DEPARTMENT OF JUSTICE

CRIMINAL ANTITRUST ENFORCEMENT

Joint Address by

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AAG Bingaman:

It is a tremendous honor to be here today, not just because of the distinguished nature of this conference, but also because this is my first opportunity to appear at a public function with the new Deputy Assistant Attorney General for Criminal Enforcement, Gary Spratling. Most of you are familiar with Gary's long record of contributions to antitrust enforcement and to the Antitrust Division. The Division is fortunate to have Gary Spratling to turn to upon Joe Widmar's retirement.

Gary's career has been exemplary, and he has made himself an acknowledged national leader in antitrust enforcement, well-known and widely respected in the federal government, the private bar and the State Attorneys General offices. Gary has headed the Division's San Francisco Field Office for the past 11 years, with responsibility for federal antitrust enforcement in the broad expanse of the western United States. Gary's professional accomplishments as a litigator have been recognized by his receipt of two of the Justice Department's most prestigious awards -- the John Marshall Award and the Presidential Rank Award. Finally, Gary's extraordinary leadership skills are reflected in his extensive bar activities. Gary has served as past chair of the California Bar's Antitrust Section and currently serves as vice chair of the ABA Antitrust Section's Criminal Practice and Procedure Committee.

Gary is a superb successor to Joe Widmar as Deputy for Criminal Enforcement. Joe's record of accomplishment was immense, with over $350 million in criminal fines collected as a result of the more than one thousand cases filed during his tenure. Joe's record, wisdom and judgment developed in 33 years of service to the Division and to the people of the United States cannot be duplicated. But Gary Spratling's special brand of leadership, the wide respect in which he is held nationally and his enthusiasm and deep experience in criminal antitrust cases will allow Gary to make his own important and distinctive

contribution to the vital criminal program of the Antitrust Division. I am profoundly honored today to deliver this joint address with Gary to discuss our criminal enforcement program. It is no accident that the position of Deputy for Criminal Enforcement is filled by an outstanding lawyer who has made a career of the Antitrust Division. Criminal enforcement is an essential part of the Division's mission of protecting competition and the competitive process, and effective criminal enforcement requires the kind of consistency of standards and steadiness of purpose that someone with many years of service in the Division quintessentially brings to this vital job.

I have often noted that antitrust enforcement is fundamentally nonpartisan and bipartisan and that there is great continuity from one administration to another. Criminal enforcement illustrates the truth of those observations. The serious consequences of criminally violating the antitrust laws reflect the serious nature of the offense. The responsibility for bringing cases that may result in an individual losing his liberty or in an individual or a corporation paying substantial criminal fines is a solemn one, stemming as it does from the most awesome of governmental powers. The Antitrust Division always has exercised that responsibility as wisely and judiciously as possible, under the direction of dedicated public servants like Joe Widmar and Gary Spratling.

The Division's Core Mission

Criminal enforcement against the most serious antitrust offenses is our core mission. People who rig bids, allocate markets or fix prices are taking money out of the pockets of American consumers and out of the registers of American businesses just as surely as if they broke in under cover of darkness. Competition -- open competition on the merits -- results in lower prices, higher quality and more choice for consumers and businesses. Americans chose from the beginning of the Republic to organize their economy around the principle of

open competition precisely for these benefits. The American Revolution was a rejection of political oppression, to be sure. But an inextricable part of the Americans' complaint against England was the imposition of royal monopolies and the economic oppression and suffocation that inevitably resulted. It is a fact that Thomas Jefferson included a prohibition of monopolies in his list of essential protections that should be included in the Bill of Rights. Price fixing and the other criminal violations of the Sherman Act are the antitheses of open competition. They are criminal precisely because they raise prices, they lower quality and they reduce choice. In a narrow sense, as I have said, they take money from Americans. In a broader sense -- and equally important -- criminal antitrust violations tear at the economic fabric of our society. Antitrust crimes are antisocial, just as fraud and robbery are antisocial. A society that tolerated such crimes could not long maintain its economic freedom, any more than a society that tolerated murder could long maintain its physical freedom.

Thus it was that Congress passed the Sherman Act in 1890 and included both criminal and civil remedies for violations. That law passed Congress with only one dissenting vote and was signed by President Benjamin Harrison, who had urged Congressional action on antitrust legislation in his first annual message to Congress in December 1889. The Act reflected the broad American consensus in favor of free competition on the merits and against price fixing and other conspiracies that artificially raise the price of products. The strength of our national commitment to free competition is perhaps best expressed by Senator John Sherman in his autobiographical Recollections. When he looked back on forty years of a public life that included serving in the House of Representatives and the Senate, as Secretary of the Treasury for President Rutherford Hayes and as Secretary of State for President William McKinley, that Ohio Republican said of the goal of protecting the competitive process from combinations that "prevent and destroy all competition," simply, "I know of no object of greater importance to the people."

In 1975, Congress reaffirmed our nation's condemnation of antitrust crimes by upgrading those crimes from misdemeanors to felonies. It also substantially increased the penalties for these crimes, providing for fines of up to $1 million for corporations and up to $100,000 for individuals, and jail sentences of up to three years for individuals. In 1990 -- the centenary of the Sherman Act -- Congress again underscored the severity of antitrust crimes with a further increase in maximum punishments, raising maximum fines to $10 million for corporations and $350,000 for individuals. Alternatively, as with other federal felonies, courts have the power of imposing fines equal to twice the harm suffered by the crime's victims or twice the gain enjoyed by the perpetrators.

I am proud of the job the Division has done in the past two years of continuing its tradition of criminal enforcement of the antitrust laws. The Division has maintained its commitment to the prosecution of hard-core antitrust violations. Gary will highlight some of our recent accomplishments. He will also discuss some of the elements of the Division's Quality Criminal Cases Initiative, through which we hope to enhance our ability to identify and prosecute the most important criminal violations of the antitrust laws. In the remainder of my remarks, I would like to discuss briefly one of the greatest challenges facing the Division in carrying out its criminal enforcement mission in today's global economy -- effectively prosecuting international cartels and price-fixing conspiracies. The Challenge of International Enforcement

Conspiracies to fix prices or allocate markets that originate abroad can harm the American economy just as surely as domestic conspiracies. But international conspiracies are much more difficult to prosecute, even once they are detected. National boundaries very often present significant hurdles to international law enforcement. The General Electric case illustrates some of these hurdles. As I said at the time that Judge Smith handed down his ruling, we respect his decision.

Obviously, as set forth in the indictments and the briefing before and during trial, the Government believed that it had presented enough evidence to send the case to the jury. But we do not question that it was an unusually difficult case, due in major part to the basic problem of gathering evidence in international cases. For example, most of the actions at issue in the case took place in Europe, and key witnesses were outside the United States.

Ultimately, we did not succeed in clearing those hurdles in General Electric. But the outcome there will not deter us from bringing complex international cases in the future where we believe that prosecution is appropriate. Each investigation presents a unique set of facts, which is evaluated on the merits once all the evidence is collected. It would be a fundamental and serious mistake for anyone to generalize about our prosecutorial decisions based on the result in one case.

Moreover, I do not think that the problems of international discovery that we encountered in General Electric are insoluble. To the contrary, it is my profound belief that the 21st Century will witness increasing cooperation and coordination between national antitrust enforcement agencies, much to the detriment of international cartels.

The potential of such international cooperation for enhancing law enforcement was demonstrated in the past year by the Division's coordination in two cases with Canadian officials. In the first case, we and the Canadian Bureau of Competition Policy worked closely together under the terms of the U.S.-Canada Mutual Legal Assistance Treaty (MLAT) to uncover and break up an international cartel in the $120 million a year thermal fax paper market. Our coordination allowed each country to bring criminal charges under its respective antitrust laws. We charged a Japanese corporation, two U.S. subsidiaries of Japanese corporations and an executive of one of the firms with conspiring to charge higher prices to thermal fax paper customers, who are

mostly small businesses and owners of home fax machines. Our information charged these defendants with raising fax paper prices by about 10 percent. The defendants pleaded guilty and agreed to pay some $6 million in fines.

Coordination with Canadian officials also was essential to breaking up a price-fixing conspiracy in the $100 million plasticware industry. The Canadian Mounties raided offices in Montreal on the same day that the FBI executed search warrants in Minnesota and Massachusetts, ensuring that international boundaries did not prevent us from obtaining important evidence. The ultimate result of this teamwork? Guilty pleas from seven executives and four corporations. Two of the corporations already have agreed to pay over $8 million in fines. Sentencing of the remaining defendants should be completed in the next three or four weeks.

Our invaluable cooperation with the Canadians is possible, as I mentioned, because of the mutual assistance treaty between our two countries. Last year, Congress passed important legislation authorizing the Department of Justice and the Federal Trade Commission to negotiate reciprocal antitrust enforcement assistance agreements with other countries, agreements that will facilitate closer cooperation. The International Antitrust Enforcement Assistance Act (IAEAA) of 1994 was passed with overwhelming bipartisan support in October of last year, just ten weeks after it was introduced. The President signed it into law on November 2.

Under the provisions of the law, we will be able to negotiate written agreements with foreign antitrust enforcement agencies that will allow us to obtain evidence already in the files of those agencies or in the possession of persons in the territory of the other country in exchange for offering the same kind of assistance on a reciprocal basis to the foreign agencies. The basic model, by the way, is not new. It was used for legislation that helps the Securities and Exchanges Commission

and DOJ's Criminal Division obtain foreign-located evidence. One of the most important provisions of the Act is that reciprocal assistance depends upon the foreign agencies' according law enforcement information the same level of confidentiality that such information is accorded in this country.

Once bilateral agreements under the Act are in place, our ability to obtain evidence abroad will be enhanced immeasurably. Cartels and price-fixers will no longer enjoy de facto immunity from prosecution here just because they conduct their meetings outside the borders of the United States or take care to keep incriminating documents only in files located abroad. The benefit to the American economy will be greater protection from the depredations of international cartels.

The challenge of antitrust enforcement in a global economy -- especially criminal enforcement -- is daunting. But with tools such as bilaterals negotiated under the IAEAA and dedicated leaders such as Gary Spratling, I can assure you that the Antitrust Division will be up to it. With that, I am proud to present to you the new Deputy Assistant Attorney General for Criminal Enforcement, Gary Spratling.

DAAG Spratling:

I cannot begin to tell you what an honor it is to be able to serve the Division as Deputy Assistant Attorney General, an honor that I will always cherish. I thank Anne Bingaman for giving me this opportunity. It is a source of no small humility, however, to follow in the footsteps of Joe Widmar. His contributions to the Division and to antitrust enforcement in his three decades of public service may never be equaled. One fact in particular encapsulates for me his remarkable achievements: Joe supervised the prosecution of more than half of all the criminal antitrust cases filed since the passage of the Sherman Act in 1890. I am reminded of Thomas Jefferson's remark when he became America's ambassador to France upon the retirement of Benjamin Franklin.

When someone asked whether he was Dr. Franklin's replacement, Jefferson replied, "No one can replace him, sir; I am only his successor." I certainly do not purport to replace Joe, merely to succeed him.

It is fitting, therefore, to begin by noting a few of the more important domestic criminal cases that the Division resolved under Joe's supervision in the past year and a half. Then I will discuss some of the elements of the Division's Quality Criminal Cases Initiative, a program designed to increase our ability to detect and go after criminal antitrust violations, and announce new actions to increase the resources devoted to criminal antitrust enforcement.

Steel Wool Scouring Pads

The first case I would like to discuss is the price fixing case against Miles, Inc., the manufacturer of SOS steel wool scouring pads. To understand the importance of that case, it is necessary first to recall that in August 1993, the Division under Anne Bingaman and at Joe Widmar's recommendation announced an expansion of its leniency program for corporate participants in antitrust conspiracies who come forward with information about criminal antitrust violations. The new policy allows corporations to avoid criminal prosecution even if their cooperation begins after an investigation is already underway. Under prior policy, the timing of a corporation's cooperation was dispositive to the availability of leniency. The Division concluded that the timing of disclosure is not always critical to the public interest in disclosure, yet the "pre-existing investigation" limitation sharply reduced the incentive for companies to come forward, because they often would not be in a position to know if the Division had started an investigation.

The new policy was an immediate success. In the first year, an average of one corporation per month came forward, compared to one corporation per year under the old policy. The result has

been the successful prosecution of cases that may not have been detected at all. Moreover -- and this is extremely important in an era where taxpayers expect the government to accomplish better results with fewer resources -- the cooperation has allowed us to complete cases much more swiftly and with less effort than if we had to prosecute without the cooperation of a conspirator.

Let me add, too, a benefit that is difficult to measure but that I believe is very real. The expanded leniency program increases the incentive for conspirators to cheat on each other, an incentive that must inevitably sow doubt in the minds of potential conspirators and reduce their willingness to conspire in the first place. In this way, the expanded leniency program has an important deterrent effect. The success of the expanded program is illustrated by the case against Miles. Miles and its primary competitor, Dial, which makes Brillo pads, discussed prices and discount levels throughout 1992 at meetings and in telephone conversations. Dial came forward with information about the discussions and obtained amnesty under the leniency program. Miles, on the other hand, pleaded guilty to a felony for conspiring to fix prices and was fined $4.5 million. There is no question in my mind that we wrapped up that case with a minimum of effort and a maximum of results precisely because of the leniency program. Dial's early and complete cooperation -- encouraged by the leniency program -- led directly to a just and swift conclusion of the case.

The ultimate beneficiaries of a case like this one are American consumers. It's bad enough when to have to scrub pots and pans in the first place. But to think that you also paid an artificially high price for the steel wool pads adds insult to injury.

Residential Flush Doors

Consumers also directly benefitted from a series of cases we brought against manufacturers of residential flush doors. Flush

doors are made of flat wood that can be covered with various types of door facings. They are used primarily in residential basements, bedrooms and bathrooms and are sold throughout the United States to door distributors and wholesalers, home improvement centers and residential construction companies. In all, it is a $600 million market. Last June, we charged Premdor, one of the two largest residential door manufacturers in the country, with conspiring to fix prices. The company pleaded guilty and agreed to pay $6 million in fines. Two other companies have since been convicted and fined as a result of that investigation, which is ongoing.

Milk and Dairy Products

As most of you know, one of the Division's most sustained criminal enforcement efforts has attacked bid rigging in the milk and dairy products industry. We brought our first case in this industry in May 1988 in Florida. Since then, we have filed 126 criminal cases against 73 corporations and 80 individuals in 18 states. The defendants in these cases were rigging bids on contracts to supply milk to schoolchildren, including contracts for federally subsidized school lunch programs, as well as on contracts to supply dairy products to the United States military. Some of the conspiracies we uncovered had been rigging bids since the late 1960s. In addition to Sherman Act violations, we have brought charges and obtained convictions for mail fraud, false statements, false declarations before a federal grand jury and obstruction of justice.

As a result of this effort, 63 corporations and 59 individuals have been convicted, resulting in fines totaling $59 million. Twenty-nine of the individuals received jail sentences averaging almost seven months a piece. Just last November, for example, the former general manager of an Indiana dairy products company was sentenced to two and a half years of incarceration for his role in a conspiracy to rig bids for school milk contracts in northern Indiana and Michigan. We also have

recovered civil damages of about $8 million. Among the more notable of recent convictions are those of Borden and its subsidiary, Meadow Gold, on charges of rigging bids in Alabama, Mississippi, Louisiana and Indiana, for which the two companies were fined over $5 million. In all, Borden has been assessed over $16 million in fines and damages for its participation in such conspiracies.

Since I am in Dallas, I should note the conviction here of Southern Foods Group for rigging bids submitted to public school districts in here in Dallas, in Wichita Falls and in Tyler from the mid- 1970s to 1991 and its conviction in Louisiana for rigging bids there between 1985 and 1989. Southern participated in the conspiracies through various predecessors. The convictions resulted in fines totaling $2.9 million.

Rig Bids or Fix Prices: Go to Jail

Before discussing our Quality Criminal Cases Initiative, I want to underscore something that individuals should think about before they engage in price fixing or bid rigging or before they attempt to obstruct our investigations into such activities. People go to jail for these offenses. These are not "victimless" crimes, by any stretch of the imagination. They take money from American consumers, taxpayers and businesses, in the case of the substantive Sherman Act crimes, and they undermine the integrity of the judicial system, in the case of the obstruction crimes.

As such, the penalties for violating these crimes are severe. Just by way of example, two construction managers who conspired to rig bids on construction contracts in Kansas and to obstruct our investigation into the bid rigging each were sentenced last August to a year in jail. Likewise, the owner of several Louisiana seafood companies, who conspired to obstruct our investigation into price fixing in the crawfish industry, was sentenced last month to 14 months in prison. As these and other cases demonstrate, the Antitrust Division will not hesitate to

seek significant jail sentences against individual defendants in the cases that it prosecutes.

Quality Criminal Cases Initiative

With that thought in mind, I would like to announce some steps we are taking to enhance our ability to detect and prosecute criminal antitrust violations. One of the most difficult challenges of criminal antitrust enforcement is becoming aware of the possibility that an antitrust crime has been committed. Thus, the Division has continuously examined and attempted to enhance its ability to detect possible violations of the antitrust laws so that those potential violations can be investigated and, if appropriate, prosecuted. The Division recently has embarked upon a new comprehensive Quality Criminal Cases Initiative designed to generate leads to suspicious conduct.

The Initiative was developed with the participation of all criminal prosecutors in the Division. It resulted in a series of more than 20 concrete, prioritized recommendations for generating leads for more criminal cases. Anne has approved the implementation of the recommendations. Some of the highest priority recommendations--the ones I will talk about today--were measures designed to increase the number of referrals of possible antitrust crimes from other investigative and prosecutorial agencies, such as U.S. Attorneys' Offices, the Fraud Section of the Criminal Division, the Federal Bureau of Investigation and the Inspector Generals' Offices of federal agencies. These various organizations, in the course of investigations in their particular areas of responsibility, very often obtain evidence of conduct that amounts to criminal antitrust violations. It is important, then, that they be aware of the significance of that evidence and that they have an efficient mechanism for bringing it to our attention.

Anne and I recently met with the Executive Office of United States Attorneys and the Attorney General's Advisory Committee of United States Attorneys -- a group of eighteen United States Attorneys that serves as an advisory group and liaison between the Assistant Attorneys General of the Department's litigating divisions and the U.S. Attorneys. We presented a proposal involving a series of coordinated, multi-level contacts between Antitrust Division Field Offices and U.S. Attorneys' Offices across the country with the objective of establishing and implementing in each office a mechanism to regularly and consistently refer leads or information concerning possible antitrust violations to the Antitrust Division. The proposal has several elements, including:

- sensitizing U.S. Attorney personnel to the indicia of suspicious antitrust conduct;

- discussing the types of matters which are currently prosecuted as fraud which may be more appropriately prosecuted as antitrust violations, or prosecuted jointly as Title 15 and Title 18 offenses;

- establishing a specific, regular referral mechanism between the offices; and

- coordinating the prosecution or disposition of matters involving both antitrust and other violations.

The Committee endorsed the proposal and supports the active participation of U.S. Attorneys' Offices nationwide.

I also have met with representatives of the Fraud Section of the Criminal Division for the purpose of increasing the likelihood that auditors and criminal investigators will detect anticompetitive practices and refer those leads to us. The response was very positive. For example, the Fraud Section requested that Defense Contract Audit Agency Headquarters issue

new antitrust guidance memoranda to field auditors and supervisors, alerting them to indicators of suspected anticompetitive activity and attaching an explanation of suspicious conduct that should be reported as well as a list of suspicious signs that may indicate bid rigging or price fixing. Our enhanced referral mechanism with the Fraud Section already has generated new leads, one of which provided the basis for the initiation of a grand jury investigation.

In the next couple of months, we will be advancing similar nationwide and regional measures with the FBI and Inspector Generals' Offices -- all in an effort to increase the likelihood that anticompetitive conduct will be detected, identified as a possible antitrust violation and referred to the Division for investigation and prosecution.

New Resources for Criminal Enforcement

Anne has decided that the criminal program needs additional resources to detect and develop quality cases, so she has authorized two actions designed to improve the number of leads and the speed with which they are followed up, as well as the pace and overall quality of our investigations. Before I explain these actions, you should know one aspect of the Division's operations in order to put them in context. In the Antitrust Division today, criminal enforcement is primarily the responsibility of prosecutors located in its seven regional field offices. Over the last fifteen years, the field offices have filed 80 percent of the criminal cases brought by the Division. Moreover, in the functional realignment of the Division which we have been implementing for the past year, we decided to move still more criminal matters to the field. The goal was to take greater advantage of the special prosecutorial expertise of the field office attorneys as a way of making our criminal enforcement program more effective. These new actions that Anne and I are announcing today will augment the field offices'

ability to carry out their primary mission of investigating and prosecuting criminal antitrust violations and related federal crimes.

Additional Staff. First, Anne has approved the hiring of additional staff to assist in the investigation and development of criminal cases in the field offices. In filling these positions, we will be looking for individuals with extensive knowledge of investigative techniques. This is a first for the Division, so we will start with four field offices as an experiment. We believe that this added staff will be extremely valuable in performing a host of enforcement tasks, including conducting prompt and highly competent field interviews, coordinating our efforts with those of the other law enforcement agencies with which we work and assisting in the organization of case presentation during grand jury proceedings and at trial. Paralegals. Second, Anne also has approved the assignment of paralegals from our corps of Honors Program paralegals in Washington to criminal investigations in the field. Over the past year and a half, the Division has added over 90 new paralegals through an Honors Program that recruits top graduates of the nation's finest colleges and universities. These talented young people, who are hired for two year terms, greatly enhance the effectiveness of the Division's attorneys and economists by allowing those professionals to devote a greater percentage of their time to tasks that require their professional training. The benefit to our civil enforcement program has been outstanding. But, until now, very little use has been made of those paralegals in criminal work in the field. Anne has decided to make them as available for criminal work in the field offices as for civil and merger work in D.C.

The Quality Criminal Cases Initiative and the dedication of new resources to our criminal enforcement program reflect the continuing centrality of criminal enforcement to the Division's mission of protecting consumers and the economy from anticompetitive behavior. The message I want to send, however,

is not merely that the cop is on the beat. We are and we have been, as Borden can tell you or as those Kansas construction managers who are looking at hard time can tell you. Rather, the message I want to send is that we are constantly and actively looking for ways to be more efficient and more effective -- in other words, to get more out of every ounce of energy we put into the vital task of criminally enforcing the Sherman Act.