to deal with real estate mortgage foreclosure fraud all around the country. We are working as best we can to get our people to stretch and continue outreach efforts to educate State and local and county officials about what to look for and when to come to the FBI office in their community or come to us and we will work together and we will go after it.

Senator BLUMENTHAL. Let me ask you, in terms of sort of leveraging resources, what is the state of cooperation with State Attorneys General these days?

Mr. BAER. Speaking to a former Attorney General of the State with whom, when I was at the FTC, we cooperated well, I think it is in a good place. In some ways it is not for me to say, but on matters like going after the Apple e-books conspiracy, we had I think 34 co-plaintiff States and reached a very successful outcome, good working relationship. On merger investigations like beer and like the recent merger involving American and U.S. Air we settled, we worked closely and cooperatively.

Part of what we need to do is make sure that we recognize the legitimate State interests that need to be reflected in any discussion about settlement or challenge, but so far I think it is working quite well, and I have been pleased to get back on that side of the ledger.

Senator BLUMENTHAL. Thank you.

I want to focus on an issue concerning congressional exemption under the antitrust laws, a little bit different from what we have been discussing. As you may know, Senator McCain and I have introduced a measure called the “FANS Act,” F-A-N-S, because we are troubled by the blackout policies of professional sports leagues and broadcast and cable networks that all too often leave sports fans in the dark, literally, unable to watch games that they want to see. And we believe that the leagues enjoy antitrust exemptions and billions of dollars in subsidies that should require them to give fans fair access to their favorite teams on TV, which is why we introduced this legislation actually just last Monday that would protect fans, consumers, and taxpayers who essentially make these leagues successful. Part of the reason they are successful also is they enjoy live programming antitrust exemptions that enable them to have live programming more available to consumers and using the cable and the Internet.

I am not asking you to give me your opinion or judgment on the proposed legislation right now. I understand you may want a chance to look at it. I would hope that perhaps you would and give me your views on it. But talking in general about antitrust exemptions, if the market dynamics show that prices are increasing, in this case it is the rights to sports programming, and the evidence for a unique marketplace need to collude—and here they are

colluding, and that evidence is unclear—isn't it appropriate for Congress to consider revisiting antitrust immunities that have been granted in the past?

Mr. BAER. Senator, I appreciate the pass on the specifics of the legislation because I could not respond adequately, although we will look at it. As a general matter, the Antitrust Division of the Justice Department and my colleagues at the Federal Trade Commission have urged that antitrust exemptions be granted sparingly and be looked at very, very closely. That continues to be the view of the Justice Department.

Senator BLUMENTHAL. Well, I certainly join you in that general view and hope that you will perhaps join me in advocating that this exemption should be narrowed or eliminated if the leagues continue these blackout policies that are essentially anti-consumer and take advantage of market power without any public benefit or insufficient public benefit to justify them. So I thank you for that view, and I look forward to hearing more about it.

Thank you, Madam Chair.

Chairman KLOBUCHAR. Thank you very much, Senator Blumenthal.

Before you leave and we get our next panel up, we really felt that we have not given you enough opportunity to talk about your chart, Mr. Baer, if that is your chart, with your car and everything, so we wondered if you wanted to add anything for your final question about the auto products targeted by the conspirators and which are some of the biggest parts of the car products that are targets.

Mr. BAER. We developed that chart in part just to show the pervasiveness of the bad conduct pattern we had seen. If you look at the auto products that the conspirators fixed prices on—this is just what we have discovered and prosecuted so far, it is not necessarily the end of the game by any stretch—but, you know, Mitsubishi got overcharged for alternators, starter motors, ignition coils. Hitachi, you know, six different products, air flow meters, throttle bodies, ignition coils, alternators, valve timing controller devices, starter motors. It is Mitsubishi compressors, condensers.

If you look around the car and look at the safety systems or the electrical systems, there has been a very bad pattern of conduct that domino by domino we—the dominoes are falling. I almost mixed a metaphor there, but I caught myself. The dominoes are falling, and we think we are actually, as we go forward, going to be able to deliver more good news to the American consumer about prosecuting bad conduct with the help of the guy to my left and his terrific team.

Chairman KLOBUCHAR. Okay. Do you want to add anything, Mr. Hosko?

Mr. HOSKO. No. I echo Mr. Baer's sentiments.

Chairman KLOBUCHAR. Okay, very good. Well, we are looking forward to hearing about more successes, and if there is anything we can help with legislatively, even the smallest things, we would love to do anything to help. And I think your first answer to that, "Yes, get rid of the sequestration, Senator." But if there are any tools that we can give you and legal issues, we would love to work together to help you.

Do you want to add anything, Senator Lee?

[No response.]

Chairman KLOBUCHAR. Okay. Thank you, both of you.

Mr. BAER. Thank you very much.

Mr. HOSKO. Thank you.

Chairman KLOBUCHAR. We will call up our second panel.

[Pause.]

Chairman KLOBUCHAR. Okay. I would like to now introduce our next panel of distinguished witnesses.

Our first witness will be Hollis Salzman. Ms. Salzman is a partner at Robins Kaplan Miller & Ciresi, which I will add is a Minneapolis-based law firm, and I do not think that is why she is here. In fact, I think our staff was looking for experts in this area, and it just happened to be a Minneapolis-based law firm because, in fact, you are out of the New York office, and she is the co-chair of the Antitrust and Trade Regulation Group, and I will say Robins Kaplan has handled some major international civil litigation and handled it quite well.

We next have Mr. Christopher Hockett. Mr. Hockett is a partner at Davis Polk and serves as the head of the firm's antitrust practice, also a very well-known firm. He is also chair of the section on antitrust law for the American Bar Association and is testifying on behalf of the section.

Our third witness will be Ms. Margaret Levenstein. Dr. Levenstein is the executive director of the Michigan Census Research Data Center and an associate research scientist for the Institute for Social Research at the University of Michigan. She is also an adjunct professor of business economics and public policy in the Ross School of Business. So being from Michigan, you probably care a lot about cars. Okay. You do not have to answer that.

Our final witness will be Mark Rosman. Mr. Rosman is a partner at Wilson Sonsini Goodrich & Rosati, where he is a member of the firm's antitrust practice.

A friend of mine from the University of Chicago was at your firm for a long time. We can talk about it later.

Prior to joining the firm, he served as assistant chief of the National Criminal Enforcement Section in the Justice Department's Antitrust Division.

So I ask our witnesses to rise and raise their hands as I administer the oath. Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. SALZMAN. I do.

Mr. HOCKETT. I do.

Ms. LEVENSTEIN. I do.

Mr. ROSMAN. I do.

Chairman KLOBUCHAR. Thank you. Why don't we begin with Ms. Salzman.

**STATEMENT OF HOLLIS SALZMAN, PARTNER & CO-CHAIR,
ANTITRUST AND TRADE REGULATION GROUP, ROBINS
KAPLAN MILLER & CIRESI, LLP, NEW YORK, NEW YORK**

Ms. SALZMAN. Thank you very much for inviting me to be here to testify. We talked a lot about the auto parts litigation, and I am

one of the co-lead counsels in the private enforcement actions that supplements the criminal cases in the auto parts cases.

I wanted to make three points here today that are outlined in my written testimony.

The first point relates to ACPERA, and I echo the comments made earlier today. The Antitrust Division's use of the amnesty and leniency for the first firm who reports its participation in a cartel and providing evidence against the cartel has been hugely successful. For example, the air cargo litigation, the LCD case, and most recently, and as we have been discussing today, the auto parts cartels where the DOJ has secured record fines and sent ample numbers of people to jail for violating the antitrust laws. These are real-life cases that affect real people. These are consumers that are harmed, consumers who purchase computers, cell phones, automobiles. These are products purchased by every household in America, and consumers are greatly affected by these cartels and the overcharges to their products as a result.

ACPERA could be enhanced. Specifically the statute does not provide enough guidance on the contours of the required cooperation and the timing of such cooperation in civil cases. A recent example is in the auto lights litigation that is pending before Judge Wu in the Central District of California. Recently in that case, the plaintiffs made a motion before the court to exclude the ACPERA applicant's right to seek single damages in a case because the applicant did not cooperate in a timely fashion or in a robust manner with the plaintiffs in that action, and Judge Wu agreed with the plaintiffs. The timing of cooperation is particularly relevant if you think about it in terms of a statute of limitations. If a defendant, an ACPERA applicant, is to provide quality evidence and that evidence provides additional co-conspirators that could be brought into litigation or that should have charges brought against it as participants in the conspiracy but that information arrives after a statute of limitations has run, that information has no value for the private plaintiff.

So we think that having appropriate explanations in the ACPERA statute as part of it, both in terms of what is expected of a leniency applicant in terms of its cooperation in a private case, as well as the timing of the cooperation, will not only assist the private litigants, but will also provide guidance to defendants in their process as they move through their Leniency Program and would likely want to take advantage of the single damages limitation that is being offered to them.

A second point, while not part of ACPERA, is the Senate's recent passing of the Whistleblower Act for reporting antitrust crimes, which will enhance the ability to secure evidence of antitrust violations. We are hopeful that this Act will receive approval of the full Congress.

We do think, however, that the added provision of a financial reward for reporting should be reconsidered by the Senate as such a provision would motivate employees to step forward with information on criminal acts.

Finally, given the tremendous success of the Department of Justice's cartel enforcement, including recoupment of record fines exceeding well over \$1 billion in each of the last two years alone, we

urge Congress to consider increased funding for the DOJ's antitrust enforcement efforts. It is especially in difficult economic times when companies are looking for ways to increase profits, which may include engaging in unlawful conspiracies, and given the recent DOJ record fines, which are growing daily, increased and continued funding for the Department of Justice makes good economic dollars and sense.

Thank you.

[The prepared statement of Ms. Salzman appears as a submission for the record.]

Chairman KLOBUCHAR. Thank you very much.

Next, Mr. Hockett.

STATEMENT OF CHRISTOPHER B. HOCKETT, CHAIR, SECTION ON ANTITRUST LAW, AMERICAN BAR ASSOCIATION, AND PARTNER, DAVIS POLK & WARDWELL, LLP, MENLO PARK, CALIFORNIA

Mr. HOCKETT. Good afternoon, Chairman Klobuchar and Ranking Member Lee. I am Chris Hockett. I am a partner at Davis Polk and chair of the 8,000-member Section of Antitrust Law. My remarks today are given on behalf of the Antitrust Section, and I thank you for the honor of appearing before you.

As we have heard from every witness so far—and I do not think there will be any change by the end of the day—there is no question that cartels hurt American consumers and the American economy by raising prices, stopping competition, reducing output, and reducing quality. And for decades, it has been a top priority of the Antitrust Division to prosecute cartel conduct.

The commitment of the Division to this mission has been exemplary and unwavering over multiple administrations. Our Nation's Criminal Antitrust Enforcement Program is truly a model of bipartisan or nonpartisan consistency. And as Chairman Klobuchar and Ranking Member Lee have observed, it has also been highly successful.

The advent of the revised Leniency Program in the 1990s and Congress' decision to increase penalties for criminal antitrust conduct have launched a new era of success in detecting and prosecuting large international cartels that inflict significant harm on the American public.

As one former Division head once said, "Leniency programs are the greatest investigative tool ever designed to fight cartels."

Now, is the system working perfectly? No. There is always room for improvement. So what are the important challenges and what can we do about them?

Well, I have made some remarks about that in my written testimony, but today I would like to briefly highlight two things.

One, personnel cuts. Over the years, the returns on cartel enforcement efforts have been multiples of the Antitrust Division's budget. You heard from Assistant Attorney General Baer 10 times each year, year over year. And we are currently in the midst of a boom in U.S. cartel enforcement with the auto parts investigation being the largest ever, and it is just one among many.

However, this intense activity level coincides with other events that have resulted in a one-third decrease in the number of cartel

enforcers at the Division plus the implementation of a hiring freeze. It is perhaps too early to tell the effects of this head-count reduction, but given the importance of cartel enforcement to American consumers and the complexity of the job that needs to be done, the current situation presents a significant concern.

The second thing is the internationalization of cartel enforcement. Antitrust law has been one of the United States' most successful exports over the past 20 years, and that includes cartel enforcement. Other countries have seen the high fines and criminal sanctions associated with our enforcement efforts and have followed our lead. Fifty countries now have leniency programs, and we are encouraging other countries to adopt criminal laws to prevent antitrust violations, and they are.

Now, that is in many ways a very good thing because it increases the chances of detection, it increases deterrence, but there are also some downsides. It adds complexity and requires the kind of coordination that Assistant Attorney General Baer mentioned they were engaged in: coordination, cooperation, engagement with counterparts around the world, among other things, to avoid the kind of double recovery problem that Senator Lee mentioned.

The proliferation of these vigorous anti-cartel mechanisms around the world also creates another complexity, and that is, criminal sanctions are going to be enforced by jurisdictions whose notions of due process and fair treatment are different, quite a bit different from our own. And we strongly support the Division's continued involvement to ensure transparent and fair investigative, administrative, and adjudicative procedures related to cartel enforcement, both in the U.S. and abroad. We at the Antitrust Section are committed to furthering those goals, but we are no substitute for the Antitrust Division, which is an active and important leader in international organizations such as the ICN and the OECD.

So we urge the Antitrust Division to be supported in its efforts to stay engaged in those very, very important international dialogues for the sake of American consumers and American businesses doing business globally, because we do not want people to be thrown in jail for getting into a joint venture.

[The prepared statement of Mr. Hockett appears as a submission for the record.]

Chairman KLOBUCHAR. Very good. Thank you.

Dr. Levenstein.

STATEMENT OF MARGARET C. LEVENSTEIN, RESEARCH SCIENTIST, INSTITUTE FOR SOCIAL RESEARCH, ADJUNCT PROFESSOR OF BUSINESS ECONOMICS AND PUBLIC POLICY, ROSS SCHOOL OF BUSINESS, UNIVERSITY OF MICHIGAN, ANN ARBOR, MICHIGAN

Dr. LEVENSTEIN. Thank you, Senator Klobuchar and Senator Lee, for inviting me to speak to you today.

As we have said, cartels can and do have a significant negative impact on consumers and competition. My research with Valerie Suslow has shown that cartels do last, perhaps not forever, but on average seven to 10 years. Cartels have been found in a wide variety of industries, including ones that are technologically dynamic,

not just staid, staple goods industries, but things like computer chips and flat panel screens. Cartels affect consumers in industry, agriculture, financial services, and the public sector.

While economists, which I am, being economists, differ on exact estimates of the impact of cartels on prices, it is clear that cartels can raise prices substantially. But cartels do not simply raise prices. To survive and protect their profits, cartels must prevent entry. They must create barriers to entry.

Some of these barriers will not endure, but if you are a firm attempting to enter an industry and are denied access to technology, as happened to a firm in the graphite electrodes industry, or denied access to customers, as happened to someone who tried to go up against the sewing needle cartel, or faced with a targeted price war, as happened to a firm that was trying to sell steel pipes, then it will not matter to you that some other firm, but perhaps with deeper pockets, manages to wear the cartel down years later. Your entrepreneurship, the potential that your dynamic activity could contribute to our economy, is stymied.

The Antitrust Division has had a strong and consistent anti-cartel enforcement policy for the past 20 years. But cartels continue to form, and we see recidivism among convicted cartel members. This suggests that existing penalties, while they have increased, are still insufficient. Firms still treat these fines as the cost of doing business. We can and should increase fines, and corporate fines are critical to aligning shareholders' incentives with consumer welfare. But fines large enough to deter collusion are probably large enough to bankrupt firms given the uncertainty in detection and the high profits that collusion dangles in front of firms. We do not want to bankrupt firms. That simply undermines rather than strengthens competition.

So we need smarter, not simply larger, penalties. Jail terms, embraced by the Division, provide a more effective—a very effective, I think, deterrent to individual executives and to managers.

Two other potential remedies I think should be considered.

First of all, I think we should consider banning executives who have been convicted of felonies against consumers in their industry. There are not an enormous number of tools to do that, but I do not think it is impossible. There are some ways that we could imagine doing that.

I also think we need to consider increased scrutiny of mergers of former cartel members. We have seen in a couple instances cartels broken up, only to see consolidation in the industry afterwards, which defeats the purpose.

Finally, you might consider increased private litigation as a way to increase deterrence, but I think it is important to remember that private action by itself rarely discovers cartels. Civil penalties are important for fairness, and the DOJ, with its outreach to consumers, can help consumers to detect and prevent collusion, and so bring private resources, sort of a Consumer Neighborhood Watch, if you like, to bear. So private action can complement federal action, but it is not a substitute for federal action.

Amnesty has been very effective at breaking up cartels, particularly international cartels that had long considered themselves immune. But amnesty cases still require resources, and unless there

are effective resources for—unless prosecutorial resources are expanded or at least maintained, amnesty cases crowd out other investigations. Colluding firms hide what they are doing and develop ever more sophisticated ways of operating and hiding these things, and so it takes increasing resources on the part of investigators to discover collusion.

Investigative resources can pay off. Newly developed statistical screening techniques discovered collusion in LIBOR three years before the *Wall Street Journal* reported on it. Novel techniques in analyzing Web-based communication could be used to discover invitations to collude, such as those that were employed in the U-Haul case.

Intra-industry swaps, which have legitimate business purposes but which are also used regularly to meet cartel quotas, could be investigated.

The Division and FTC should also identify highly concentrated market niches. Most cartels operate in extremely concentrated markets. In one study, Professor Suslow and I found that over two-thirds of cartels were in markets with a four-firm concentration ratio of over 75 percent, and these were often global concentration ratios. With appropriate resources, the DOJ and the FTC can identify markets that are at risk. This is not a simple task, as market definition is key.

For example, there are over 5,600 commercial banks in the United States, and for decades most economists thought of U.S. banking as being overly fragmented, not too concentrated. But the number of participants in LIBOR is much smaller. The number of participants in foreign exchange markets, which were also subject to collusion we now know, is smaller still. And I can count on one hand the number underwriting municipal bonds. Thus, Professor Suslow and I called a recent paper “Constant Vigilance.”

While we will never stop all price fixing—and we probably would not want to because that would be overdeterrence—there are both investigative tools and sanctions that, with appropriate policies and resources, we can apply to reduce the impact of anticompetitive behavior on consumers and competition.

Thank you.

[The prepared statement of Dr. Levenstein appears as a submission for the record.]

Chairman KLOBUCHAR. Thank you very much.

Mr. Rosman.

**STATEMENT OF MARK ROSMAN, PARTNER, WILSON SONSINI
GOODRICH & ROSATI, WASHINGTON, DC**

Mr. ROSMAN. Good afternoon and thank you, Chairman Klobuchar and Senator Lee. My name is Mark Rosman, and I am a partner at Wilson Sonsini Goodrich & Rosati in the Antitrust Group here in Washington, D.C. Before joining Wilson Sonsini, I was a trial attorney and prosecutor for the U.S. Department of Justice Antitrust Division for 2 decades, and I work both in the field office as well as at the headquarters. It is my distinct honor to have worked for the DOJ, and it is a distinct honor to be here today to testify with you all.

Before leaving the DOJ, I was the lead prosecutor on the airlines investigation, which you heard Assistant Attorney General Baer allude to, bringing in \$1.8 billion in fines. It was certainly a proud accomplishment of mine while I was at the Department. And I brought in this little piggy bank that I kept on my desk when I was at the Department. It is from China, and one of the prosecutors in my old office brought this back for me, and I kept it on my desk as a little good luck charm and also a bit of a motivator to bring in the big fines. And I have this on my desk today, but it has a little bit of a different meaning to me today.

Number one, when I look at it, I wonder: Could I ever have really put \$1.8 billion in this little piggy bank?

But, also, I wonder, to echo Dr. Levenstein's comments, whether going for bigger fines was always the best thing and the right thing that the Department should be doing as opposed to looking at some other alternatives that the Senators here today have raised and asked about, going for smarter fines, perhaps. And I am going to talk a little bit more about that in my comments.

In my written comments I outline four areas of concern, and I do not think anybody can really question the success of the Antitrust Division, and these comments are made in the vein of improving and building on that success.

One of the areas of concern is a discussion of refocusing and rebalancing, if you will, the Division's focus on these blockbusters, I will call them, cartels, international cartels. And I think we heard Senator Blumenthal ask a good question about, you know, whether perhaps—or at least raise a concern whether the emphasis and the focus has shifted, the pendulum has swung to the other end of the spectrum such that there may be a lack of focus on domestic and regional price-fixing violations.

A second concern I raised is about the application of the guidelines to lower-level employees and mid-level employees, and whether the Antitrust Division should consider using some guidelines applications such as offering individuals who are involved in these offenses a minimal or minor role adjustment in order to encourage cooperation, because juries recently have acquitted a number of these individuals that have been brought to trial in cases, and there have been a lot of resources spent prosecuting lower-level individuals.

A third concern goes to your point, Senator Lee, about the point that you have raised about double counting and whether there are other ways the Division could approach sentencing and fines for corporations. And, in particular, there is a practice that is used now and has been used for quite some time of a bump, it is called, if you will, for indirect commerce. And this is significantly raising the fines both in the airlines cases that I worked on, but also continuing today in the auto parts cases, and whether that commerce—whether the Division needs to go after that commerce, whether it is just serving a deterrent effect, and whether it may be best gone after by other authorities that are now actively investigating these types of violations.

And then, finally, I raise some thoughts in my written remarks about concerns about deterrence generally and specifically as to individuals who are involved, and I think there has always been a

push, and certainly when I was at the DOJ, of raising the bar, increasing the amount of time individuals go to jail, and certainly I would agree with the Assistant Attorney General's remarks that fear of going to jail is a deterrent, but I think one thing that I would highlight is also there has to be a fear of detection, a fear of getting caught. And I think the professor alluded to that as well. And so, you know, if you are not really afraid of getting caught, having longer and higher jail sentences may not be the best deterrent.

With that, I see my time is up, and I am happy to answer any questions that you may have.

[The prepared statement of Mr. Rosman appears as a submission for the record.]

Chairman KLOBUCHAR. Thank you very much. We are going to get started. Senator Lee is going to go first this time. Thanks.

Senator LEE. I want to talk a little bit more about the bump, Mr. Rosman. I suspect that this happens a fair amount because they want to obtain a larger fine. They have got their own piggy bank on their desk. I thought that was interesting, by the way. That was the first thought I had, was how you could possibly fit over \$1 billion in such a thing. My second thought was that that piggy bank sort of resembles a cat. I do not know quite what to do with that, but I do not know, maybe they have a different variety of pig there.

But it seems to me that this could result in double counting and double penalizing the same conduct, the same transaction. How do they go about it? And, more importantly, what can we do to help discourage improper bumping?

Mr. ROSMAN. Yes, so I will say that when I was at the Division—and I am sure today it is the case as well—the leadership and the attorneys were mindful of this issue, and so there was a concern, and there were discussions and ongoing discussions today, as we have heard, with their counterparts from other countries to try to take into account that this is a real issue.

And so, for example, in the airlines cases, when you looked at indirect commerce, it was a question of inbound, what was called “inbound commerce”—in other words, for air cargo or passenger commerce, commerce that was literally on flights coming into the United States. And so that was part of the bump. But the DOJ did not take a dollar-for-dollar measure of that commerce. There was actually an adjustment that was made based on the import-export ratio. So the DOJ did try to take into account and not actually take all of that commerce.

What I am questioning here today is: Is that enough? And given the increasing levels of enforcement worldwide, do they really need to go after that? And are there, in fact, other ways to incentivize companies, such as through compliance program credit and perhaps other penalties, such as increased corporate governance, that would achieve the same goals that the Division has rather than just simply trying to ratchet up the fines.

Senator LEE. I do not necessarily hear you saying that there is a legitimate purpose for the practice. Do you think there is? Should it be abandoned altogether?

Mr. ROSMAN. Well, I would say that, you know, it depends on the facts. As you pointed out earlier, these are complex kind of factual

considerations, even getting down to the level of, you know, where is the product that is in question invoiced? You know, where is the invoice sent to? Is it sent to the United States? Is it sent to some other country to try to determine where the sale takes place?

So it is a very fact-driven type of analysis, and in some cases, if there is a direct—you know, you could say that even in an indirect sale there is some effect on the United States. I am not here to say that that is impossible. But I think that given that the fines are reaching very high levels, even just taking direct commerce alone, it is a fair question to ask: Do you need this indirect commerce? Does it really serve a deterrence purpose? Other countries going after that commerce that takes place in their country, is that enough of a deterrent without having to account for it, even if you agree that it might have had some indirect effect on the U.S.? I think that is a valid question.

Senator LEE. Thank you. That is helpful.

Dr. Levenstein, let us talk about fines and jail time. You talk in your testimony about the fact that in some circumstances fines might not work and, in fact, might be even counterproductive. You might reach a point at which they become counterproductive. Talk to me a little bit about why reliance on prison time and/or debarment might be better.

Dr. LEVENSTEIN. I think the way that economists think about this is that, in order to deter collusion, you need to have the expected payoff to collusion be negative. You do not want it to pay. And you can have it not pay by having high fines. You can have it not pay by having it likely that you will have to pay those fines, so increasing the investigative activity, the likelihood of detection will also increase deterrence.

There are other things, though. There are individuals who may not have to pay the fines or may be compensated in other remunerative ways. When you think about going to jail, you might actually get managers who are not willing to engage in collusion if you use prison sentences.

I think there are other things that—so I think that—well, there are two things. One is that prison sentences are effective deterrents if people believe that they are likely to face them. So, again, it is always combined with discovery.

I think that we want to think about things like barring people from an industry because there are clearly certain industries and certain firms that have been engaged in this activity over and over again, and we even have the suggestion that there are firms that say, okay, you take one for the team and then we will take care of you after that. And people have to understand that—this is not an acceptable way to compete, and that you cannot participate in the market if you do this.

Senator LEE. Yes, that, and I suppose are people who, once they have learned they can earn a living in a certain way, they would like to continue earning a living that way, especially if it is very lucrative.

Dr. LEVENSTEIN. Well, when people have been successful at doing this and the fines are not—the fines are not enough to make it not profitable. That is the bottom line. And if you know that it is still profitable, then you are going to keep doing it.

Senator LEE. Okay. Mr. Hockett, you expressed some concerns regarding fair treatment and due process for defendants, especially in foreign jurisdictions with which the U.S. cooperates in investigations. What do you think we could do to help alleviate those concerns within the U.S. in that regard?

Mr. HOCKETT. You know, a couple of ways. I think, number one, set a good example by continuing to provide transparency, fairness, and due process in our own system when we are addressing conduct by people who live outside the United States.

Second, I think continuing to engage in these international fora, which is something that may seem sort of extra and optional to people who are not involved in it, but it is really the only way that the U.S. Government can try to shape the norms of what is considered a hard-core antitrust violation worthy of jail time or huge fines and how people are treated in those systems. It is a big challenge because unlike, say, merger enforcement, which bolts onto a country's regime probably they did not have anything like it until they decided to adopt it, a criminal antitrust enforcement regime overlays the country's native criminal justice system, which, as I indicated before, might be dramatically different from what we are used to and the guarantees of due process and procedural fairness that we are used to.

So what we do not want is a situation in which American businesses and citizens doing business abroad are confronted with claims that seem quite exotic as far as hard-core antitrust violations and then are treated to foreign justice systems that are unfair.

The only way to do that is through the soft influence that we have through these international fora, and in which the DOJ has played quite an active role, but they are increasingly constrained in doing that by the lack of funds.

Senator LEE. Thank you.

Thank you, Madam Chair.

Chairman KLOBUCHAR. Very good. Thank you.

I will start with you, Ms. Salzman. You represent victims of price fixing, the consumers, and often companies that have paid higher prices because of a crime and criminal cartels. What is the magnitude of the harm? And what have you seen that it means for their bottom line and their ability to expand their businesses?

Ms. SALZMAN. I think that that is a very good question, but it varies from case to case, and depending on the particular conspiracy, each conspiracy takes on its own characteristics in terms of the amount of overcharge.

I cited a study in my written testimony, and, you know, depending on how you look at the averages, you are looking at probably, at the low end, around 25 percent of an overcharge. And what this does to consumers is consumers do not know about these antitrust conspiracies because, until it is brought to light either by the government or private enforcement, they just continue to overpay higher prices for goods. And for businesses that are paying for overpriced goods from purchases from wrongdoers, they are passing it on to consumers who are ultimately injured. But also for the businesses what it does is it creates higher costs for them in terms of inputs for their businesses, and that in and of itself is a problem

for their business model and what else they could do with those funds in terms of competing in the market, research and development, other ways that they could spend that money.

I was wondering if I could make one comment to the bumping question.

Chairman KLOBUCHAR. Sure.

Ms. SALZMAN. I just have a slightly different perspective on this bumping issue. The way that I see it—and I am thinking in particular in the auto parts litigation, where there was an imputed amount in the fine, it had to do with goods that were manufactured abroad, but put into a product that ultimately ended up in the United States. And to me that is commerce that affects our consumers here in the U.S. And if you violate the antitrust laws and you are being brought to justice for that, you should be held accountable for those transactions.

Chairman KLOBUCHAR. We talked earlier about the lawyer power in the Antitrust Division and across the board, including with the FBI, with their agents. How do you think this will negatively affect consumers if we see this continued drawdown of people working in this complex area?

Ms. SALZMAN. I think, as I said in my remarks, that I do think funding the Department of Justice so that it has adequate staffing and funds to continue their investigation is imperative for our economy. In bad economic times, companies look for ways to make money, and unfortunately some of the companies look to conspiring with their competitors, which results in higher prices for small businesses and consumers. So I think it is imperative that the Department of Justice continue to get funding and increased funding.

Chairman KLOBUCHAR. And if they do not bring a case for whatever reason, does that affect your decision about what you do?

Ms. SALZMAN. It does not always affect our decision. There are times when we are given information on a conspiracy and we try to investigate, but without the power of subpoena that the Department of Justice has, it is very difficult to get the necessary early information and evidence that would be required to sustain a motion to dismiss a complaint in court.

Chairman KLOBUCHAR. Very good. Thank you.

Mr. HOCKETT, Senator Lee asked you about the international aspect of this, and just stepping back from—I know you have these concerns on the due process issues and other things. Just how has it changed over the years? I would just think more and more this has become an international issue, so there is a reason to pursue it beyond our—I do not think these crooks care about the State borders or country borders, and look at this as an international issue, and isn't there an argument to actually have this be more of an issue that is raised in whether it is trade negotiations or other things without other countries?

Mr. HOCKETT. Yes, it is certainly a global issue. These cartels that have come to light, largely through the Leniency Program, have operated across international borders. They have hurt not only U.S. consumers but consumers all around the world. And as I have indicated, the regimes designed to enforce against cartel conduct have sprouted up all over the world with our encouragement. That is what makes it so important for our enforcers to work

side by side with theirs, not simply to promote fairness and avoid double recoveries, but also to coordinate the enforcement efforts themselves, which require simultaneous seizures of information, dawn raids, sharing of information consistent with confidentiality requirements, so that they can act as effective law enforcement agents and prosecutors.

Chairman KLOBUCHAR. Thank you.

Dr. Levenstein, understanding that more than just economic data is needed to prove price fixing, some experts have suggested that the DOJ should use economic screening tools to monitor industries, particularly those that are highly concentrated, as a way of detecting potential cartel activity. For example, a number of foreign jurisdictions use economic screens, and screens are widely attributed to discovering the LIBOR conspiracy.

What is your view on the use of economic screens to detect cartels?

Dr. LEVENSTEIN. Well, I think statistical screens—

Chairman KLOBUCHAR. Would you explain it to everyone here what that means?

Dr. LEVENSTEIN. A statistical screen is simply a way of looking at the prices that are supposedly set independently by all of the participants in a market to see whether or not it is even within the realm of plausibility that they were set independently without working together. And it was clear from the analysis of the LIBOR case that the probability that these prices—that these LIBOR rates had been set independently on a daily basis over many, many years and somehow ended up the way that they did was not within the realm of possibility. And they use—I mean, it is not just are they the same prices, but they actually look at the matching of the digits in the price to determine these things in that particular case.

Screens have also been used in some gas price-fixing cases I believe the FTC has looked at.

They have also been used, say, in the school milk auctions. They have been shown that you can use those. That was done *ex post*, not to discover the cartel, but they have been shown to be quite effective in distinguishing, particularly when you are talking about auctions, where you have a small number of bidders, when you have auctions where the bids become public, it is actually—it is very hard for the customer to protect itself because we do want transparency from our local governments, but it makes it very easy for these firms to do this, and it is a very useful technique in getting at it.

Chairman KLOBUCHAR. And critics have said that there is sometimes a risk of a false positive. How do you respond to that?

Dr. LEVENSTEIN. You need good investigative techniques. You need good statisticians. I do not think anybody is saying, oh, just because they charge the same price, that means it is collusion. But the techniques are actually quite robust.

Chairman KLOBUCHAR. Okay. Thank you very much.

Mr. Rosman, just one last question here. Do you agree that private enforcement and private follow-on suits are an important component to antitrust law and the benefit of consumers? And are there barriers now for victims to get to court?

Mr. ROSMAN. I do agree that private enforcement is an important part of the mix of deterrence, and as was referred to earlier, treble damages are a big component of that. So I think it is important, yes.

Are there barriers now? I am not sure there are significant barriers. Ms. Salzman might disagree with me about that. I think that, you know, you certainly see whenever there is an investigation brought by the DOJ you can almost, you know, bet—you could bet that there are going to be class action suits filed right on the heels of whatever case—it does not even have to be a case, frankly. It can be a search warrant, a headline in the news, and these cases are going to be filed.

And there are now, you know, many more cases where plaintiffs are choosing to opt out, such as, I believe, Best Buy was one of those cases where they believe they have their own case for damages; they can opt out of the class action.

So I think there is a robust private enforcement that is going on out there. Perhaps there could be some fine tuning to it, but I think that plaintiffs do have a strong voice out there right now.

Chairman KLOBUCHAR. All right. Do you have any follow-ups?

[No response.]

Chairman KLOBUCHAR. Okay. Very good. Well, I wanted to thank all of you. I think this was a robust hearing, to use Mr. Rosman's word there at the end, and I know that there were some ideas tossed out there for changes to the law, which we appreciate. And we really appreciate everyone's time, and thank you for all of your efforts in this very, very important area.

We will leave the record open for a week—is that enough time? Okay—for colleagues to put any questions on the record or for ourselves, and we just want to thank you all for taking time out of your day today and visiting with us, and we learned a lot. So thank you for that, and the hearing is adjourned.

[Whereupon, at 4:31 p.m., the Subcommittee was adjourned.]

A P P E N D I X

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

UPDATED Witness List

Hearing before the
Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights

On

“Cartel Prosecution: Stopping Price Fixers and Protecting Consumers”

Thursday, November 14, 2013
Dirksen Senate Office Building, Room 226
2:30 p.m.

Panel I

The Honorable William Baer
Assistant Attorney General
Antitrust Division, United States Department of Justice
Washington, DC

Ronald T. Hosko
Assistant Director, Criminal Investigative Division
Federal Bureau of Investigation
Washington, DC

Panel II

Hollis Salzman
Partner & Co-Chair, Antitrust and Trade Regulation Group
Robins, Kaplan, Miller & Ciresi, LLP
New York, NY

Christopher B. Hockett
Chair, Section on Antitrust Law, American Bar Association
Partner, Davis Polk & Wardwell, LLP
Menlo Park, CA

Margaret C. Levenstein
Research Scientist, Institute for Social Research
Adjunct Professor of Business Economics and Public Policy, Ross School of
Business
University of Michigan
Ann Arbor, MI

Mark Rosman
Partner
Wilson Sonsini Goodrich & Rosati
Washington, DC

PREPARED STATEMENT OF WILLIAM J. BAER, ASSISTANT ATTORNEY GENERAL, ANTI-TRUST DIVISION; AND RONALD T. HOSKO, ASSISTANT DIRECTOR, CRIMINAL INVESTIGATIVE DIVISION, FEDERAL BUREAU OF INVESTIGATION



Department of Justice

STATEMENT

OF

WILLIAM J. BAER
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

AND

RONALD T. HOSKO
ASSISTANT DIRECTOR
CRIMINAL INVESTIGATIVE DIVISION
FEDERAL BUREAU OF INVESTIGATION

BEFORE THE

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

HEARING ON

"CARTEL PROSECUTION: STOPPING PRICE FIXERS
AND PROTECTING CONSUMERS"

PRESENTED ON

NOVEMBER 14, 2013

STATEMENT
OF
WILLIAM J. BAER
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION
AND
RONALD T. HOSKO
ASSISTANT DIRECTOR
CRIMINAL INVESTIGATIVE DIVISION
FEDERAL BUREAU OF INVESTIGATION
BEFORE THE
SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY
AND CONSUMER RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
HEARING ENTITLED
“CARTEL PROSECUTION: STOPPING PRICE FIXERS
AND PROTECTING CONSUMERS”
PRESENTED ON
NOVEMBER 14, 2013

Chairman Klobuchar, Ranking Member Lee, and distinguished members of the Subcommittee, thank you for inviting us to appear before you today to discuss how cartels steal money from American consumers and why criminal enforcement against cartels is a cornerstone of the work of the Department of Justice’s Antitrust Division. The FBI is a key and long-standing partner in virtually all Antitrust Division cartel investigations. Working together we are making a difference for American consumers.

The subcommittee is right to spotlight cartel misconduct. This criminal misbehavior, whether international, national or local, harms both American consumers and businesses. The courts agree. They unanimously condemn cartel offenses “because of their pernicious effect on competition and lack of any redeeming virtue,” *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958), and describe criminal antitrust offenses as “the supreme evil of antitrust,” *Verizon v. Trinko*, 540 U.S. 398, 408 (2004). Judicial precedent and common sense tell us the same thing: price fixing, bid rigging, and other criminal antitrust crimes cause direct and unambiguous antitrust harm.

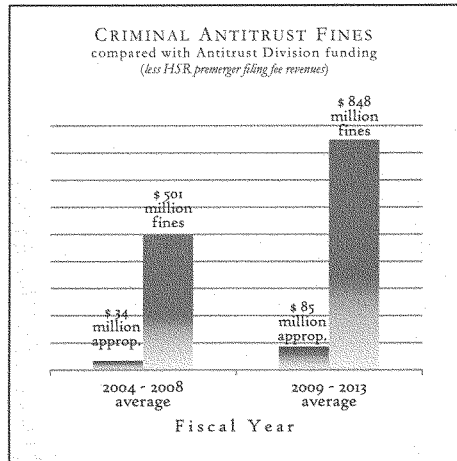
Our efforts to uncover and prosecute cartel behavior are, and need to be, robust. We target domestic and international cartels and prosecute those who rob consumers of their hard-earned dollars—both corporations and individuals, whether foreign or domestic. The Antitrust Division and the FBI use all available investigative tools to detect and prosecute violators of U.S. antitrust laws.

The Department of Justice applies resources and expertise from its Fraud Section, Antitrust Division, Civil Division, Public Integrity Section, Office of International Affairs, and the Asset Forfeiture and Money Laundering Section, as well as U.S. Attorneys' Offices across the country to support prosecutions relating to these criminal cases. The FBI assists the Antitrust Division through its International Corruption Unit (ICU), which, in addition to antitrust offenses, investigates allegations of corruption of U.S. public officials and fraud against the U.S. Government (among others). The FBI found conceptual and analytical synergy in grouping these activities since investigations in any one of these areas has the potential to lead to operational intelligence in another, and its robust liaison relationships with foreign law enforcement and regulatory officials often aid the investigations. Moreover, the FBI's assistance in Antitrust Division investigations benefit ICU personnel, who gain expertise in conducting multinational criminal investigations and navigating judicial processes supporting those matters.

Aggressively pursuing criminal price fixers and bid riggers benefits us in many ways. Enforcement ensures that the specific bad conduct is eliminated. At the same time, other wrongdoers are put on notice and are dissuaded from continuing their illegal conduct. Finally, those contemplating price fixing realize the serious adverse consequences and are deterred from committing the crime in the first instance. At the end of the day, our enforcement actions result in lower prices for consumer goods and services, including computers, televisions, automobiles, shipping, hospital services, and financial services.

Let us start with our most recent cartel enforcement statistics. During Fiscal Year 2013 the Antitrust Division filed 50 criminal cases, and obtained \$1.02 billion in criminal fines. The criminal antitrust fines imposed in these cases reflect the harm that cartels inflict on consumers; under the Sentencing Guidelines they take into account the total value of sales affected by the defendant's participation in the cartel. In those 12 months we charged 21 corporations and 34 individuals and courts imposed 28 prison terms with an average sentence of just over two years per defendant.

American taxpayers are well-served by effective cartel enforcement. In the last ten fiscal years, the Antitrust Division has obtained criminal fines averaging nearly \$675 million per year. That is more than 10 times its average annual appropriation



of \$60 million (net of the division's share of offsetting collections of Hart-Scott-Rodino fees collected by the FTC). In just the last five fiscal years the division averaged nearly \$850 million in criminal fines versus an average appropriation of about \$85 million (again, net of HSR fees). These fines do not go to the Antitrust Division, but rather are contributed to the Crime Victims Fund, which helps victims of all types of crime throughout the country. They are provided assistance with medical and counseling expenses, assistance in the form of shelter,

crisis intervention, and justice advocacy, and money for state and local services to crime victims.

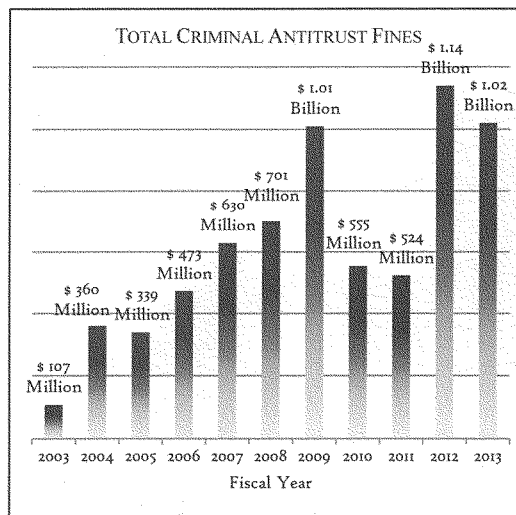
The Evolution of Cartel Enforcement at the Antitrust Division

The Antitrust Division's cartel enforcement successes are the result of many years of building and implementing an enforcement strategy that couples strong sanctions with incentives for voluntary disclosure and timely cooperation. The Antitrust Division's Corporate Leniency Program is a particularly effective investigative tool for detecting large-scale international price-fixing cartels. But, it is not the only tool. The division and the FBI uncover cartel behavior using a variety of tools, including internal investigative efforts, customer complaints and submissions to our Citizen Complaint Center, outreach efforts with law enforcement agents, information from auditors, trade groups, business and law students, suspicious documents uncovered in civil investigations, and everyday news stories. Collaboration with federal and state agencies is also key to detecting and investigating cartels.

Our progress in detecting and prosecuting cartels can be traced to a deliberate change in strategy and approach implemented over the last two decades. In the early 1990's, recognizing the harm that international cartels pose to American businesses and consumers, the division made investigating and prosecuting international cartels a top priority. What did we do?

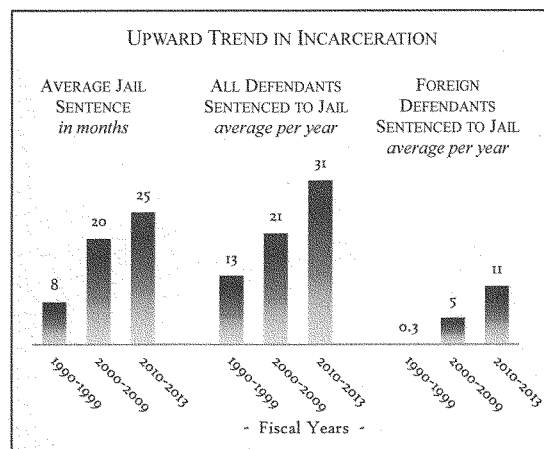
- We adopted a corporate leniency program that provides incentives for companies, both domestic and foreign, to investigate and self-report to the Antitrust Division their involvement in antitrust crimes. This dramatically increased the rate of self-disclosure by corporations.
- We strengthened our ties with the FBI to partner better on investigations, make more use of FBI covert techniques and financial expertise, and expedite our investigation and prosecutions.
- We engaged bilaterally and multilaterally with competition authorities around the world to achieve a general consensus on attacking cartels and coordinating our approach to detection, investigation and prosecution.

These strategies have resulted in a dramatic increase in exposing the world's largest price-fixing cartels. In recent years we prosecuted cartels involving air transportation (more than \$1.8 billion in criminal fines obtained), liquid crystal displays (more than \$1.39 billion in criminal fines obtained), and auto parts. Attorney General Holder recently described the auto parts investigation as the largest criminal investigation the Antitrust Division has ever pursued, both in terms of its scope and the potential volume of commerce affected by the alleged illegal conduct. The investigation is far from over. Thus far we have obtained more than \$1.6



billion in fines. In each of these matters, the FBI is a strong partner with the Antitrust Division, providing invaluable contributions to our investigations, including in interviews, searches, and forensic work.

Criminal fines cannot and do not tell the whole story. Large criminal penalties make cartel behavior less attractive. But the threat of jail time for the company officials responsible for injuring consumers is itself a powerful deterrent. The



Antitrust Division has pursued stiff penalties against individuals. Today more individuals involved in cartel activity are being sent to jail and are being jailed for longer periods of time than ever before. In the 1990's, jail sentences for Antitrust Division defendants averaged eight months. Today the average prison sentence for Antitrust Division defendants is 25 months. Culpable foreign

nationals who injure American consumers do not escape our grasp either. In the last four years, courts have sentenced an average of 11 foreign nationals to jail per year. That compares with a total of three foreign nationals sentenced to jail in the ten years from 1990 through 1999.

Specific Cartel Enforcement

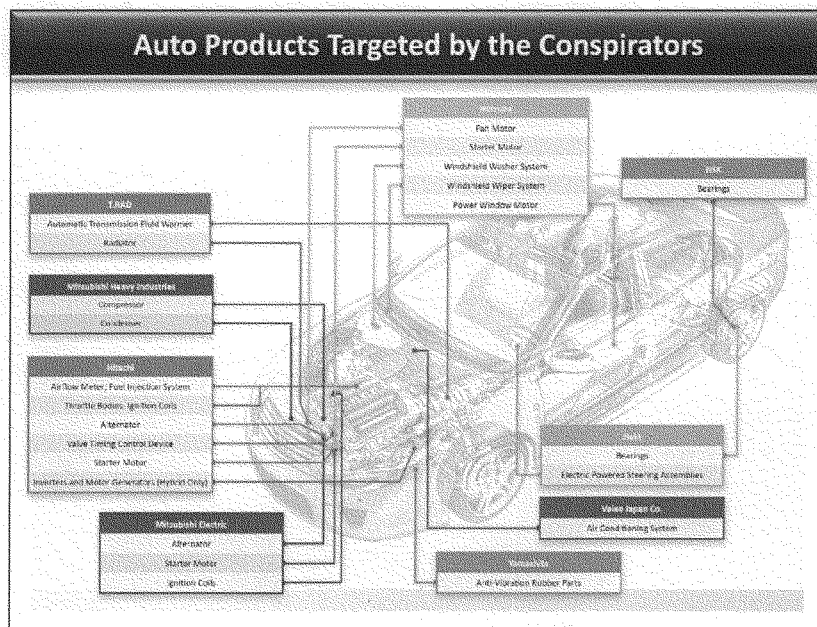
Our ongoing and recent activities demonstrate how effective cartel enforcement makes an enormous, measurable difference to consumers and the economy. I will start with large-scale international cartels that affect wide swaths of the economy and then I will turn to more local cartels that also have demonstrable adverse effects.

Investigations of large international cartels pose significant challenges—with documents, witnesses, and wrongdoers often located outside the U.S. We have developed over time a shared commitment with enforcers around the world to fighting international cartels. We work closely in addressing these challenges.

This has significantly increased our ability to effectively investigate and prosecute these cartels. Cooperation with our sister agencies around the world allows for coordinated raids in cross-border cartel investigations, helping to preserve crucial evidence, increases access to foreign-located evidence, and induces cooperation from foreign subjects of investigations that previously had been lacking.

Our ongoing auto parts investigation exemplifies how the Antitrust Division and the FBI cooperate with our foreign counterparts. The investigation included FBI search warrants executed on the very same day and conducted at the very same time as searches by enforcers in other countries. During the ongoing investigation the department has coordinated with antitrust agencies of Japan, Canada, the Republic of Korea, Mexico, Australia, and the European Commission.

What has this effort thus far produced? To date the division has charged a total of 21 companies and 21 executives. All 21 companies have either pleaded guilty or have agreed to plead guilty. The immediate victims of these conspiracies include such automotive manufacturers as Ford, General Motors, Chrysler, Honda, Toyota, Nissan, Subaru, Mazda and Mitsubishi. The parts involved included safety



systems such as seatbelts, airbags, and antilock brake systems, making it costlier for car makers to provide many safety features. Many car models were fitted with multiple parts that were fixed by the auto parts suppliers. In September, Attorney General Holder announced nine corporate guilty pleas involving more than \$740 million in criminal fines. Those September charges involved more than a dozen separate conspiracies spanning over a decade and involving numerous auto parts suppliers from around the globe that targeted U.S. manufacturing, U.S. businesses and U.S. consumers. The cases filed to date involve conduct affecting over \$8 billion in auto parts sold to car manufacturers in the U.S. and parts used in more than 25 million cars purchased by American consumers. The multiple conspiracies charged in September affected U.S. automobile plants in 14 states: Alabama, California, Georgia, Illinois, Indiana, Kansas, Kentucky, Michigan, Mississippi, Missouri, Ohio, Tennessee, Texas, and Wisconsin. And as the Attorney General said in the recent announcement, our work in this area is not finished.

Cartels involving components of finished products are not unique to the auto industry. For example, the joint Antitrust Division/FBI investigation into LCD panels uncovered long-running price-fixing conspiracies that affected some of the largest computer manufacturers in the world, including Hewlett Packard, Dell and Apple. These conspiracies injured every family, school, business, charity and government agency that paid more for notebook computers, computer monitors and LCD televisions during the conspiracy. The conspirators fixed the prices of at least \$23.5 billion in panels that came into the United States, either as raw panels or incorporated in finished products. At last year's trial of AUO, one of the cartel ringleaders, the division's economic expert testified that the conspirators increased their margin by an average of \$53 for each and every flat panel the conspirators made over the course of four years. This figure demonstrates concretely the very real costs this price-fixing conspiracy imposed on American businesses and consumers. The division has obtained more than \$1.39 billion in criminal fines in this investigation.

In recent years we detected and prosecuted of number of cartels affecting shipping services. An increase in shipping prices can influence the prices of a wide array of goods. The division, with the assistance of the FBI, uncovered a number of conspiracies involving air cargo services affecting over \$20 billion in commerce, and the air cargo investigation led to the discovery of conspiracies involving freight forwarding services affecting over \$350 million in commerce, and air passenger transportation involving over \$4 billion in commerce. In the air cargo and freight forwarding conspiracies, various fees and surcharges were imposed on customers for shipments of goods to and from the U.S., including agreements on

the amount and timing of surcharges in the period before the Christmas holiday shopping season. We obtained total fines of over \$1.9 billion in the air transportation and freight forwarding investigations, coordinating with the Australian Competition and Consumer Commission, the European Commission, the New Zealand Commerce Commission, the U.K. Office of Fair Trading, the Japan Fair Trade Commission, the Brazilian competition agency, and other agencies. And, the division has an ongoing investigation into price fixing, bid rigging and other anticompetitive conduct in the coastal water freight transportation industry. So far, three companies and six individuals have pleaded guilty or have been convicted at trial, and have been ordered to pay more than \$46 million in criminal fines in a price-fixing conspiracy involving coastal freight services between the continental United States and Puerto Rico.

In addition, the division's investigation into bid rigging in municipal bonds markets has been conducted with the assistance of the FBI and Internal Revenue Service – Criminal Investigation, and also coordinated with other federal and state law enforcement agencies that have parallel investigations, including the U.S. Securities and Exchange Commission, the Office of the Comptroller of the Currency and the Federal Reserve Bank of New York, and a working group of 20 State Attorneys General. This investigation, like others, demonstrates how coordination of parallel investigations enhances our ability to identify and prosecute significant crimes. To date, a total of 20 individuals have been charged as a result of the department's ongoing municipal bonds investigation and 19 have been convicted or pleaded guilty, and one company has pleaded guilty. Those implicated have agreed to pay a total of nearly \$745 million in restitution, penalties, and disgorgement to federal and state agencies. Conspirators went to great lengths to defraud municipalities across the country, from soliciting intentionally losing bids for investment agreements to paying out kickbacks to manipulate the competitive bidding process. These actions deprived American towns and cities of competitive interest rates for the investment of tax-exempt bond proceeds used by municipalities for various public works projects, such as building or repairing schools, hospitals and roads, water pollution abatement projects, and low-cost housing, and to refinance outstanding debt. These complex, seemingly uninteresting backroom deals have a real impact on taxpayers, who should benefit from a municipal bond issue and are ultimately responsible for paying it off. In addition, corrupt bidding schemes serve to weaken the public's trust in the municipal bond market and prevent public entities from enjoying the benefits of a true competitive bidding process.

While large-scale international cartels can involve significant volumes of commerce, the FBI and the Antitrust Division are acutely aware that local or regional cartels also have the potential to significantly harm consumers. In local communities the division continues to uncover collusive schemes among real estate speculators aimed at eliminating competition at real estate foreclosure auctions. The division continues to investigate with the FBI and HUD inspectors general bid rigging and fraud in local real estate markets in Alabama, California, Georgia, and North Carolina. The division and FBI have uncovered patterns of misconduct through which conspirators worked together to keep public auction prices artificially low by making agreements not to bid against one another, instead designating a winning bidder to obtain selected properties at public real estate foreclosure auctions. Conspirators also conducted their own unofficial “knockoff” auctions open only to members of the conspiracy—often taking place at or near the courthouse steps where the public auctions were held—paying each other off and diverting money to co-conspirators that otherwise would have gone to pay off the mortgage and other holders of debt secured by the properties, and, in some cases, the defaulting homeowner. The division’s real estate foreclosure auction investigations have resulted in recent cases against 64 individuals and 3 companies. Altogether, these investigations have uncovered bid rigging and fraud on auctions involving more than 3,400 foreclosed homes, and have caused more than \$23 million in loss, primarily to mortgage holders. The division also has uncovered similar schemes involving public tax lien auctions, including an ongoing investigation of tax lien auctions in New Jersey that has resulted in guilty pleas from 11 individuals and three companies.

Conclusion

Together, the FBI’s and the Antitrust Division’s dedicated public servants are working hard to hold both corporations and individuals responsible for cartel behavior. American consumers are the beneficiaries of that dedication. We are 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.

PREPARED STATEMENT OF HOLLIS SALZMAN, PARTNER AND CO-CHAIR, ANTITRUST
AND TRADE REGULATION GROUP, ROBINS, KAPLAN, MILLER & CIRESI, L.L.P.

Prepared Statement of Hollis Salzman
Partner & Co-Chair, Antitrust and Trade Regulation Group
Robins, Kaplan, Miller & Ciresi, L.L.P.
On behalf of the Committee to Support the Antitrust Laws

Before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights

For a Hearing on: "Cartel Prosecution: Stopping Price Fixers and Protecting Consumers"

Thursday, November 14, 2013
Dirksen Senate Office Building, Room 226
2:30 p.m.

Chairman Klobuchar, Ranking Member Lee, and distinguished members of the Subcommittee, thank you for the opportunity to appear before you today. My name is Hollis Salzman, and I am a partner in the law firm of Robins, Kaplan, Miller & Ciresi L.L.P., appearing today on behalf of the Committee to Support the Antitrust Laws ("COSAL"). In 1986, COSAL was established to support the enactment, preservation and enforcement of a strong body of antitrust laws in the United States. It is the only organization in Washington, D.C. that is dedicated to lobbying for strong antitrust laws and effective private enforcement.

COSAL is pleased that the Subcommittee is examining a particularly important aspect of the enforcement of the antitrust laws – protecting consumers from the serious financial harm caused by price-fixing cartels.

More than a century ago, Congress passed a landmark United States antitrust statute, the Sherman Antitrust Act of 1890. The legislative history of the Act demonstrates that its main objective is to protect consumers from cartels or monopolies which destroy competition, thereby raising prices.¹ In order to do so, the Sherman Act has two main provisions, Section 1, restricting the formation of cartels and prohibiting other collusive practices regarded as being in restraint of trade, and Section 2, prohibiting the creation of a monopoly and the abuse of monopoly power.

The antitrust laws are vital to the health of our economy because price-fixing directly harms small businesses and consumers. In recent years, a number of large-scale empirical studies have examined the impact of cartel activity on prices and determined that cartel overcharges substantially raise prices. Antitrust scholars John M. Connor and Robert H. Lande conducted a meta-analysis of 1,517 estimates of cartel overcharges (or undercharges) in over 200 publications

¹ See 21 CONG. REC. 2460 (1980) (statement of Sen. Sherman) (arguing that trusts' cost savings "goes to the pockets of the producer"); *id.* at 2457 (statement of Sen. Sherman) ("[T]rusts tend to] advance the price to the consumer."); *id.* at 2558 (statement of Sen. Pugh) ("Trusts . . . [destroy] competition . . . and thereby increase prices to consumers . . .").

that analyzed cartels operating in 381 markets.² The median average cartel overcharge for all types of cartels and time periods was 23.3%.

I am here today to make three recommendations for the enhanced enforcement of the United States antitrust laws. First, it would greatly benefit consumers bringing private follow-on antitrust actions if Congress were to give more direction on the timing of cooperation with civil litigants needed for cartel defendants to receive leniency under the Division's Corporate Leniency Program. Second, Congress should pass legislation approving a recovery mechanism for antitrust whistleblowers to complement the recently passed Criminal Antitrust Anti-Retaliation Act of 2013, which provides anti-retaliatory protections for such whistleblowers. Third, it is imperative that the government adequately fund the Department of Justice's Antitrust Division so that it may continue to aggressively prosecute cartel conduct.

As to the first point, for decades, the Division and private litigants have worked together to prevent anticompetitive conduct that harms consumers by bringing criminal and civil actions against members of price-fixing cartels. Private damages actions are the primary means by which consumers obtain restitution for the damages they suffer because of anticompetitive cartel activity and courts have noted that such actions are in fact the superior method for consumers to obtain restitution.³ While the courts express a preference for civil litigants to seek restitution, attempts by private plaintiffs to do so are often thwarted by the current ambiguity in the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA"), which does not define the type of timely cooperation that is needed by cartel defendants to qualify for corporate leniency.

Cartelists are incentivized to apply for leniency because, through ACPERA, they have the potential to significantly limit their liability in private damages actions. Specifically, ACPERA allows an amnesty applicant to limit its liability in follow-on civil actions to actual damages, but only if the applicant provides "satisfactory cooperation" to civil plaintiffs.⁴ Unfortunately – even with the 2010 amendments – ACPERA only provides vague guidance on the timeliness of satisfactory cooperation. And as we near ACPERA's tenth anniversary, there is an absence of caselaw interpreting how timely an amnesty applicant's cooperation must be to be considered satisfactory under ACPERA. Amnesty applicants have at times taken advantage of this uncertainty to delay cooperating with plaintiffs in follow-on civil litigation until a point in time at which their cooperation is no longer helpful.⁵ For the statute to provide meaningful assistance to private enforcement of the antitrust laws, we request that the statute be amended to require satisfactory cooperation at the earliest possible opportunity. More direction from Congress as to

² John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 CARDOZO L. REV. 427, 456-57 (2012).

³ See, e.g., Guilty Plea and Sentencing Hearing at 22:4-9, *United States v. TRW Deutschland Holding GmbH*, Case No. 2:12-cr-20491-GCS-PJK (E.D. Mich. Sept. 25, 2012) ("As it relates to the question of restitution, the Court is satisfied, given the considerable civil litigation that has already begun in relation to these violations and will likely continue, that the . . . civil forum is a better place to establish the amount of the recovery to be had by way of restitution . . .").

⁴ ACPERA, Pub. L. No. 108-237, §213(b), 118 Stat. 665, 666 (codified as amended at 15 U.S.C. § 1 note).

⁵ See, e.g., *In re Aftermarket Auto. Lighting Prods. Antitrust Litig.*, No. 09 MDL 2007-GW(PJWx), 2013 U.S. Dist. LEXIS 125287 (C.D. Cal. Aug. 26, 2013) (finding defendants not entitled to the damages-limiting benefits of ACPERA because they did not disclose all relevant information to civil class action plaintiffs in a timely fashion).

what constitutes timely cooperation would greatly assist private litigants who need this information in order to obtain appropriate restitution.

As to the second point - we commend the Senate for unanimously passing the Criminal Antitrust Anti-Retaliation Act, which extends whistleblower protection to employees who provide information to the Division related to criminal antitrust violations. However, we respectfully request that the Senate revisit its decision to omit the availability of a financial recovery to whistleblowers in antitrust actions. As you are undoubtedly aware, the current statute does not offer financial incentives to employees who report cartel activity. Although the Government Accountability Office ("GAO") recently examined this issue and declined to recommend the addition of a financial recovery to antitrust whistleblowers, many of its reasons for doing so would apply equally to all of our whistleblower statutes that include similar provisions. For example, the GAO was persuaded by the Division's concern that jurors in its criminal cases might question the credibility of a witness who stands to benefit financially from a successful enforcement action. However, the same concern would apply to other whistleblower statutes that in other areas of the law are already considered valuable tools in the government's efforts to uncover unlawful conduct. And contrary to the position of some critics, who argued a recovery mechanism could hinder government enforcement of the antitrust laws, a recovery mechanism is likely to complement, not hinder, the Division's Corporate Leniency Program. A rewards program would motivate employees to report illegal cartel conduct, and consequently, further incentivize companies to implement rigorous compliance programs to avoid being the subject of a whistleblower claim and related government enforcement proceeding.

Finally, we applaud the Division's continued and ongoing efforts to prevent and prosecute cartels that harm consumers through anticompetitive overcharges. Even during this recession, we've seen unprecedented cartel enforcement by the Division. This year has been a banner year for the Division, collecting for the US Treasury over \$1 billion in criminal antitrust fines. For example, in the ongoing international auto parts investigation, described by the Division as the "largest criminal investigation [it] has ever pursued, both in terms of its scope and the potential volume of commerce affected," the Division has criminally charged twenty-one companies and twenty-one executives and levied over \$1.6 billion in fines. And in the recent investigation into the liquid crystal display panel ("LCD") price-fixing cartel, the Division obtained convictions against ten companies and criminal fines totalling \$1.39 billion.

The Division's efforts to detect and prosecute the cartels in the global automotive parts and LCD industries exemplify how vigorous enforcement of the antitrust laws protects consumers; for most Americans, cars, computers and televisions are essential purchases and necessities of everyday life. In these tough financial times, the Division needs more, not less funding, to support its efforts to protect consumers, who may already be struggling from antitrust violations and other financial constraints. Increased funding for the Division should garner bipartisan support not only because the Division's enforcement of the antitrust laws protects consumers from unlawfully inflated cartel prices, but because the investment pays for itself by allowing the Division to collect enhanced fines from price-fixers.

In conclusion, we believe implementation of these three recommendations could substantially increase the effectiveness of the current antitrust regime in protecting consumers from the

harmful effects of price-fixing. Clarification on the timeliness of an amnesty applicant's obligation to cooperate with civil plaintiffs in follow-on antitrust actions, a recovery mechanism for antitrust whistleblowers, and increased funding for the Department of Justice's Antitrust Division are all measures which will increase the government's and private plaintiffs' ability to detect, deter, and obtain restitution for, cartel activity.

Thank you again for the chance to appear before you today. COSAL welcomes your interest in these matters, and looks forward to working with members of the Subcommittee and others in Congress to address the issue of how to best enforce the United States antitrust laws to protect consumers from the substantial financial injury caused by price-fixing.

PREPARED STATEMENT OF CHRISTOPHER B. HOCKETT, CHAIR, SECTION ON ANTITRUST
LAW, AMERICAN BAR ASSOCIATION, AND PARTNER, DAVIS POLK & WARDWELL,
L.L.P., MENLO PARK, CALIFORNIA

STATEMENT OF

CHRISTOPHER B. HOCKETT

ON BEHALF OF THE

AMERICAN BAR ASSOCIATION

SECTION OF ANTITRUST LAW

before the

SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND

CONSUMER RIGHTS

of the

COMMITTEE ON THE JUDICIARY

of the

UNITED STATES SENATE

concerning

U.S. CARTEL ENFORCEMENT

November 14, 2013

Good afternoon Chairman Klobuchar, Senator Lee, and members of the Subcommittee.

My name is Christopher Hockett, and I am a partner at Davis Polk & Wardwell LLP in Menlo Park, California. I am also the current Chair of the Section of Antitrust Law of the American Bar Association (“Antitrust Section”) and, as such, I have been duly authorized to testify on behalf of the Antitrust Section. The views expressed in the Section’s comments and in this testimony were approved by the Council of the Section of Antitrust Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

Thank you for inviting me to testify before you today concerning U.S. cartel enforcement. Today I will focus on several key aspects of cartel enforcement:

- The Antitrust Division’s consistent and successful efforts to investigate and prosecute cartels, and the need for adequate resources to support those efforts going forward;
- The importance of international outreach and cooperation to promote enforcement and encourage fair treatment and due process across jurisdictions;
- The use of investigative techniques to complement the Division’s successful Corporate Leniency Policy; and
- The merit of the Division’s new policy concerning the identification of employees who are carved out of corporate plea agreements.

I. THE ANTITRUST SECTION SUPPORTS THE DIVISION’S CONSISTENT APPROACH TO VIGOROUS CARTEL ENFORCEMENT

Over the past thirty or more years, the U.S. Department of Justice, Antitrust Division (the “Division”) has devoted considerable resources to cartel enforcement. In the early years of the Clinton administration, the Division meaningfully strengthened its Corporate Leniency Program, which led to increased detection of cartels, and enhanced enforcement efforts against international cartels, which have the potential for substantial harm to U.S. consumers in light of an increasingly global economy. Despite many changes in the Division leadership, including through the Clinton, Bush and Obama administrations, the Division has consistently targeted

cartel behavior with highly successful results. There has been little dispute across the political spectrum that cartel enforcement is a top enforcement priority and that it benefits consumers and the U.S. economy. The Antitrust Section therefore supports the continued efforts of the Division in actively investigating and prosecuting cartel conspiracies that injure U.S. consumers.

In the 1990s, then-Assistant Attorney General Anne K. Bingaman explained that the enactment and progressive strengthening of the Sherman Act's criminal provisions "has been a bipartisan objective of the United States Congress."¹ She noted further that the "Division's criminal enforcement program is fundamentally nonpartisan and bipartisan," fostering "great continuity from one Administration to another."² Over a span of decades, no President, Attorney General, or Assistant Attorney General has expressed the slightest doubt or hesitation about strong anti-cartel enforcement as a good policy that should be maintained.

The Division's cartel enforcement efforts received a substantial boost in effectiveness from three key developments in the early 1990s. First, the Division substantially strengthened its Corporate Leniency Program. That program was originally implemented in 1978 but was little used until 1993, when the Antitrust Division made it more transparent and increased the opportunities and raised the incentives for companies to report criminal activity and cooperate with the government.³ Second, in 1993, the Division reallocated resources to concentrate enforcement efforts on national and international cartels "that involve large amounts of

¹ Anne K. Bingaman, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, The Clinton Administration: Trends in Criminal Antitrust Enforcement, Remarks Presented Before the Corporate Counsel Institute 5 (Nov. 30, 1995), available at <http://www.justice.gov/atr/public/speeches/0471.htm>.

² *Id.*

³ Scott D. Hammond, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades, Remarks Presented at the 24th Annual National Institute on White Collar Crime 2 (Feb. 25, 2010), available at <http://www.justice.gov/atr/public/speeches/255515.htm> (characterizing the program between 1978 and 1993 as "rarely utilized," yielding "on average only about one leniency application per year," and involving "[n]o leniency application . . . [that] resulted in the detection of an international or large domestic cartel").

commerce and affect great numbers of businesses and customers.”⁴ Ms. Bingaman remarked in 1995 that “[c]riminal enforcement against the most serious antitrust offenses has been, and remains, [the Division’s] core mission.”⁵ This focus has been consistently maintained from the administration of President Clinton, under which Ms. Bingaman served, to those of Presidents Bush⁶ and Obama.⁷

Third, the Division secured significantly higher fines both through legislative initiatives, which increased the maximum corporate fine from \$1 million to \$10 million to \$100 million, and the use of the Alternative Fining statute that permits “double-the-gain” or “double-the-loss” fines, which has enabled fines as high as \$500 million. Similarly, Congress increased the maximum prison term for criminal antitrust violations from three to ten years. These higher fines and prison terms have increased incentives for cooperation under the Leniency Program.

Under the revised Leniency Program, the Clinton, Bush and Obama administrations have each seen substantial increases in the number of leniency applicants and “a steady trend toward higher corporate fines for cartel offenses and longer jail sentences for individuals.”⁸ Along the way, notable developments in cartel enforcement have included the implementation of the “Amnesty Plus” policy, pursuant to which a party already subject to investigation with respect to

⁴ Bingaman, *The Clinton Administration: Trends in Criminal Antitrust Enforcement*, at 1.

⁵ *Id.* at 4.

⁶ See R. Hewitt Pate, Acting Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, *Anti-Cartel Enforcement: The Core Antitrust Mission*, Remarks Before the British Institute of International and Comparative Law 1 (May 16, 2003), *available at* <http://www.justice.gov/atr/public/speeches/201199.htm> (noting his belief that the “most important . . . work of the Antitrust Division” is “[o]ur sustained law enforcement effort against cartels, domestic and international”); Scott D. Hammond, Acting Deputy Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, *An Overview of Recent Developments in the Antitrust Division’s Criminal Enforcement Program*, Remarks Before the American Bar Association Midwinter Leadership Meeting 1 (Jan. 10, 2005), *available at* <http://www.justice.gov/atr/public/speeches/207226.htm> (“The detection, prosecution, and deterrence of cartel offenses is the highest priority of the Antitrust Division.”).

⁷ See Hammond, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, at 5 (“The Antitrust Division’s sentencing statistics over the last two decades show a steady trend toward higher corporate fines for cartel offenses and longer jail sentences for individuals.”).

⁸ See *id.* at 4-5.

Product A may receive leniency regarding Product B and a discount on the fine paid under a plea on Product A. Congress also passed the Antitrust Criminal Penalty Enhancement and Reform Act (“ACPERA”), which increased incentives for cartelists to come forward by eliminating treble damages and joint and several liability from civil damage claims for parties that receive leniency.⁹

The Leniency Program in its current form is integral to the Division’s enforcement efforts. Over 90% of the more than \$5 billion in fines imposed for antitrust crimes from the mid-1990s to early 2010 resulted from investigations involving leniency applicants.¹⁰ For FY 2012, the Division broke new records in the amount of total fines, and number and length of prison sentences in criminal antitrust prosecutions, and for FY 2013 it almost matched those record levels, again exceeding a billion dollars in fines.¹¹ Included in these figures was a cartel investigation that went to trial and resulted in a \$500 million corporate fine that “matches the largest fine ever imposed against a company for violating the U.S. antitrust laws.”¹² Additionally, prison sentences imposed on individuals for antitrust violations increased by more than three times the average and were imposed on roughly twice the number of defendants, compared to those in the 1990s.¹³ These figures demonstrate that cartel enforcement has remained vigorous and nonpartisan across administrations, and there is no reason to doubt that the Division will continue its vigilant enforcement against cartels in the years to come.

⁹ Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, Title 2, § 215(a), 118 Stat. 661.

¹⁰ See Hammond, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, at 3.

¹¹ William J. Baer, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, *Division Update Spring 2013: Criminal Program*, available at <http://www.justice.gov/atr/public/division-update/2013/criminal-program.html>.

¹² *Id.* (reporting on the prosecution of AU Optronics Corporation in the Northern District of California in 2012).

¹³ *Id.*

However, the ability of the Antitrust Division to build upon its successes in rooting out cartels and protecting consumers is naturally constrained by the resources that are available to it. At a time when cartel enforcement is growing in complexity and scope, domestically and internationally, the Division's need for resources is similarly expanding. Yet, in the midst of the auto parts investigation (the largest the Division has ever undertaken) and other major ongoing investigations, the number of cartel enforcers at the Division has dropped by one-third after closure of four field offices and imposition of a hiring freeze. Effective continued enforcement requires significant resources, especially given the fact-intensive and global nature of many of these investigations. Therefore, the Antitrust Section encourages the Government to carefully evaluate and consider increased funding and staffing for the Division's cartel enforcement efforts.

II. **THE ANTITRUST SECTION SUPPORTS CONTINUED U.S.-LED EFFORTS IN INTERNATIONAL OUTREACH AND COOPERATION TO ENSURE THAT PARTIES ARE AFFORDED FAIR TREATMENT AND DUE PROCESS GLOBALLY**

The Antitrust Section strongly supports the efforts of the Division to cooperate with other international enforcement agencies on cartel enforcement, and in particular to encourage the consistent application of fair and reasonable investigative, administrative and judicial procedures related to cartel enforcement. Moreover, it is critical that the Division continue to lead by example by ensuring that foreign corporations and foreign nationals prosecuted in the U.S. receive full due process and fair treatment.

The Division states that its international initiatives "aim to bring greater cooperation and convergence to international antitrust enforcement . . . by facilitating international discussion of important issues, building bilateral and multilateral relationships, and learning how best to

coordinate investigations and remedies.”¹⁴ To this end, the U.S. has entered into antitrust cooperation agreements with several jurisdictions, including Australia, Brazil, Canada, China, the EU, and, most recently, with India in 2012, in recognition that effective enforcement of the U.S. antitrust laws requires cooperation and coordination with international agencies.¹⁵ The Division actively participates in multilateral organizations, such as the International Competition Network (“ICN”) (where it co-leads a subgroup of the Cartel Working Group), the Competition Committee of the OECD, and the United Nations Conference on Trade and Development (“UNCTAD”). The Division also has intensified its outreach recently through the Visiting International Enforcers Program.¹⁶

The U.S. has been a leader in international outreach and cooperation to ensure that parties are afforded fair treatment and due process globally. Three areas in which due process and fair treatment are especially relevant are the coordination of investigations, the transparency for parties involved in competition proceedings, and the determination of penalties.

Because cartels often affect many markets worldwide, it is routine for the Division to cooperate with other jurisdictions in investigating global cartels. For example, the Division recently announced that nine Japan-based companies and two executives agreed to plead guilty and to pay a total of more than \$740 million in criminal fines for their roles in separate conspiracies to fix the prices of more than thirty different products sold to U.S. car manufacturers and installed in cars sold in the United States and elsewhere. This plea agreement

¹⁴ U.S. Dep’t of Justice, Antitrust Div., International Program, *available at* <http://www.justice.gov/atr/public/international/index.html>.

¹⁵ U.S. Dep’t of Justice, Antitrust Div., Antitrust Cooperation Agreements, *available at* <http://www.justice.gov/atr/public/international/int-arrangements.html>.

¹⁶ Rachel Brandenburger, Special Advisor, Int’l, Antitrust Div., U.S. Dep’t of Justice, Intensification of International Cooperation: The Antitrust Division’s Recent Efforts, Remarks as Prepared for the American Chamber of Commerce (Feb. 17, 2012), *available at* <http://www.justice.gov/atr/public/speeches/281609.pdf>.

involved coordination with the Japanese Fair Trade Commission, the European Commission, Canadian Competition Bureau, Korean Fair Trade Commission, Mexican Federal Competition Commission and Australian Competition and Consumer Commission.

Enforcement agencies can coordinate in a variety of ways, including by: (1) sharing information about investigations; (2) obtaining appropriate waivers and sharing business information; (3) sharing substantive theories of harm; (4) coordinating dawn raids, searches, interviews, document demands and remedies; and (5) coordinating the timing of investigations or decisions.¹⁷ International coordination of investigations may contribute to ensuring procedural fairness for parties through, for instance, protecting the parties' rights to determine when and which information and documents can be transferred between agencies of different countries and reducing the likelihood of arbitrary enforcement decision-making. Such coordination may also help avoid unnecessary burdens and expenses for both the enforcers and the parties.

The Division has also previously recognized the importance of procedural fairness and transparency in investigative, administrative and judicial procedures, a dialogue that has taken place in the OECD.¹⁸ Without such cooperation, the potential for conflicting outcomes and material differences in procedure will be greater. Transparency is also important for multinational corporations to understand the various antitrust and competition laws that apply to them and how their conduct should be shaped to comply with these laws.

The Antitrust Section applauds the efforts of the Division and other enforcement agencies to continue a dialogue on the appropriate remedies in international cartel cases. At present, the fines and other sanctions for cartel violations vary substantially across the world. The United

¹⁷ See OECD, Competition Committee, Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation (2013), at 72.

¹⁸ Christine A. Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, International Cooperation: Preparing for the Future, Remarks as Prepared for the Fourth Annual Georgetown Law Global Antitrust Enforcement Symposium (Sept. 21, 2010), *available at* <http://www.justice.gov/atr/public/speeches/262606.htm>.

States, with criminal sanctions, including the prosecution of individuals, and the European Union, with its high corporate fines, are typically recognized as having the most robust penalties for cartel behavior. However, other jurisdictions are seeking to pursue cartels with increased vigor, and accordingly to impose harsher penalties than before. The Antitrust Section encourages the Division and agencies in other jurisdictions to consider the extent to which penalties imposed on the same behavior by multiple authorities may result in “double counting” or excessive and unreasonable fines, especially when considered in light of follow-on civil damages actions. Moreover, to the extent that enhanced cartel penalties and criminal enforcement regimes further expand internationally, there is increased risk that U.S. businesses operating abroad could face severe sanctions without the benefit of due process protections that are well-established under U.S. law. The Antitrust Section strongly supports any effort by the Division to encourage other jurisdictions to increase transparency and due process in the administration of sanctions for cartel behavior, and encourages the Government to monitor and ensure appropriate funding for this important international engagement and dialogue.

III. THE ANTITRUST SECTION SUPPORTS THE CONTINUED USE OF A VARIETY OF INVESTIGATIVE TECHNIQUES TO COMPLEMENT THE SUCCESS OF THE DIVISION'S CORPORATE LENIENCY PROGRAM

Leniency is now the most important tool that the Division and many other competition agencies use to detect cartels.¹⁹ Despite the considerable success of leniency programs such as the Division's, however, there exist other tools for detecting cartels. Leniency is a "reactive detection" tool in that it relies on those who have committed cartel violations to come forward and admit their crimes. Alternatively, competition agencies may use certain "proactive detection" efforts by which the agencies may investigate markets to uncover suspected cartels. The use of these tools, if viewed as effective for detecting cartels, can also complement leniency programs. As the Division has noted, a "prerequisite to building an effective amnesty program is instilling a genuine fear of detection."²⁰

The Division has long encouraged the public to bring complaints and leads regarding suspected cartel activities to its attention. In addition, it has also conducted outreach and training for procurement organizations to assist them in identifying and reporting "red flag" bidding behaviors indicative of potential cartels. Another potential tool is a "screen," defined as a "statistical test based on an econometric model and a theory of the alleged illegal behavior, designed to identify whether collusion, manipulation or any other type of cheating may exist in a particular market, who may be involved, and how long it may have lasted."²¹ In short, a screen is a data-driven methodology that in theory could assist competition agencies in determining in

¹⁹ OECD, Directorate for Financial and Enterprise Affairs, Competition Committee, Background Note by the Secretariat: Roundtable on Ex Officio Cartel Investigations and the Use of Screens to Detect Cartels (Oct. 23, 2013), at 4.

²⁰ Scott D. Hammond, Director of Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, Cornerstones of an Effective Leniency Program, presented before the ICN Workshop on Leniency Programs 9 (Nov. 22-23, 2004), available at <http://www.justice.gov/atr/public/speeches/206611.pdf>.

²¹ OECD, Directorate for Financial and Enterprise Affairs, Competition Committee, Paper by Rosa Abrantes-Metz: Roundtable on Ex Officio Cartel Investigations and the Use of Screens to Detect Cartels (Oct. 23, 2013).

which industries cartels are more likely to arise and in detecting possible cartel conduct. However, screens should be approached with caution because they often yield false positives.²² A screen may be unable to distinguish between illegal cartel conduct and perfectly legal oligopoly behavior or tacit collusion, or it may be faulty due to the inability to capture relevant variables.²³ Based on a screen's false positive, a competition agency may then decide to seek further information about the possible cartel conduct through an in-depth investigation in the relevant industry. The resulting investigation would waste scarce agency resources and divert them away from what could be more effective investments, such as the Division's Leniency Program.²⁴ Investigations of false positives would also burden companies and employees required to cooperate with the Division's investigation and produce documents, data and other information, as well as incurring substantial legal and other costs from the investigation.

The Division's efforts in the late 1970s to reorient its enforcement policy to rely on market structure screens to detect cartels resulted in expensive investigations that ultimately did not lead to any cartel prosecutions.²⁵ Although it is possible that the Division may now be able

²² See OECD, Background Note by the Secretariat: Roundtable on Ex Officio Cartel Investigations and the Use of Screens to Detect Cartels at 5.

²³ There may be instances where a screen can distinguish between cartel conduct and tacit collusion, but the issue is again, whether such methods are ultimately reliable. See Rosa M. Abrantes-Metz & Albert D. Metz, How Far Can Screens Go in Distinguishing Explicit from Tacit Collusion? New Evidence from the Libor Setting, *CPI Antitrust Chronicle*, Vol. 1 (Mar. 2012) (the authors attempted to distinguish between such behavior by applying screens to evidence from Libor).

²⁴ See OECD, Directorate for Financial and Enterprise Affairs, Competition Committee, Paper by William E. Kovacic: Roundtable on Ex Officio Cartel Investigations and the Use of Screens to Detect Cartels (Oct. 24, 2013) at 5 (noting that "a reallocation of resources to proactive screens can seem to be an inferior investment of enforcement agency effort").

²⁵ See OECD, Directorate for Financial and Enterprise Affairs, Competition Committee, Note by the United States: Roundtable on Ex Officio Cartel Investigations and the Use of Screens to Detect Cartels (Sept. 27, 2013) at 7 (discussing the Division's prior experience with use of screens and noting "those methods did not produce solid leads for cartel investigations"); see also OECD, Paper by William E. Kovacic: Roundtable on Ex Officio Cartel Investigations and the Use of Screens to Detect Cartels at 6 (citing Marc Allen Eisner, *ANTITRUST AND THE TRIUMPH OF ECONOMICS* 148-149 (1991)).

to use screens more effectively, it bears repeating that caution is warranted in light of the potential costs for the Division and the downsides of false positives.

The Antitrust Section thus supports the continued use of a variety of techniques to develop investigative leads for cartel enforcement, but cautions against techniques that would unnecessarily burden companies or drain scarce enforcement resources.

IV. THE ANTITRUST SECTION APPLAUDS THE CHANGE IN THE PUBLIC CARVE-OUT POLICY ANNOUNCED BY ASSISTANT ATTORNEY GENERAL BILL BAER

A company may, through a plea agreement with the Division, negotiate immunity for current and former employees. However, the Division may insist that certain employees be excluded, or “carved out,” from these agreements. Prior examples of such employees were (1) those who refused to cooperate with the Division’s investigation, (2) employees whom the Division was still investigating, and (3) employees who could not be found but were believed to have information that could be relevant to the investigation. Until recently, the Division’s corporate plea agreements, which are publicly filed in federal court, included the names of these carved-out employees.²⁶

On April 12, 2013, Assistant Attorney General Bill Baer announced that the Division would be implementing two changes to its carve-out policy.²⁷ First, the Division will continue to carve out employees who it has reason to believe were involved in criminal wrongdoing and who are potential targets of the Division’s investigation. However, the Division will no longer carve out employees for reasons unrelated to culpability. Second, the Division will no longer include the names of carved-out employees in the plea agreements filed with the court. Instead, the

²⁶ U.S. Dep’t of Justice, Press Release, Statement of Assistant Attorney General Bill Baer on Changes to Antitrust Division’s Carve-out Practice Regarding Corporate Plea Agreements, (Apr. 12, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/295747.htm.

²⁷ *Id.*

names will appear in an appendix, which the Division will ask the court for leave to file under seal. The Division has now implemented this policy, and courts have granted the motions to file the carved-out names under seal.

The Antitrust Section strongly supports this change in the public carve-out policy, and agrees with the statement by Assistant Attorney General Bill Baer that “[a]bsent some significant justification, it is ordinarily not appropriate to publicly identify uncharged third-party wrongdoers.”²⁸

V. **CONCLUSION**

In sum, the Antitrust Section strongly supports the position that cartels are anticompetitive and harm consumers, and that the Division should continue its policy of prioritizing cartel detection, prosecution and deterrence. The Antitrust Section recognizes that cartel enforcement has remained consistent across administrations, and applauds the success of the Division’s Leniency Program, and the Division’s continued efforts to engage in outreach and cooperation with cartel enforcers around the world. The Government should closely monitor performance in this area to ensure that the Division is given adequate resources to maintain its leadership position in the fight against cartels. The Antitrust Section appreciates the opportunity to appear before the Subcommittee to discuss this important issue of U.S. antitrust law, and I look forward to your questions.

²⁸ *Id.*

PREPARED STATEMENT OF MARGARET C. LEVENSTEIN, RESEARCH SCIENTIST, INSTITUTE FOR SOCIAL RESEARCH, ADJUNCT PROFESSOR OF BUSINESS ECONOMICS AND PUBLIC POLICY, ROSS SCHOOL OF BUSINESS, UNIVERSITY OF MICHIGAN, ANN ARBOR, MICHIGAN

Testimony by Margaret C. Levenstein, University of Michigan

To

Senate Committee on the Judiciary

Subcommittee on Antitrust, Competition Policy and Consumer Rights

On

“Cartel Prosecution: Stopping Price Fixers and Protecting Consumers”

Thursday, November 14, 2013

Thank you, Senator Klobuchar and other members of the Committee, for inviting me to speak to you today.

Cartels can and do have a significant negative impact on consumers and competition. My research with Valerie Suslow has shown that cartels do last – perhaps not forever – but on average 7-10 years, a duration that is comparable to the lifespan of the average U.S. business.¹ Cartels may fall apart, but not so quickly that we can ignore the very real impact that they have on consumers and competition. While economists, being economists, differ on exact estimates of the impact of cartels on product pricing, it is clear that cartels, where successful, can raise

¹ Margaret C. Levenstein and Valerie Y. Suslow, “What Determines Cartel Success” *Journal of Economic Literature* 2006 44(1), pp. 51-52, and “Breaking Up Is Hard to Do: Determinants of Cartel Duration,” *Journal of Law and Economics* 2011 54(2), pp. 463-5, 468-9.

prices substantially.² That they raise profits is clearly evidenced by the length firms go to in order to maintain collusion despite the penalties for doing so.

Cartels do not simply harm consumers by increasing prices. To survive, cartels must prevent other firms from taking advantage of the profit opportunity created by high prices. When prices and profits are high, other firms will attempt to enter the market. To survive and protect their profits, cartels must create barriers to entry. Some of these barriers to entry will not endure over time. But if you are a firm who attempts to enter an industry and is denied access to technology, as happened to a firm in the graphite electrodes cartel, or denied access to customers, as happened to a manufacturer of sewing needles, or faced with a targeted price war, as a firm trying to sell steel pipe was, then your impact on the market will be stymied and the cartel's price will be maintained. It won't matter to you that some other firm, perhaps with deeper pockets, manages to wear the cartel down some years later.³

The Antitrust Division of the U.S. Justice Department has had a consistent and strong anti-cartel enforcement policy for the last twenty years. But we continue to discover a steady stream of cartels, including cartels that have formed since the adoption of more consistent and aggressive

² See Levenstein and Suslow, "Cartels and Collusion - Empirical Evidence" forthcoming in *Oxford Handbook on International Antitrust Economics* Connor, for a review of cartel effects on price. Available at SSRN: <http://ssrn.com/abstract=2182565>.

³ For details on the graphite electrodes restrictions on sharing of technology, see, Levenstein and Suslow "Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy," *Antitrust Law Journal*, 2004 71:3, p. 840. For details on the sewing needle cartel's restrictions on access to customers, see, Levenstein and Suslow, "How Do Cartels Use Vertical Restraints? Reflections on Bork's Antitrust Paradox and Twenty-first Century Cartels," *Journal of Law and Economics*, forthcoming. For details on targeted price wars by the steel pipe cartel, see *Journal of Law and Economics*, 2011 p. 470.

amnesty and leniency policies. And we see recidivism – firms that are caught and fined and should have learned better, who are caught again.⁴

This suggests that existing penalties are not yet sufficient to deter collusion.⁵ Fines that are large enough to deter collusion are probably so large that they would bankrupt firms, undermining rather than strengthening competition. This is especially true given the profitability of collusion and the uncertainty of detection. Large fines are important, as large fines are what get shareholders' pocketbooks and attention. Firm owners must fear prosecution if they are to have the incentive to establish appropriate corporate governance that includes rigorous internal antitrust compliance policies. But we need smarter, not simply larger, penalties. The Division's policy of using jail terms provides a much more effective deterrent to the individual executives and managers who are active players in the cartel. Two other potential remedies that have been used less and that should be used more are: (1) regulation or prohibition of future activities in the industry by convicted executives who have shown themselves willing and able to participate in criminal activity against consumers⁶, and (2) increased scrutiny of mergers and acquisitions by firms that have been involved in collusive activity. We do not want to break up a cartel only to allow the industry to reorganize and consolidate, simply creating a merged firm as a more durable cartel form.⁷

⁴ For documentation of recidivism, see Levenstein and Suslow, "Constant Vigilance: Maintaining Cartel Deterrence During the Great Recession," *Competition Policy International*, v. 6:2, Autumn 2010, p. 153.

⁵ See John Connor and Robert Lande, "How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines," *Tulane Law Review* 2005, 80, 513.

⁶ See D. Daniel Sokol, "Cartels, Corporate Compliance and What Practitioners Really Think About Enforcement," *Antitrust Law Journal*, 2012, 78, 201-240.

⁷ See, for example, a speech by FTC Commissioner J. Thomas Rosch: "A similar issue arises when a former cartel member enters bankruptcy proceedings. The priority of bankruptcy courts is to take actions that preserve the value of the firm's assets to its debtors. This presumption can lead to anticompetitive industry reorganization. The DOJ and the FTC have intervened in bankruptcy proceedings with mixed success. For example, in the aftermath of

It is important to remember that while private, civil action increases the financial penalties resulting from collusion beyond what criminal fines can do, private action is limited in its ability to deter collusion for two reasons. First, as I have said, there is a limit on the size that fines can reach before they become counter-productive. More importantly, private action, by itself, rarely discovers new cartels or instances of collusive behavior. Private citizens and companies do not have the same investigative and discovery tools as the U.S. government. Civil actions can reinstate fairness for consumers, but it is extremely unlikely that small customers are going to discover that they are the victim of collusion through civil action. Thus, civil penalties for private actions are a useful complement to effective enforcement – working side-by-side with criminal enforcement – but such penalties are not a substitute.

The Antitrust Division's use of amnesty and leniency for the first firm who confesses to participation in a cartel and provides evidence against the cartel has been highly effective at identifying and ending a large number of cartels, particularly international cartels that had previously considered themselves outside the scope of enforcement. These prosecutions are important in that they highlight the continuing, and often strikingly blatant, anticompetitive conduct that was considered normal business practice. Cartels have been found in many different products and they affect consumers in industry, agriculture, financial services, and the

the prosecutions related to the graphite electrodes cartel, the Carbide/Graphite Group filed for Chapter 11 bankruptcy protection. The DOJ filed an antitrust lawsuit to prevent SGL, a co-conspirator in the cartel, from acquiring Carbide/Graphite Group. The bankruptcy court judge awarded the assets of Carbide/Graphite Group to another company and the DOJ dismissed its lawsuit. In a more recent case that did not involve prior collusion, the FTC was unable to convince a bankruptcy judge to slow the march of bankruptcy proceedings sufficiently to protect the interests of consumers." "Implications of the Financial Meltdown for the FTC" quoted in Levenstein and Suslow, "Constant Vigilance: Maintaining Cartel Deterrence During the Great Recession," *Competition Policy International*, 6: 2, Autumn 2010, p. 154.

public sector. These cartels have been found in a wide variety of industries, including ones that are technologically dynamic, like computer chips and flat panel screens. Technological dynamism does not make an industry immune to collusion.

The very success of the Division's antitrust and leniency policies creates another issue.

Amnesty and leniency cases still require resources. Unless resources for effective prosecution are expanded, amnesty and leniency cases can crowd out the resource-intensive investigations that are necessary for discovering cartels. There is a lot of money at stake for colluding firms, so it is worth it to firms to try to hide what they are doing and to develop new and evermore sophisticated ways of doing so. That means it takes real resources on the part of investigators to discover collusion.

There are things that investigators can do besides wait for confessions or calls from whistleblowers. We have made important advances in using statistical techniques to identify collusive activity. These screening techniques highlighted the high likelihood that LIBOR rates were being set collusively three years before the nature of the activity of participating banks was reported by the *Wall Street Journal*.⁸ Novel techniques in scraping the web and analyzing web-based communication could be used to discover "invitations to collude" such as those that were at the center of the U-Haul case.⁹ Intra-industry swaps, which have legitimate business

⁸ Rosa Abrantes-Metz, Luke M. Froeb, John F. Geweke, and Christopher Taylor, "A Variance Screen for Collusion," *International Journal of Industrial Organization*, 24 (2006), 467–486, available on line December 2005, and C. Mollenkamp and M. Whitehouse, "Study casts doubt on key rate; WSJ analysis suggests banks may have reported flawed interest data for LIBOR," *Wall Street Journal* (May 29, 2008), A1.

⁹ "[I]n response to U-Haul's actions from 2006 through 2008 to raise market prices, including announcements made during a 2008 quarterly earnings conference call, the FTC and U-Haul agreed that U-Haul would refrain from '[c]ommunicating, publicly or privately, to any Person who is not an Insider, that Respondents are ready or willing . . . to raise, fix, maintain, or stabilize prices or price levels, rates or rate levels, conditional upon a Competitor also raising, fixing, maintaining, or stabilizing prices or price levels, rates or rate levels.'" *Competition Policy International* 2010, p. 152.

purposes but which are also used by cartels to adjust output to meet cartel quotas, could be investigated. There are activities which we know cartels use to sustain collusion and hide collusion. With suitable resources the Division (or the FTC) could detect these activities and determine when they are being used to undermine competition.

The Division and the FTC could and should put also resources into identifying highly concentrated market niches. Many of the cartels that have been discovered in the last twenty years operate in markets that are extremely concentrated. In one study, we found that over two thirds of cartels were in markets with a four-firm concentration ratio of over 75%.¹⁰ Cartels do form in less concentrated industries, and certainly there are pro-competitive reasons for large and concentrated industries. But with appropriate resources, the DOJ and FTC can identify markets that are potentially at risk. This is not necessarily a simple or obvious task, as market definition is key. For example, there are over 5600 commercial banks in the U.S., and for decades most economists have insisted that the United States suffered from too much fragmentation, not too much concentration, in banking. Hence, deregulation to allow interstate banking, etc. But the number of participants in LIBOR is much smaller. The number participating in the foreign exchange markets is smaller. I can count on one hand the number underwriting municipal bonds. There's a reason that Professor Suslow and I called a recent paper "Constant Vigilance."

Finally, outreach to potential victims, including giving them advice on how to detect and prevent bid rigging as was done for public procurement funded under American Reinvestment and Recovery Act and as the Division does to the extent possible, brings the resources of a

¹⁰ *Journal of Law and Economics* 2011, p. 470.

much larger number of people – and people with an interest in paying attention – to bear on the discovery of collusive and anticompetitive activity.

While we may never stop all price fixing, there are both investigative tools and sanctions that, with appropriate policies and resources, we can apply to reduce the impact of anti-competitive behavior on consumers and competition.

PREPARED STATEMENT OF MARK ROSMAN, PARTNER, WILSON SONSINI GOODRICH &
ROSATI, WASHINGTON, DC

STATEMENT OF MARK ROSMAN

before the

SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER
RIGHTS

of the

COMMITTEE ON THE JUDICIARY

of the

UNITED STATES SENATE

concerning

U.S. CARTEL ENFORCEMENT

THURSDAY, NOVEMBER 14, 2013

Good afternoon Chairman Klobuchar, Senator Lee, and members of the Subcommittee. My name is Mark Rosman, and I am a partner at Wilson Sonsini Goodrich & Rosati P.C. here in Washington, D.C. Before joining Wilson Sonsini Goodrich & Rosati, I was a trial attorney and prosecutor with the Antitrust Division of the U.S. Department of Justice (“Division” or “DOJ”) for two decades and served in both a field office and the headquarters. In that time I had was responsible for investigating and trying various cartels, including at the regional, national, and international level. My last position with the Division was as the Assistant Chief of the National Criminal Enforcement Section (“NCES”). It was my distinct honor and privilege to work for the Division and it is an honor and privilege to be here testifying with you today.

The Division’s criminal cartel enforcement program is one of the more successful government enforcement programs in the world. It consistently nets record fines, detects and prosecutes cartels presenting extremely complex facts, and navigates through some of the most difficult procedural challenges. And, in my opinion, its prosecutors are some of the finest anywhere. Yet, as with any institution, there are opportunities for improvement. My remarks today, while not critical of the Division, are meant to suggest areas for improving antitrust cartel enforcement in the United States.

These four areas of improvement are: (I) refocusing enforcement efforts to detect and prosecute domestic (regional and national) cartels, i.e., avoid tunnel-vision on the “blockbuster” international cartels; (II) reconsidering the application of certain sentencing guidelines, particularly with respect to the Division’s use (or non-use) of the “mitigation role adjustment”; (III) reconsidering the use of a “bump” within the Guidelines Fine Range to account for (arguably) indirect commerce; and, finally, (IV) rethinking the ratcheting of fines and jail sentences as a means of deterrence. My testimony today will cover each of these four areas in turn.

I. Enforcement Focus: Should DOJ Rebalance Its Focus on “Blockbuster” Cartels?

A. Overview of Recent Focus in Criminal Enforcement at DOJ

Recent Antitrust Division enforcement has been national, and international, in scope. The Division’s efforts have included large, multi-national, cartel enforcement investigations relating to municipal bonds (“muni-bonds”), liquid crystal display (“LCD”) panels, coastal freight, automotive parts (“auto parts”), airline cargo (“air cargo”), and the London Interbank Offer Rate (“LIBOR”), among other products and services. These investigations have all taken place against the backdrop of the Division’s closure of four out of seven of its regional field offices, which were primarily focused on criminal antitrust enforcement.

The Division’s field offices in Cleveland, Dallas, Atlanta, and Philadelphia officially closed earlier this year, while the three remaining regional offices in Chicago, New York, and San Francisco have remained open for business. Many believe this measure officially ushered in a new era – with the primary focus being on large scale cartel investigations – at the Division. As Attorney General Holder stated regarding the closures: “We have seen that these . . . antitrust cases become more complex, more complicated, and it is our view that they can best be handled by the reduced

number of offices that we have with larger teams.”¹ This statement recognizes the shift that has taken place at the Division.

While I agree with the Attorney General that some consolidation may have been warranted, the wholesale closure of four regional offices may prove to be too aggressive of a step. The field offices played beneficial roles. The offices not only played a part in large national and international investigations, they also handled important smaller, regional and local, criminal cartel cases. They further created efficiencies in presenting facts before a grand jury and trying cases in jurisdictions in which the field offices resided. The Division’s recent real estate public foreclosure auction investigations provide a good example.

Despite the benefits of the four field offices, DOJ decided to close them in an attempt to focus on prosecuting large, multi-national, multi-party cartels. For instance, the recent investigations in auto parts, muni-bonds, LIBOR, air cargo, and LCDs were all international in scope. The majority of the criminal fines now come from investigations that are international in scope, and this trend does not appear to be slowing anytime soon. But while lucrative, DOJ’s overwhelming focus on the international cartel presents a number of unique challenges.

B. Challenge 1: Pursuing Domestic Cartels

In the last year the DOJ prosecuted only two U.S. companies for their roles in antitrust cartels, focusing instead on non-U.S. companies involved in international cartels, particularly those in the auto parts and LIBOR investigations. (Indeed, some may say that the DOJ has focused an inordinate amount of time/resources prosecuting Japanese companies and executives for their roles in the auto part conspiracies.) And while the Division netted \$1.14 billion in fines in 2012, i.e., “the highest ever obtained by the Division in a single year,”² most of these fines come from only two industries, auto parts and financial services. The DOJ may be (inadvertently) giving potential cartels in countless other industries a free pass.

The closing of four regional offices contributes to this, as these offices had responsibility for detecting and prosecuting regional or local cases. While smaller, these types of cases arguably may have a more direct impact on consumers, such as bid-rigging involving public construction contracts. The closing further has the effect (perhaps obviously) of constraining resources that could be detecting cartels in other industries. But the problems of closing these offices are only compounded by the shift in focus to international cartels. These international cartels are more complex, requiring additional resources to prosecute and thus further draining an already depleted supply of prosecutors. International cartels also often stem from leniency applications; indeed, it has been reported that over 90% of fines imposed from the mid-1990s to early-2010 resulted from investigations involving

¹ *Oversight of The U.S. Department Of Justice: Hearing Before the Senate Comm. on the Judiciary*, 112 Cong. 13 (2012) (testimony of Eric Holder, Attorney General of the United States).

² See U.S. Dep’t of Justice, Antitrust Div., Division Update Spring 2013, available at <http://www.justice.gov/atr/public/division-update/2013/criminal-program.html>.

leniency applicants.³ This creates a passive (wait-and-see) approach to detection, which just further leaves DOJ vulnerable to domestic cartels going unnoticed. Despite the amnesty program's overwhelming success, the DOJ should work diligently to detect cartels in other ways, as it did before the amnesty program arose; for example, the DOJ used to employ screens and conduct significant public outreach to identify cases.⁴

C. Challenge 2: Avoiding Slippage

As Attorney General Holder noted, international cartel enforcement is complex. The international cartel being prosecuted today often involves multiple companies, multiple countries, and multiple products (potentially), and the cartel is being investigated by multiple jurisdictions.⁵ For example, the auto-parts investigation has involved a range of parts, including "safety systems such as seatbelts, airbags, steering wheels, and antilock brake systems and critical parts such as instrument panel clusters and wire harnesses."⁶ Indeed, DOJ recently announced the plea agreements of nine Japan-based companies and two executives in the auto parts investigation, which involved "conspiracies to fix the prices of more than 30 different products sold."⁷

The complexities of international cartel prosecution are numerous and varied. In addition to procedural issues of dealing with multiple authorities, there are fact development issues of dealing with companies outside the United States, and there are legal challenges that may not arise in a smaller, more straightforward domestic cartel (such as extra-territorial reach of the Sherman Act or the privacy laws of other countries.) The result is that some prosecutions may slip. The complexities may drain too many resources, create too many litigation risks, or prove too burdensome to gather the evidence; thus leaving prosecutors no choice but to take a pass (or worse

³ Scott Hammond, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, "The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades," Remarks as Prepared for the 24th Annual National Institute on White Collar Crime (Fed. 25, 2010), available at <http://www.justice.gov/atr/public/speeches/255515.htm>

⁴ Daniel Sokol and Rosa Abrantes recently wrote an interesting paper on this subject. Rosa M. Abrantes-Metz & D. Daniel Sokol, *The Lessons from LIBOR for Detection and Deterrence of Cartel Wrongdoing*, 3 HARV. BUS. L. REV. 10 (2012).

⁵ In DOJ's recent deferred prosecution agreement with Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A. ("Rabobank"), entered into on October 29, 2013, DOJ worked with numerous agencies. Rabobank agreed to pay over \$1 billion in criminal and regulatory penalties – stemming from investigations by the DOJ, United States Commodities and Futures Trading Commission ("CFTC"), United Kingdom Financial Conduct Authority ("FCA"), and the Dutch Public Prosecution Service. The DOJ also cooperated with the Securities and Exchange Commission and United Kingdom's Serious Fraud Office. See Press Release, Dep't of Justice, Rabobank Admits Wrongdoing in Libor Investigation, Agrees to Pay \$325 Million Criminal Penalty (Oct. 29, 2013), available at http://www.justice.gov/atr/public/press_releases/2013/301368.htm.

⁶ See U.S. Dep't of Justice, Antitrust Div., Division Update Spring 2013, available at <http://www.justice.gov/atr/public/division-update/2013/criminal-program.html>.

⁷ See Press Release, Dep't of Justice, Nine Automobile Parts Manufacturers and Two Executives Agree to Plead Guilty to Fixing Prices on Automobile Parts Sold to U.S. Car Manufacturers and Installed in U.S. Cars (Sept. 3, 2013), available at http://www.justice.gov/atr/public/press_releases/2013/300969.htm.

miss something completely). This raises serious questions of fairness for companies and executives that agree to plead guilty and cooperate earlier in an investigation.

D. Challenge 3: Maintaining Transparency

A third challenge for the DOJ is maintaining its hallmark level of transparency as to its practices and policies. The DOJ has always prided itself in, and indeed much of its success is attributable to, its transparency. However, recent uses of non-prosecuting agreements (NPAs) and deferred prosecuting agreements (DPAs) in financial services industry have created questions about when and under what circumstances companies will be entitled to such resolutions.⁸ The DOJ has provided some clarity as to the standard for using these means of resolution, stating that it used NPAs/DPAs primarily to avoid disproportionate collateral consequences.⁹ But it is still not entirely clear how that standard has been applied or will be applied in future investigations.

II. “What Goes Up, Doesn’t Come Down”: Should DOJ Employ the “Mitigating Role Adjustment” of the Sentencing Guidelines to Prosecute Individuals?¹⁰

Another consequence of focusing on large, international cartels is that there tends to be more individuals to prosecute. This may be considered a positive consequence by some measure, but it nonetheless tests DOJ’s prosecution skills and resources. This is partly because individuals in these larger, international cartels tend to have varied roles in the conduct and varied degrees of involvement. It is not a “one-size-fits-all” type of prosecution. As a result, the DOJ may be challenged more at trial, particularly by those who had a less significant (or relatively minor) role in the conduct. In fact, this is what several executives of AU Optronics recently decided, and juries acquitted these defendants. One could question whether DOJ has been overly aggressive in this regard, and it may therefore be an appropriate time to consider what other enforcement tools may be available to DOJ for convincing individuals “farther removed” from the conspiracy to enter into plea agreements, rather than go to trial. (Indeed, it requires the same amount of resources (if not more) to prosecute an individual who played a minor role than an individual who played a major role.)

One such tool may be in the United States Sentencing Guidelines (“Guidelines”): the “Aggravating and Mitigating Role Adjustments” of the Guidelines.¹¹ The “role adjustments” are

⁸ For example, in the muni-bonds investigation, the Division entered into NPAs with several companies—including UBS A.G., JPMorgan Chase & Co., Wachovia Bank N.A., and GE Funding Capital Markets Services Inc. See U.S. Dep’t of Justice, Antitrust Div., Division Update Spring 2013, available at <http://www.justice.gov/atr/public/division-update/2013/criminal-program.html>.

⁹ Scott Hammond’s comments at the 2012 International Cartel Workshop and John Terzaken’s comments at this year’s International Bar Association’s annual conference highlight this point. See Panel Discussion at The International Cartel Workshop in Vancouver, *The GCR Cartel Roundtable*, Global Competition Rev. (Feb. 2012); Ron Knox, *Ex-official sees slight policy shifts in US criminal enforcement*, Global Competition Rev. (Oct. 9, 2013).

¹⁰ I co-authored a more detailed article on this topic with my colleague, Jeff VanHooreweghe, in August 2012. “What Goes Up, Doesn’t Come Down: The Absence of the Mitigating-Role Adjustment in Antitrust Sentencing,” *THE ANTITRUST SOURCE*, August 2012, available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug12_rosman_7_31f.authcheckdam.pdf.

intended to “serve the guideline’s objective of ensuring that sentences appropriately reflect the defendant’s culpability and specific offense conduct.”¹² The “role” adjustments do this by increasing or decreasing the Guidelines’ “Base Offense Level” based on the size and scope of the crime and the defendant’s particular role in committing it; the “aggravating role” increases the Base Offense Level; conversely, the “mitigating role” adjustment decreases it. The Base Offense Level is then used to calculate a recommended sentencing range (i.e., jail sentence range) for the individual defendant.

Notably, the DOJ has routinely sought to increase an individual defendant’s jail sentence based on the individual’s role in the conspiracy by using the “aggravating role” adjustment, yet it has never used the “mitigating role” adjustment to decrease an individual defendant’s jail sentence. A recent review of DOJ prosecutions revealed that the “aggravating role” provision has increased the Guidelines’ sentencing range by as much as 80 percent for some individuals. The review also revealed that the DOJ has likely been presented with opportunities to use the “mitigating role” adjustment when an individual played a relatively lesser role in the conduct, but has chosen not to.

There are several reasons why the DOJ may consider using the “mitigating role” adjustment. First, it is the law. While courts recognize that it is not mandatory to sentence an individual defendant per the Guidelines’ recommended sentence, courts must still consider the Guidelines when determining the sentence and, in doing so, all provisions of the Guidelines should be applied.¹³ Second, applying both “role” provisions may help eliminate sentence disparities. Under current practice, the recommended sentencing ranges go up, but cannot go down for an individual’s role. When considering the various roles defendants’ can (and do) play in complex antitrust cartel cases, this one-sided approach can lead to equal treatment for unequal conduct.

Third, and perhaps most importantly for this hearing, using the “mitigating role” adjustment is good enforcement policy. The DOJ (in my view) handicaps itself by ignoring the “mitigating role” adjustment. The DOJ has had less success prosecuting individuals considered “farther removed” from the conduct, i.e., those playing a lesser role.¹⁴ If the DOJ employed the “mitigating role” adjustment it would have an additional tool for persuading such individuals to plead guilty instead of

¹¹ U.S. Sentencing Guidelines Manual §§ 3B1.1, 3B1.2.

¹² Office of the General Counsel, U.S. Sentencing Commission, Aggravating and Mitigating Role Adjustments Primer §§ 3B1.1, 3B1.2, March 2013, at 1.

¹³ U.S. SENTENCING GUIDELINES MANUAL §§ 1B1.11(b)(2) (“The Guidelines Manual in effect on a particular date shall be applied in its entirety.”) and 1B1.1(a) (providing the order in which a court must apply the Guidelines); *United States v. Stephenson*, 921 F.2d 438 (2d Cir. 1990) (explaining that prosecutors must apply the Guidelines as a “cohesive and integrated whole,” not piecemeal.).

¹⁴ For instance, while the Division was successful in prosecuting more senior-level AU Optronics executives, it failed to convict three lower-level employees of the company. Former Deputy Assistant Attorney General Scott Hammond also acknowledged that prosecuting “farther removed” executives becomes more difficult, noting: “As you try to hold more individuals accountable, you [bring] cases against people farther removed. . . . The tougher cases go to trial.” Leah Nylen, *Antitrust Complexities Provide Hurdle to Trials*, MLEX, Dec. 28, 2011 (quoting Scott Hammond).

fighting the allegations. This is not to say that the DOJ should employ the “mitigating role” adjustment to prosecute more individuals than it already prosecutes; instead, it could be used as a tool for prosecuting those it has already targeted.

III. “Dump the Bump”: Should DOJ Apply the Sentencing Guidelines To Conduct (Arguably) Outside The Reach of the Sherman Act?

A third area of improvement that the DOJ may consider is its application of a “bump” in calculating the Guidelines’ recommended fine range for corporations when the conduct (arguably) affected U.S. commerce indirectly. As suggested above in Section I, the DOJ’s focus on international cartels invites a host of factual and legal challenges to prosecution. One of these challenges is determining whether conduct that occurred outside the United States somehow affected commerce in the United States.¹⁵ When a company enters into a plea agreement with DOJ, the DOJ has often resolved this challenge by calculating a Guidelines’ fine range based on affected sales in the United States (or clearly affecting U.S. commerce directly) and then “bumping” up the fine within that range to account for affected sales outside the United States if (arguably) there is some connection to the United States.

This was the case for at least several companies entering into pleas in the recent air cargo and auto parts investigations. In air cargo, for example, the DOJ investigated whether airlines fixed certain surcharges and base rates for shipping cargo in to and out of the United States. One of the prosecuting challenges was whether the coordination on inbound shipments had the requisite “direct, substantial, and reasonably foreseeable” effect on domestic or import commerce. The DOJ took the position (consistently) that the conduct did have the requisite effect on shipments in both directions, but recognized that it was arguable with respect to shipments in to the United States (inbound). The DOJ therefore decided in its sentencing recommendation (for companies that entered plea agreements) that it would use revenues for shipments out of the United States as the basis for the calculation, but it would “bump” the fine range up by a certain percentage to account for the effect on shipments in to the United States. While not identifying the “bump” explicitly, the DOJ would rationalize the imposition of the increased fine in its plea agreements by stating:

“The volume of affected commerce calculation in paragraph 8(b) above does not include commerce related to defendants’ cargo shipments on trans-Atlantic routes into the United States. The defendants take the position that any agreements reached with competitors with respect to cargo shipments on routes into the United States should not be included in the defendants’ volume of affected commerce calculation pursuant to U.S.S.G. §2R1.1(d)(1). The United States disputes the defendants’ position and contends that the defendants’ cargo shipments on routes into the United States during the charged conspiracy period violated the U.S. antitrust laws. Moreover, the United States asserts that a

¹⁵ The question of the Sherman Act’s extraterritorial reach is certainly one that has attracted considerable (and necessary) discussion; and I do not attempt to participate at length here today. For our purposes, it is enough to remember that the Sherman Act applies only to conduct that, *inter alia*, had a “direct” effect on domestic or U.S.-import commerce. Sherman Act, 15 U.S.C. § 6a (2006).

Guidelines fine calculation that fails to account for cargo shipments into the United States would understate the seriousness of, and the harm caused to U.S. victims by, the offense and would not provide just punishment. . . . The parties recognize the complexity of litigating the issues set forth in [this paragraph] and the resulting burden on judicial and party resources, and agree that the appropriate resolution of this issue is to impose a fine in the lower end of the Guidelines sentencing range”¹⁶

The DOJ continues to use the approach applied in air cargo; it has been applied in several other enforcement actions, including in the ongoing auto parts investigation. For example, DOJ took this approach in the plea agreement with one of the early pleas in the auto parts case, Furukawa Electric Company, Inc., (wire harnesses). At the plea hearing, DOJ explained that it considered three categories of commerce: (1) wire harnesses and related products that are manufactured in the U.S., sold to automakers in the U.S. who are installing these parts into their cars, (2) wire harnesses and related products that were manufactured abroad, that were then sold into the U.S. and installed in cars in the U.S., and (3) wire harnesses and related products that are manufactured abroad, sold to automakers abroad, installed in cars abroad that are ultimately destined for the U.S. and U.S. consumers. In calculating the Guidelines’ fine range the DOJ started with the revenues derived from categories (1) and (2), but ultimately “bumped” up the recommended fine within that range by accounting for the revenues derived from category (3). The DOJ stated at the plea hearing:

“Although we could have included this [category (3)] commerce arguably, we did not include it in our overall volume of commerce analysis or our calculation overall. . . . Essentially what we did is we took the categories one and two and we started the defendant at the bottom of the guidelines range. We then adjusted upwards within the range because we felt that the guidelines fine was understating the seriousness of the offense because of this third category of commerce that we were not including.”¹⁷

As the Subcommittee may know, the air cargo and auto parts investigations have netted some of the largest fines in the history of antitrust enforcement. These record fines are due, in part, to this “bump.”

While the “bump” may be effective at netting significant fines, it is not necessarily right. Some may even argue that the application is unprincipled. Whether or not that is true, applying the “bump” raises at least a few significant issues that may require further consideration. First, is applying the “bump” consistent with the United States Sentencing Guidelines? Nowhere in the Guidelines is there a provision for the “bump.” Further, nowhere in the Guidelines is it contemplated that the fine range should account for potential or debatable violations of law. Rather,

¹⁶ Plea Agreement, *United States v. Société Air France*, et al, 1:08-cr-00181, at ¶¶ 8(c), 8(d) (D.D.C.) (filed July 22, 2008), available at <http://www.justice.gov/atr/cases/f235500/235548.htm>.

¹⁷ Transcript of Plea & Sentencing Hearing, *United States v. Furukawa Electric Co.*, 2:11-cr-20612, at 18-21 (E.D. Mich.) (November 14, 2011).

the Guidelines advise that the fine calculation should be based on the “volume of commerce attributable to an individual participant in a conspiracy,” which is considered the revenues “done by him or his principal in goods or service that were affected by the violation.” U.S.S.G. §2R1.1. The Guidelines presume, therefore, that the relevant conduct indeed violated the law, not potentially or arguably violated the law. The Guidelines later allow for some discretion in determining the recommended sentence (*e.g.*, indeed the Guidelines provide a fine range), and indeed allow a court to consider “the seriousness of the offense” in making the determination. U.S.S.G. §2B1.1, Application Note 20. But again, the Guidelines contemplate that an offense occurred (not arguably occurred).

Second, but related, is the DOJ over-reaching its authority by applying the bump? Asked differently, should the DOJ prosecute conduct that falls outside the extra-territorial reach of the Sherman Act (at least arguably, as the DOJ recognizes)? If the conduct does not have the requisite “direct, substantial, and reasonably foreseeable effect” on U.S. commerce, the FTAIA instructs that the Sherman Act “shall not apply.” If the Sherman Act does not apply, the defendant has not violated the law, and thus a plea agreement should not be entered. Indeed, a court may only enter a plea if it has jurisdiction to do so.¹⁸ And third, is the DOJ contributing to a “double-counting” of fines? The “bump” applies to conduct that presumably a foreign authority may be interested in prosecuting; by accounting for this conduct it ignores the comity principles underlying the restrictions to the extra-territorial reach of the Sherman Act.¹⁹

While there are a number of legal, factual, and policy questions at the core of these issue, many of which are reasonably debatable, it may be more prudent enforcement policy to not account for effects from conduct that is not certain to violate the Sherman Act, at least not until the debates are resolved.

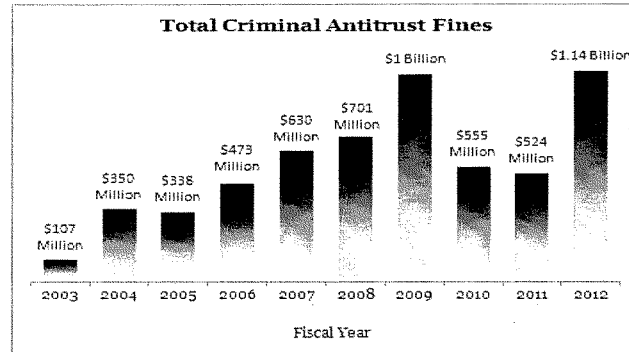
IV. Alternative Sentencing Considerations: Does the Punishment Fit The Crime (or Deter Future Conduct)?

Finally, as noted above, the DOJ has significantly increased the level of fines and jail sentences in recent years. The following graphic, as noted above, shows that the Division netted the most fines in its history in 2012.²⁰

¹⁸ But we recognize that certain cases have held that the FTAIA does not impose a jurisdictional bar; rather it defines the scope of the antitrust violation. *See, e.g., Animal Science Products, Inc. v. China National Metals & Minerals Import & Export Corp.*, 654 F.3d 462 (3d Cir. 2011) (holding that the “FTAIA imposes a substantive merits limitation rather than a jurisdictional bar.”).

¹⁹ One indication that the DOJ may be overly aggressive in the use of the “bump” is the increasing number of inability to pay applications made by companies.

²⁰ *See* U.S. Dep’t of Justice, Antitrust Div., Division Update Spring 2013, *available at* <http://www.justice.gov/atr/public/division-update/2013/criminal-program.html>.



With respect to jail sentences, the Division noted: “During FY 2012, 78 percent of the individuals sentenced in Division cases were sentenced to prison time. The Division is now sending approximately twice as many defendants to prison as it did in the 1990s. And the defendants sentenced to prison are serving longer terms.”²¹ It is clear that the DOJ does not appear to be letting up, as evidenced by the fact that it recently sought a \$1 billion fine against AUO and the maximum 10-year sentences against AUO executives.²² Further, within the last month alone, the DOJ has secured \$740 million and \$325 million in criminal fines from nine auto-parts manufacturers for their role in the auto-parts investigation²³ and Rabobank for its role in the LIBOR investigation, respectively²⁴.

However, while jail time and fines may be key ingredients of deterrence, is DOJ’s relentless push to increase jail time and fines the only means to achieve greater deterrence? The DOJ does not rely on any study that has linked jail and fines to deterring antitrust cartels. Several in the defense bar have written that at some point DOJ’s aggressive pursuit of penalties could actually have an adverse effect on enforcement, as less companies and individuals will want to cooperate.²⁵ Thus, it

²¹ *Id.*

²² See Sentencing Memorandum, *U.S. v. AU Optronics Co. et al.*, No. CR-09-0110 SI, at 56 (N.D. Cal.) (Sept. 20, 2012), http://www.justice.gov/atr/cases/f286900/286934_1.pdf.

²³ See Press Release, Dep’t of Justice, Nine Automobile Parts Manufacturers and Two Executives Agree to Plead Guilty to Fixing Prices on Automobile Parts Sold to U.S. Car Manufacturers and Installed in U.S. Cars (Sept. 3, 2013), available at http://www.justice.gov/atr/public/press_releases/2013/300969.htm.

²⁴ See Press Release, Dep’t of Justice, Rabobank Admits Wrongdoing in Libor Investigation, Agrees to Pay \$325 Million Criminal Penalty (Oct. 29, 2013), available at http://www.justice.gov/atr/public/press_releases/2013/301368.htm.

²⁵ Donald Klawiter, *Enhancing International Cartel Enforcement: Some Modest Suggestions*, COMPETITION POLICY INTERNATIONAL (Sept. 28, 2011); Donald C. Klawiter & Jennifer M. Driscoll, “Sentencing Individuals in Antitrust Cases: The Proper Balance,” ANTITRUST MAGAZINE, Spring 2009; Megan Dixon, “A Tension in the US Approach to International Cartel Enforcement: At What Point Does Aggressive Pursuit of Individuals Undercut the Corporate

may be time to rethink how the punishment fits the crime. There are several alternatives that could be considered, including bans for employees from serving as Board members or practicing in certain professional capacities (e.g., in Australia the ACCC can impose a civil order disqualifying an individual from managing a corporation), bans for companies from doing business in particular markets, or requirements to hire compliance monitors and increase compliance efforts.

The DOJ has taken some steps to “think outside the box” when it comes to penalties and resolving its investigations. Indeed, the Assistant Attorney General recently highlighted the Division’s efforts to seek compliance monitors as part of the remedy as a way the Division is “open to new ideas that remedy anticompetitive conduct and guard against any recurrence.”²⁶ With respect to the Division’s successful prosecution of AU Optronics Corporation (“AUO”), the AAG noted: “Last year, for the first time, the division recommended that a criminal antitrust defendant be required, as a condition of its probation, to retain an independent corporate monitor to develop and implement an effective antitrust compliance program.”²⁷ The AAG also highlighted the Division’s recent victory over Apple in the e-books litigation, where an external monitor and full-time internal antitrust compliance officer will work together to ensure compliance with the Judge’s final order as well as antitrust laws in general.²⁸ The DOJ has also increased use of non-prosecution (“NPAs”) or deferred prosecution agreements (“DPAs”) to resolve certain matters, as described above.

Conclusion

I am proud to have been a part of one of the most successful criminal enforcement programs in the world for 20 years. The DOJ has largely taken a very considered, prudent approach to cartel enforcement, and it should be commended. I raise these four “areas” today only because (as with most institutions) there is room for improvement. The areas of improvement that I identify reflect some of the more significant legal and policy challenges that the DOJ faces today, as I see it now from the perspective as a defense counsel representing companies and individuals under investigation. Thank you again for the opportunity to provide this testimony.

Leniency Policy,” COMPETITION LAW INTERNATIONAL, Jan. 2012. AUO, however, was sentenced to pay a \$500 million fine, which still matched the largest fine imposed on a company for violation of the U.S. antitrust laws. Further, the executives’ sentences were nowhere close to the Division’s 10-year request. See U.S. Dep’t of Justice, Antitrust Div., Division Update Spring 2013, available at <http://www.justice.gov/atr/public/division-update/2013/criminal-program.html>.

²⁶ Bill Baer, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, “Remedies Matter: The Importance of Achieving Effective Antitrust Outcomes,” Remarks as Prepared for the Georgetown Law 7th Annual Global Antitrust Enforcement Symposium (Sept. 25, 2013), at 12, available at <http://www.justice.gov/atr/public/speeches/300930.pdf>.

²⁷ *Id.* at 11.

²⁸ *Id.* at 7; see also Final Judgment, *United States v. Apple, Inc. et al.*, No. 12-cv-2826 (S.D.N.Y. 2012) (Sept. 5, 2013), <http://www.justice.gov/atr/cases/f300500/300510.pdf>.

QUESTIONS SUBMITTED BY SENATOR AMY KLOBUCHAR FOR ASSISTANT ATTORNEY
GENERAL WILLIAM BAER

“Cartel Prosecution: Stopping Price Fixers and Protecting Consumers”
Senator Klobuchar’s OFRs for Assistant Attorney General William Baer

1. The Antitrust Division does not often use its authority to obtain restitution for victims of price-fixing or other cartel conduct. Instead, we rely on victim companies and consumers to bring private civil litigation to get redress for the higher prices they paid as a result of price-fixing. How important are these private civil suits? Should we be concerned about any barriers faced by private litigants bringing these cases?
2. Civil cases are often running concurrently with the Justice Department’s investigations and prosecutions. Does the Justice Department make an effort to coordinate with plaintiffs, to the extent that it can, so that private enforcement efforts are not unnecessarily impeded? How can the DOJ provide more outreach to cartel victims so that these individuals or businesses can play a more active role in helping to discover cartel conduct?
3. The leniency program has been enormously successful at detecting cartels. Besides the leniency program, how else does the DOJ detect cartels? What is your view on the use of economic screens to detect cartels and should the DOJ use them in certain industries that are more conducive to economic screening, like financial markets?
4. Concerns have been raised by criminal defense lawyers about the 1996 Memorandum of Understanding (MOU) between the Antitrust Division and the Immigration and Naturalization Service (now Immigration and Customs Enforcement). They claim that antitrust offenses should not be considered crimes involving “moral turpitude” and they argue that the DOJ should revise its policy to extend the waiver of the MOU to foreign nationals who choose to stand trial in the U.S, rather than plead guilty. Can you please respond to those concerns?
5. Concerns have been raised that the DOJ would effectively limit the carriers that are eligible to obtain gates and slots that are divested as a result of DOJ’s settlement with American Airlines and US Airways. By limiting the carriers that can compete for the divested gates and slots to Southwest, JetBlue and similar carriers, they assert that this will result in market winners without regard to those airlines’ ability to connect passengers to competitive international and domestic networks that can compete effectively with the New American Airlines. In fact, as the DOJ noted the complaint that initially challenged the proposed merger, carriers like Southwest and JetBlue “have less extensive domestic and international route networks than the legacy airlines,” in addition to limited fleets. It also noted that “[i]n many relevant markets, these [non-legacy carriers] do not offer any service at all.” How do you respond to these concerns?

QUESTIONS SUBMITTED BY SENATOR AMY KLOBUCHAR FOR RONALD HOSKO

“Cartel Prosecution: Stopping Price Fixers and Protecting Consumers”
Senator Klobuchar’s QFRs for Ronald Hosko

The DOJ Antitrust Division and FBI work closely with foreign partners to execute search warrants and seizures, and according to your testimony those efforts are successful. Are there any challenges that remain in international cartel investigations, coordination, and prosecution?

QUESTIONS SUBMITTED BY SENATOR AMY KLOBUCHAR FOR MARGARET LEVENSTEIN

“Cartel Prosecution: Stopping Price Fixers and Protecting Consumers”
Senator Klobuchar’s QFRs for Margaret Levenstein

Is there a correlation between cartels and industries that have become more concentrated as a result of mergers? Should DOJ focus cartel detection resources on more highly concentrated industries? Can you name a few industries they should focus on? Should DOJ and FTC’s decisions to approve or reject a merger weigh whether there has been collusive activity?

QUESTIONS SUBMITTED BY SENATOR AMY KLOBUCHAR FOR MARK ROSMAN

“Cartel Prosecution: Stopping Price Fixers and Protecting Consumers”
Senator Klobuchar’s QFRs for Mark Rosman

You were formerly with the Antitrust Division both in Washington and in the now-closed Dallas Field Office. How does the closure of field offices impact the mission to fight international, domestic and local level cartels? Can local and domestic cartels be adequately discovered and pursued by the Washington office or remaining three field offices in San Francisco, New York and Chicago?

QUESTIONS SUBMITTED BY SENATOR AMY KLOBUCHAR FOR HOLLIS SALZMAN

“Cartel Prosecution: Stopping Price Fixers and Protecting Consumers”
Senator Klobuchar’s QFRs for Hollis Salzman

Why is private cartel enforcement an important component in the fight against cartels? What barriers exist to victims’ bringing private enforcement cases? Is there anything the DOJ can do to facilitate private enforcement?

RESPONSES OF ASSISTANT ATTORNEY GENERAL WILLIAM BAER TO QUESTIONS
SUBMITTED BY SENATOR KLOBUCHAR



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 24, 2014

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Mr. Chairman:

Enclosed please find responses to questions for the record arising from the appearance of William Baer, Assistant Attorney General, Antitrust Division, at the hearing before the Committee on November 14, 2013, entitled "Cartel Prosecution: Stopping Price Fixers and Protecting Consumers." We hope this information is of assistance to the Committee.

Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter. The Office of Management and Budget has advised us that, from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "P. J. Kadzik".

Peter J. Kadzik
Principal Deputy Assistant Attorney General

Enclosures

cc: The Honorable Charles E. Grassley
Ranking Member

**Responses of William Baer, Assistant Attorney General,
Antitrust Division, U.S. Department of Justice
To Questions for the Record
Arising from the November 14, 2013, Hearing before the
Senate Committee on the Judiciary
Regarding "Cartel Prosecution:
Stopping Price Fixers and Protecting Consumers"**

Questions posed by Senator Klobuchar

- 1. The Antitrust Division does not often use its authority to obtain restitution for victims of price-fixing or other cartel conduct. Instead, we rely on victim companies and consumers to bring private civil litigation to get redress for the higher prices they paid as a result of price-fixing. How important are these private civil suits? Should we be concerned about any barriers faced by private litigants bringing these cases?**

Private civil antitrust suits are an important part of the overall antitrust enforcement scheme and should not be deterred by unwarranted barriers. The division's criminal enforcement program often promotes successful private civil suits. For example, convictions in Antitrust Division criminal cartel prosecutions constitute "prima facie evidence against" those convicted in follow-on damages actions (per 15 U.S.C. § 16). Moreover, private damage actions may benefit from the cooperation of leniency applicants seeking to take advantage of the damages limitation in the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. 108-237, 15 U.S.C. § 1 note. However, to the extent there are legitimate problems with effectively pursuing private damage actions, we welcome those with concerns to discuss them with the division.

- 2. Civil cases are often running concurrently with the Justice Department's investigations and prosecutions. Does the Justice Department make an effort to coordinate with plaintiffs, to the extent that it can, so that private enforcement efforts are not unnecessarily impeded? How can the DOJ provide more outreach to cartel victims so that these individuals or businesses can play a more active role in helping to discover cartel conduct?**

The Antitrust Division recognizes the importance of timely and effective private enforcement of the antitrust laws. At the same time, consumers benefit and private enforcement is facilitated when the division is able to investigate criminal misconduct confidentially and prosecute it expeditiously. The division works with civil plaintiffs to protect our investigations while recognizing the need for them to proceed with litigation. The division considers whether certain types of civil discovery would interfere with an investigation and, if it will, the appropriateness of seeking a stay.

Our attorneys are in contact with plaintiffs' attorneys and receive status updates on the progress of the civil litigation and information regarding the effect of any stays as the civil cases progress.

Outreach is important. Antitrust Division attorneys make presentations to various groups including procurement officials, in-house counsel, private attorneys, state attorneys general, and business and law students in an effort to raise awareness of antitrust violations and to encourage the reporting of suspected violations to the division. Our press releases in criminal cases routinely include an invitation for persons with information about the investigated matter to contact the division and also include the telephone number of the pertinent Antitrust Division criminal section and the FBI. We also frequently work with federal agents to detect and prosecute cartel activity that harms federal agencies.

The division is continuing its outreach efforts; however, limited resources constrain the types of engagement we are able to offer.

- 3. The leniency program has been enormously successful at detecting cartels. Besides the leniency program, how else does the DOJ detect cartels? What is your view on the use of economic screens to detect cartels and should the DOJ use them in certain industries that are more conducive to economic screening, like financial markets?**

While the leniency program is important to cartel detection, we obtain leads from a variety of additional sources, including customer complaints, a variety of outreach efforts with auditors, trade groups and others, suspicious documents uncovered in civil investigations, and our Citizen Complaint Center. We have also received leads in response to our press releases about other cartels or resulting news stories. An important additional method of detection results from our outreach with and training of federal employees, such as purchasing agents, that focuses on cartel behavior that can affect federal procurement. For example, the IG's Office for the Environmental Protection Agency referred to the division allegations of bid rigging and fraud related to Superfund cleanup sites, and this investigation resulted in the successful prosecution of 3 companies and 10 individuals. Similarly, the IG's Office for the U.S. Department of Veterans Affairs referred to the Antitrust Division allegations of payoffs that prevented the VA from obtaining competitive bids for the renovation of foreclosed homes that had been financed using VA loans, and this investigation resulted in the successful prosecution of 6 individuals.

While screens can have value, in our experience they can also lead to false positives, which is a concern in light of limited resources. In addition, it is important to be able to develop documentary and testimonial support for cartel violations to complement potential concerns that might arise from application of an economic screen.

4. **Concerns have been raised by criminal defense lawyers about the 1996 Memorandum of Understanding (MOU) between the Antitrust Division and the Immigration and Naturalization Service (now Immigration and Customs Enforcement). They claim that antitrust offenses should not be considered crimes involving “moral turpitude” and they argue that the DOJ should revise its policy to extend the waiver of the MOU to foreign nationals who choose to stand trial in the U.S. rather than plead guilty. Can you please respond to those concerns?**

In general, moral turpitude has been held to be conduct that is inherently dishonest and contrary to accepted rules of morality and the duties owed between persons or to society in general. Tax fraud, mail fraud, securities fraud, and theft offenses, for example, have been held to be crimes of moral turpitude. Similarly, price-fixing, bid-rigging, and market allocation agreements among companies that hold themselves out to the public as competitors are inherently deceptive and defraud consumers who expect the benefits of competition. Thus, the division’s MOU with INS states that INS, now the Department of Homeland Security as successor to INS, considers criminal antitrust offenses to be crimes involving moral turpitude, which may subject an alien defendant to exclusion or deportation. However, an alien defendant who is convicted of an antitrust offense at trial retains the ability to contest his removability from the United States.

In today’s global marketplace, many culpable executives involved in international cartels affecting U.S. consumers and commerce are foreign nationals. They may live and work outside the U.S., but their cartel conduct affects billions of dollars of U.S. commerce yearly and takes money out of consumers’ pockets. The MOU was drafted in order to allow the Antitrust Division to secure jurisdiction over and cooperation of these foreign nationals in the division’s investigations and prosecutions of international cartels and to hold these foreign nationals accountable for antitrust crimes, just as domestic defendants are held accountable.

The cooperation of defendants receiving immigration relief under the MOU is critical to the division’s ability to investigate and prosecute international cartel activity. A foreign defendant’s willingness to cooperate with the division provides the basis for the waiver of inadmissibility under the MOU, and fulfilling the continuing cooperation requirements with the division is a condition of a defendant’s retention of the waiver. Having cooperating witnesses from multiple companies is essential to fully investigate cartels and to hold responsible individuals at each corporate conspirator accountable. Moreover, having defendants who have pleaded guilty is important at Antitrust Division trials. Extending the MOU waiver to non-cooperating defendants would undermine the incentives provided by the MOU and be unjust to those foreign nationals who are willing to accept responsibility for their criminal conduct, submit to U.S. jurisdiction, cooperate with the division, and serve time in U.S. prison. It would also be unworkable to require pleading foreign defendants to continue their cooperation to maintain the waiver while at the same time giving the MOU waiver to non-pleading defendants who have not accepted responsibility and fully cooperated with the division.

5. **Concerns have been raised that the DOJ would effectively limit the carriers that are eligible to obtain gates and slots that are divested as a result of DOJ's settlement with American Airlines and US Airways. By limiting the carriers that can compete for the divested gates and slots to Southwest, JetBlue and similar carriers, they assert that this will result in market winners without regard to those airlines' ability to connect passengers to competitive international and domestic networks that can compete effectively with the New American Airlines. In fact, as the DOJ noted the complaint that initially challenged the proposed merger, carriers like Southwest and JetBlue "have less extensive domestic and international route networks than the legacy airlines," in addition to limited fleets. It also noted that "[i]n many relevant markets, these [non-legacy carriers] do not offer any service at all." How do you respond to these concerns?**

The Proposed Final Judgment does not prohibit any airline from seeking any of the divestiture assets. However, the Proposed Final Judgment also requires that the divestitures remedy the harms alleged in the complaint. The complaint identifies harm from, among other factors, a lack of aggressive competition between and among the legacy airlines. An important factor in the divestiture, as stated in the Competitive Impact Statement, is to "impede the industry's evolution toward a tighter oligopoly." This approach follows the Antitrust Division's Policy Guide to Merger Remedies (2011). That document contains the following language with respect to the sale of divestiture assets in markets where our investigation reveals evidence of oligopolistic conduct:

First, divestiture of the assets to the proposed purchaser must not itself cause competitive harm. ... If the concern is one of coordinated effects among a small set of post-merger competitors, divestiture to any firm in that set would itself raise competitive issues. In that situation, the Division likely would approve divestiture only to a firm outside that set. (p.28)

The Department of Justice has said it will listen to arguments any carriers make as to why they should be considered acceptable acquirers for any of the divestiture assets. Indeed, the department has invited any interested carrier to approach the department and discuss any reasons why it may be an acceptable purchaser for any of the assets to be divested. We are actively engaged with potential purchasers at this time.

RESPONSES OF RONALD T. HOSKO TO QUESTIONS SUBMITTED BY SENATOR KLOBUCHAR



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 24, 2014

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Mr. Chairman:

Enclosed please find responses to questions for the record arising from the appearance of Ronald T. Hosko, Assistant Director, Criminal Investigative Division, Federal Bureau of Investigation, at the hearing before the Committee on November 14, 2013, entitled "Cartel Prosecution: Stopping Price Fixers and Protecting Consumers." We hope this information is of assistance to the Committee.

Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter. The Office of Management and Budget has advised us that, from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Peter J. Kadzik
Principal Deputy Assistant Attorney General

Enclosures

cc: The Honorable Charles E. Grassley
Ranking Member

**Responses of the Federal Bureau of Investigation
to Questions for the Record
Arising from the November 14, 2013, Hearing Before the
Senate Committee on the Judiciary
Regarding “Cartel Prosecution:
Stopping Price Fixers and Protecting Consumers”**

Question Posed by Senator Klobuchar

Question: The DOJ Antitrust Division and FBI work closely with foreign partners to execute search warrants and seizures, and according to your testimony those efforts are successful. Are there any challenges that remain in international cartel investigations, coordination, and prosecution?

Response:

Recent successes in international cartel investigations have been aided by strong relationships between the Department of Justice Antitrust Division, the FBI, and our foreign counterparts. Several countries have assisted in ongoing investigations, with particularly noteworthy assistance from Japan.

Because antitrust offenders often make extraordinary efforts to cover their crimes, these investigations frequently originate as “spin-offs” from existing cases or based on information provided by whistleblowers. Absent these, the primary investigative challenge lies in the initial identification of complex price-fixing or market allocation schemes by international cartels.

In domestic conspiracy cases, the FBI can use its analytic tools to research industries and markets, and can gather information regarding company practices through the development of human intelligence sources. When illegal conspiratorial conduct occurs outside the United States, the FBI has fewer law enforcement techniques at its disposal and consequently more limited information about individuals and companies to help us identify collusion or other illegal conduct. In these circumstances, the success of the FBI’s efforts depends on the willingness and ability of foreign counterparts to identify this conduct and share information.

Even if statutes similar to our antitrust laws exist, foreign countries have varying levels of ability and desire to help us identify collusive behavior and enforce such laws. Access to foreign records, such as travel records, would reduce the FBI’s dependence upon self-disclosures and other referrals. Absent that, strong international liaison relationships must be augmented by proactive criminal intelligence collection. We task overseas FBI personnel with developing liaison relationships and cooperatively gathering information regarding antitrust and other international corruption offenses. By training U.S. and host country officials on these violations, and through engagement with private sector

contacts, we create valuable information channels and improve the probability of identifying conspiracies. While there are few incentives for international development banks and other non-governmental organizations to provide information concerning anti-competitive conduct, we continue to seek improved collaboration with these entities.

RESPONSES OF MARGARET LEVENSTEIN TO QUESTIONS SUBMITTED BY SENATOR
KLOBUCHAR

“Cartel Prosecution: Stopping Price Fixers and Protecting Consumers”

Senator Klobuchar’s QFRs for Margaret Levenstein

QUESTION:

Is there a correlation between cartels and industries that have become more concentrated as a result of mergers? Should DOJ focus cartel detection resources on more highly concentrated industries? Can you name a few industries they should focus on? Should DOJ and FTC’s decisions to approve or reject a merger weigh whether there has been collusive activity?

RESPONSE:

1. Most examples of cartels prosecuted in the last two decades were in highly concentrated industries. Many of these cartels were international in scope and membership, and the global markets were highly concentrated, with four-firm concentration ratios above 75%. See Levenstein and Suslow (2011).
2. There have been many examples of recidivism among cartel members, even firms that had received amnesty for their participation in earlier cartels (Levenstein and Suslow 2010). This suggests that increased surveillance and skepticism regarding the competitive behavior of former cartel members is warranted and should be considered in any future merger reviews.
3. Industry concentration in the United States has increased substantially over the last several decades. (Peltzman 2014.) This suggests that the potential for explicit and tacit collusion has increased. Enforcement resources to detect and deter collusion are therefore critical to prevent increases in collusion. Policies that encourage new entry are also very important as it makes both tacit and explicit collusion more difficult.

Levenstein, Margaret C. and Valerie Y. Suslow (2011) “Breaking Up is Hard to Do: Determinants of Cartel Duration,” *Journal of Law and Economics*, 54:2, 455-492.

Levenstein, Margaret and Valerie Suslow (2010) “Constant Vigilance: Maintaining Cartel Deterrence During the Great Recession,” *Competition Policy International* 6(2) 145-162.

Peltzman, Sam (2014), “Industrial Concentration under the Rule of Reason,” *Journal of Law and Economics*, forthcoming.

RESPONSES OF MARK ROSMAN TO QUESTIONS SUBMITTED BY SENATOR KLOBUCHAR

“Cartel Prosecution: Stopping Price Fixers and Protecting Consumers”
Senator Klobuchar’s QFRs for Mark Rosman

You were formerly with the Antitrust Division both in Washington and in the now-closed Dallas Field Office. How does the closure of field offices impact the mission to fight international, domestic and local level cartels? Can local and domestic cartels be adequately discovered and pursued by the Washington office or remaining three field offices in San Francisco, New York and Chicago?

Thank you for the opportunity to testify in front of you and the subcommittee, Chairman Klobuchar, and for the opportunity to respond to these questions. As a former Trial Attorney in the Antitrust Division’s Dallas Field Office, as well as Assistant Chief of the National Criminal Enforcement Section, I have direct experience prosecuting local and domestic cartels as well as cartels that are international in scope, and I am uniquely positioned to respond to these questions.

I. While the Division’s Ability to Fight International Cartels Remains Intact, Its Ability to Fight Local and Regional Cartels is Weakened by the Field Office Closures

As I noted during my testimony, recent Antitrust Division (“Division”) enforcement has focused in particular on large-scale, international cartels. The Division’s recent efforts in the financial services (e.g., London Interbank Offered Rate (“LIBOR”) investigation) and automotive parts (e.g., automotive parts (“auto parts”) investigation) industries are examples of the Division’s recent large-scale, international cartel investigations. These investigations have all taken place against the backdrop of the Division’s closure of four (Dallas, Atlanta, Cleveland, and Philadelphia) out of seven of its regional field offices, which were primarily focused on criminal antitrust enforcement.

a. The Local and Regional Investigation vs. The Blockbuster (International) Investigation

There is many times a clear distinction between the local or regional domestic cartel investigation and the “blockbuster” cartel investigation, such as the multi-country and multi-product auto-parts investigation. The local or regional cartel typically has only one product or service at issue and, of course, is confined to a region or locality within the United States. With respect to these investigations, the Division’s prosecutors typically only deal with FBI agents and Inspector Generals’ offices, among other United States-based law enforcement officials. For example, the Division’s San Francisco Field Office has been very successful in prosecuting thirty-eight individuals in its ongoing investigation of bid rigging at public real estate foreclosure auctions in Northern California.¹ While the Division may highlight this investigation as a prime example of its continued domestic focus, this type of investigation would have been considered quite ordinary by earlier standards when domestic cases were more of the focus.

The international, or blockbuster, cartel is often times more complex and significantly more resource intensive than the local or regional cartel investigation. The international cartel being prosecuted today often involves multiple companies, multiple countries, and multiple products (potentially), and the cartel is being investigated by multiple jurisdictions.² In addition to the procedural complexities inherent in these multi-faceted investigations, there are fact development challenges in investigating conduct and companies outside the United States (such as document collection and witness interviewing issues). Further, there are legal challenges that

¹ See DOJ Press Release, Northern California Real Estate Investor Agrees to Plead Guilty to Bid Rigging at Public Foreclosure Auctions (Nov. 7, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/301569.htm.

² In DOJ’s recent deferred prosecution agreement with Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A. (“Rabobank”), entered into on October 29, 2013, DOJ worked with numerous agencies. Rabobank agreed to pay over \$1 billion in criminal and regulatory penalties – stemming from investigations by the DOJ, United States Commodities and Futures Trading Commission (“CFTC”), United Kingdom Financial Conduct Authority (“FCA”), and the Dutch Public Prosecution Service. The DOJ also cooperated with the Securities and Exchange Commission and United Kingdom’s Serious Fraud Office. See Press Release, Dep’t of Justice, Rabobank Admits Wrongdoing in Libor Investigation, Agrees to Pay \$325 Million Criminal Penalty (Oct. 29, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/301368.htm.

may not arise in a smaller, more straightforward domestic cartel (such as extra-territorial reach of the Sherman Act or the privacy laws of other countries.)

b. The Division's Recent Focus Is on the "Blockbuster" Cartel (at the Expense of the Local or Regional Cartel)

It is clear that the Division's recent efforts have focused on prosecuting large, multi-national, multi-party cartels. Indeed, this focus is one of the reasons for the regional field office closures. As Attorney General Holder stated regarding the closures: "We have seen that these . . . antitrust cases become more complex, more complicated, and it is our view that they can best be handled by the reduced number of offices that we have with larger teams."³ This statement recognizes the shift that has taken place at the Division with respect to its investigational focus.

As I noted in my testimony, I agree with the Attorney General that some consolidation may have been warranted, but the wholesale closure of four regional offices may prove to be too aggressive of a step. In other words, the decision to close the field offices is akin to using machete when a scalpel was more appropriate. The closure of the field offices may not have impacted the Division's ability to prosecute international cartels significantly (although it may have strengthened it in some respects and weakened it in others, as noted below), it certainly *weakened* the Division's ability to prosecute local and regional cartels.

i. *The Regional Field Offices Played an Important Role*

Before identifying how the closures may have weakened prosecution efforts, it is important to note how the regional field offices benefitted the Division. Perhaps the most significant benefit is that the offices handled very important smaller, regional and local, criminal cartel cases. Indeed, the field offices were central hubs for detecting and prosecuting local cases

³ *Oversight of The U.S. Department Of Justice: Hearing Before the Senate Comm. on the Judiciary*, 112 Cong. 13 (2012) (testimony of Eric Holder, Attorney General of the United States), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112shrg81674/pdf/CHRG-112shrg81674.pdf>.

in their region. As such, they created efficiencies in presenting facts before a grand jury and trying cases in jurisdictions in which the field offices resided.

The Division's recent real estate public foreclosure auction investigation in Northern California, as mentioned above, provides a good example. While smaller, these types of cases arguably may have a more direct impact on consumers, such as bid-rigging involving public construction contracts, and also arguably a more direct deterrent effect. At the same time, these regional offices also assisted in the larger national, and international, investigations when Division resources were tight.

ii. *The Impact on Enforcement at All Levels (Local, National, and International) Will Be Significant*

The closings will have a significant effect on enforcement on all types of cartel prosecutions (local/regional, national, and international). First, the closures further constrain resources that could be *currently* prosecuting or detecting cartels at the local or regional level, particularly in the localities and regions around Dallas, Atlanta, Cleveland, and Philadelphia. Second, the closures strip the Division of the efficiencies from having local, experienced prosecutors handle cases in their respective region. Third, the closures strip the Division of resources that were once focused and had experience in detecting cartels. Unlike local/regional cartels, international cartels also often stem from leniency applications; indeed, it has been reported that over 90% of fines imposed from the mid-1990s to early-2010 resulted from investigations involving leniency applicants. This promotes a passive (wait-and-see) approach to detection, which just further leaves DOJ vulnerable to domestic cartels going unnoticed.

Finally, and perhaps most significantly, the closures confirm the Division's focus on international cartel enforcement. This only exacerbates the challenges of slimming down the resources at the Antitrust Division, i.e., the focus on international calls for more resources (like

those that were once available in these offices), not the elimination of them. The focus (or the blatant shift in focus) also may cause companies operating on the local/regional and national level to be less focused on compliance (perhaps not intentionally).

II. For Local and Regional Cartels to be Adequately Discovered and Pursued by the Washington Office or Remaining Field Offices, Significant Efforts Must be Made Outside the Leniency Program

As the above comments indicate, the Division is currently facing an uphill battle with respect to discovering local and regional cartels. Although I do not question the intent of the Division to investigate and prosecute domestic cases, myself and many others do have doubts about the ability to do so given resource constraints and the office closures. And while the Division netted \$1.14 billion in fines in 2012, i.e., “the highest ever obtained by the Division in a single year,” most of these fines come from only two industries, auto parts and financial services.⁴ Thus, the DOJ may be (inadvertently) giving potential cartels, particularly local and regional cartels, in many other industries a free pass.

Despite the amnesty program’s overwhelming success, the DOJ should work diligently to detect cartels in other ways, as it did before the amnesty program arose. For example, the DOJ used to employ screens and conduct significant public outreach to identify cases.⁵ Before the amnesty program arose, the field offices were particularly successful with respect to detecting local and regional cartels. It is possible with expanded resources that the remaining Washington office and the remaining field offices could adequately pursue these types of cases; however, it would require more time on the road working with local law enforcement and perhaps even

⁴ See U.S. Dep’t of Justice, Antitrust Div., Division Update Spring 2013, *available at* <http://www.justice.gov/atr/public/division-update/2013/criminal-program.html>.

⁵ See Daniel Sokol and Rosa Abrantes recently wrote an interesting paper on this subject. Rosa M. Abrantes-Metz & D. Daniel Sokol, *The Lessons from LIBOR for Detection and Deterrence of Cartel Wrongdoing*, 3 HARV. BUS. L. REV. 10 (2012), *available at* <http://www.hblr.org/2012/10/the-lessons-from-libor-for-detection-and-deterrence-of-cartel-wrongdoing/>.

specifically dedicated resources, such as a domestic enforcement squad or sub-group within a Section.

The Division's prosecutors (some of the best in the world in my opinion) are very adept at using practices other than the amnesty program to discover cartels, but the Division needs to retain and develop the resources in order to do so.

RESPONSES OF HOLLIS SALZMAN TO QUESTIONS SUBMITTED BY SENATOR KLOBUCHAR

“Cartel Prosecution: Stopping Price Fixers and Protecting Consumers”
Hollis Salzman’s Responses to Senator Klobuchar’s QFRs

Q1. Why is private cartel enforcement an important component in the fight against cartels?

A1. Private enforcement provides virtually the only way to compensate consumers and businesses that are victims of anticompetitive cartel conduct. The importance of private cartel enforcement is underscored by the very language of the United States’ antitrust statutes. Congress created a financial incentive to encourage individuals and businesses to act as private attorneys general to bring enforcement actions by allowing them to recover treble damages and attorneys’ fees under the Sherman and Clayton acts.¹ Courts have also long considered private enforcement of the antitrust laws, including through class actions,² an important complement to public enforcement.³ The Antitrust Division of the Department of Justice’s (“DOJ”) Workload Statistics underscore this symbiotic relationship, noting “frequently restitution is not sought in criminal antitrust cases, as damages are obtained through treble damage actions filed by the victims.”⁴

¹ See Section 4 of the Clayton Act, 15 U.S.C. § 15 (“[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”).

² In particular, the class action mechanism has facilitated the prosecution of meritorious antitrust claims where otherwise there might not have been private enforcement. See, e.g., HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 18.08, at 18-3 (3d ed. 1992) (“‘It may be that a class action lawsuit is the most fair and efficient means of enforcing the law where antitrust violations have been continuous, widespread, and detrimental to as yet unidentified consumers. Sometimes a class-action lawsuit is the only way in which consumers would know of their rights at all, let alone have a forum for their vindication.’”) (quoting *Coleman v. Cannon Oil Co.*, 141 F.R.D. 516, 520 (M.D. Ala. 1992)).

³ See, e.g., *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969) (“[T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws.”); *Perma Life Mufflers, Inc. v. Int’l Parts Corp.*, 392 U.S. 134, 139 (1968) (“[T]he purpose of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.”), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); *Minn. Mining & Mfg. Co. v. N.J. Wood Finishing Co.*, 381 U.S. 311, 318 (1965) (“Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws.”).

⁴ U.S. Dep’t of Justice, Antitrust Division Workload Statistics FY 2003-2012, 11 n.15, <http://www.justice.gov/atr/public/workload-statistics.html>.

Given the limited resources available to federal and state enforcement authorities, private antitrust litigation has helped to promote compliance with the antitrust laws as well as to provide compensation to victims. Antitrust scholars Professors Joshua P. Davis and Robert H. Lande recently published an article reinforcing the results of their earlier qualitative study finding private enforcement may even deter more anticompetitive conduct than the DOJ's extremely successful anti-cartel program.⁵ For example, from 1990 to 2011, Davis and Lande calculated approximately \$11.7 billion in total deterrence from the DOJ's anti-cartel cases, in comparison to \$34-\$36 billion recovered from sixty private cases for the same period.⁶ Their research also indicated that the premise that private actions always follow and depend on government actions is false. Of the sixty cases studied, twenty-four were not preceded by government action, and another twelve involved a substantially different action than the one pursued by the government.⁷

Q2. What barriers exist to victims bringing private enforcement cases?

A2. Where a cartel has injured businesses or individuals, class actions or class arbitrations can be an efficient and effective means of ensuring adequate compensation. This is especially true where the violation resulted in harm to many victims with negative value claims – individual claims involving damages that are much smaller than it would cost to litigate the claim. In the most recent of a string of decisions imposing greater barriers on victims pursuing class action claims, the Supreme Court blocked the ability of some victims with low or negative value antitrust claims to bring suit in *American Express Co. v. Italian Colors Restaurant* (“*Italian*

⁵ Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case For Private Antitrust Enforcement*, 48 GA. L. REV. 1, 26 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2217051&download=yes.

⁶ The authors do note, however, that since some of the private cases followed DOJ actions, a portion of the deterrence from these private actions should be ascribed to the initial DOJ investigation. Davis & Lande, *supra* note 5 at 26 n. 110.

⁷ *Id.* at 30.

Colors”). Here, the Court held that a contractual waiver of class arbitration is enforceable even where a plaintiff’s costs to individually arbitrate its claim exceed the potential recovery.⁸

In *Italian Colors*, a class of merchants subject to American Express’s Card Acceptance Agreement, which contains provisions mandating arbitration, but precluding class-wide arbitration, brought antitrust claims against American Express. The plaintiff merchants argued that the provision preventing class arbitration was unenforceable because it rendered arbitration prohibitively expensive; it would cost more for individual merchants to arbitrate their claims than they could recover if they succeeded in arbitration. Plaintiffs’ expert economist, Dr. Gary L. French, found that total expert fees, even in an individual action, would cost between several hundred thousand dollars to over one million dollars, while the largest volume named plaintiff merchant might expect damages of \$12,850, or \$38,549 when trebled.⁹

On *certiorari*, the Supreme Court reversed the Second Circuit’s holding that enforcement of the class arbitration waiver would bar “effective vindication” of statutory rights under the federal antitrust laws. The Supreme Court noted that, while a merchant might well conclude that it was “not worth the expense involved in *proving* [its] statutory remedy[,]” this practical reality did not constitute “the elimination of the *right to pursue* that remedy.”¹⁰ In other words, “the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim.”¹¹ Thus the fact that a class arbitration waiver renders arbitration prohibitively expensive did not make an arbitration provision unenforceable.

⁸ No. 12-133, 133 S. Ct. 2304 (June 20, 2013).

⁹ See *In re Am. Express Merchants’ Litig.*, 554 F.3d 300, 316 (2d Cir. 2009).

¹⁰ 133 S. Ct. at 2311.

¹¹ *Id.* at 2309.

The Supreme Court's opinion in *Italian Colors* blocks many consumer and small business plaintiffs from effectively vindicating their rights under the federal antitrust laws. A mandatory arbitration clause prevents antitrust victims from pursuing their claims in federal court and an enforceable class arbitration waiver prevents such victims from aggregating their claims in arbitration which is necessary to make it economically feasible for victims to pursue low or negative value claims. To date, there is, however, at least one regulatory reform meant to curb the impact of the Supreme Court's decision, at least in the context of mortgage transactions. The Consumer Financial Protection Bureau has enacted new Truth in Lending Act rules that ban mandatory arbitration provisions. The new rules ban "terms that require arbitration or any other non-judicial procedures to resolve any controversy or settle any claims arising out of" consumer mortgage and home equity loan transactions.¹²

There are also various proposals before Congress that are intended to reverse or restrict the effect of the Supreme Court's holding in *Italian Colors*. For example, we urge the Senate to enact the Arbitration Fairness Act, introduced by Senator Franken, which would prohibit the enforcement of binding, mandatory pre-dispute arbitration clauses in certain cases, including antitrust class actions. In addition, narrowly crafted legislation aimed at specific industries in which there is heightened concern for consumer protection may lessen the inequity that occurs when large corporations unilaterally impose sweeping arbitration provisions on unwitting consumers who are then prevented from bringing aggregated actions for antitrust violations.

Q3. Is there anything the DOJ can do to facilitate private enforcement?

A3. Private enforcement provides virtually the only way to compensate consumers and small businesses that are victims of anticompetitive cartel conduct. Given the importance of obtaining restitution for consumers and small businesses harmed by cartels, effective coordination between

¹² 12 C.F.R. § 1026.36(h) (2013).

the DOJ and private litigants can greatly benefit consumers. One suggested area in which coordination may be improved is in the DOJ's participation in follow-on private civil antitrust litigation involving an Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA") applicant.

In my written testimony dated November 14, 2013, I explained that ACPERA allows an amnesty applicant to limit its liability in follow-on civil actions to actual damages if the applicant provides "satisfactory cooperation"¹³ to civil plaintiffs, but that even with the 2010 amendments, ACPERA's guidance on the timeliness of satisfactory cooperation remains vague. Amnesty applicants have at times taken advantage of this uncertainty to their advantage in follow-on civil litigation.¹⁴ While I urge Congress to amend the statute to require satisfactory cooperation at the earliest possible opportunity, the DOJ can also greatly assist plaintiffs in private civil litigation by filing amicus briefs supporting the position that satisfactory cooperation means cooperation at the earliest possible opportunity in order to make such cooperation meaningful and effective.

Of course, where discovery is stayed in a follow-on civil proceeding in deference to the DOJ's criminal investigation, there may be competing considerations which require the amnesty applicant to suspend or limit its cooperation until the stay is lifted. The 2010 amendments to ACPERA account for such a situation, and in fact require the amnesty applicant, once the stay (or protective order) is lifted, to provide "without unreasonable delay" any cooperation previously prohibited by the stay.¹⁵ Again, DOJ amicus briefs supporting the position that

¹³ ACPERA, Pub. L. No. 108-237, §213(b), 118 Stat. 665, 666 (codified as amended at 15 U.S.C. § 1 note).

¹⁴ See, e.g., *In re Aftermarket Auto. Lighting Prods. Antitrust Litig.*, No. 09 MDL 2007-GW(PJWx), 2013 U.S. Dist. LEXIS 125287 (C.D. Cal. Aug. 26, 2013) (finding defendants not entitled to the damages-limiting benefits of ACPERA because they did not disclose all relevant information to civil class action plaintiffs in a timely fashion).

¹⁵ Pub. L. No. 111-190, § 3, 124 Stat. 1275, 1276.

“without unreasonable delay,” means at the earliest possible opportunity would greatly assist private litigants, who need this information to successfully prosecute their claims.

LETTER TO HON. ERIC HOLDER, ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

United States Senate
WASHINGTON, DC 20510

September 30, 2013

The Honorable Eric Holder
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Holder:

We write regarding the ongoing investigation of antitrust crimes by international cartels in the auto parts industry, including price fixing and bid rigging.

According to the Antitrust Division's 2012 update, "The auto-parts investigation is the largest criminal investigation the Antitrust Division has ever pursued, both in terms of its scope and the potential volume of commerce affected by the alleged illegal conduct." Just last week, the Justice Department announced that nine Japan-based companies and two executives agreed to plead guilty in conspiracies to fix prices of more than 30 different auto parts sold to U.S. car manufacturers. This brings the total to 20 companies and 21 executives that have been charged in the Antitrust Division's ongoing investigation. All 20 companies have either pleaded guilty or have agreed to plead guilty and have agreed to pay more than \$1.6 billion in criminal fines. The criminal fines and prison terms in these cases are among the most severe imposed on foreign nationals voluntarily submitting to U.S. jurisdiction for Sherman Act antitrust violations.

The anti-competitive practices of the predominantly Japanese auto parts companies that have been uncovered spanned at least a decade and caused U.S.-based auto manufacturers to pay higher prices for auto parts. This in turn meant higher vehicles prices for U.S. consumers.

The U.S. auto industry is an important part of our country's manufacturing strength and jobs and is the driving force in the recent manufacturing resurgence. Clearly, U.S. auto manufacturers can and do compete and succeed anywhere in the world. We cannot allow what we now know is an international auto parts cartel to continue to harm such an important industry sector. The U.S. government must do all it can to ensure that foreign auto parts companies that want access to the U.S. market play by the same rules as everyone else. This anti-competitive behavior must be resolved before we finalize a Trans-Pacific Partnership agreement that now includes Japan.

We are pleased by the work that has been done so far and encourage the Antitrust Division to continue to aggressively pursue these cases, focusing on auto parts companies that conspired against U.S. headquartered auto manufacturers. We hope to see the Department aggressively pursue cases directly harming U.S. headquartered auto manufacturers.

Given the level of interest in the auto parts investigations we ask that our staff be briefed at your earliest convenience. Please contact any of us, or Alison Pascale of Senator Levin's staff at (202) 224-9117 to arrange the briefing. Thank you for your consideration and we look forward to learning more about these important investigations.

Sincerely,

Rebekah Stensow

Carl Levin

Chuck Sch

Ben Card

Sharon Brown

C. McCard

Amy Klobuchar