



**U.S. Department of Justice Antitrust Division**

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## Message from Makan

The Antitrust Division is pleased to provide its annual Spring Update for 2018. This spring, I have had the opportunity to reflect on my six-month anniversary as Assistant Attorney General of the Antitrust Division, looking back on the important achievements of our career staff and the exciting new developments and announcements still on the horizon. Some of the Division's milestones are highlighted in these pages, and rather than recounting them all here, I would like to highlight the key priorities that the Division is pursuing to protect competition and the American consumer.



What makes antitrust great is the bipartisan consensus approach that has emerged through decades of trial and error, followed by careful empirical study of how market actors respond to legal constraints on their behavior. The consumer welfare standard is a byproduct of that approach. Antitrust enforcers across administrations have adhered to the consumer welfare standard, helping drive economic growth, innovation, and dynamic competition. The consumer welfare standard also acts as a constraint on our power. It focuses our attention and enforcement efforts on transactions and restraints that threaten to harm competition and consumers. As a caretaker of this consensus approach, my goal as Assistant Attorney General is to ensure that the Antitrust Division exercises its power so that the American consumer can reap the rewards of free market competition and innovation.

### *Antitrust is Law Enforcement, Not Regulation*

To protect consumer welfare, the Division exercises its power through the lens of law enforcement, not regulation. Competition and enforcement work together, not at cross-purposes. Indeed, free markets work best in the absence of regulatory barriers to innovation and growth, and antitrust law reinforces the free market by condemning transactions and restraints that harm competition. As former Supreme Court Justice Robert Jackson wrote during his time as Assistant Attorney General for the Antitrust Division, “The antitrust laws represent an effort to avoid detailed government regulation of business by keeping competition in control of prices. It was hoped to . . . let [government] confine its responsibility to seeing that a true competitive economy functions.” The Division has taken Justice Jackson’s words to heart in its approach to carrying out its mission.

A key component of an enforcement-first approach is evident through our strong preference for structural remedies to mergers that would harm competition and consumers, rather than so-called behavioral remedies. A behavioral remedy requires the Antitrust Division to regulate an entire marketplace through complex decrees that ignore the profit-maximizing incentives of private actors. A structural remedy, by comparison, eliminates harm while not requiring the government to take on a long-term regulatory role. The Division’s recent settlements reflect this preference for structural relief, and importantly include new enhancements to make consent decrees enforceable.

### *The “New Madison” Approach to Antitrust Law, Intellectual Property, and Innovation*

Antitrust law likewise benefits consumer welfare by protecting incentives for innovation. This is most evident in the realm of intellectual property rights. James Madison, the Founding Father and principal drafter of the Constitution, despite his distaste for monopolies, recognized the value of patent rights. He saw patent rights “as encouragement to . . . ingenious discoveries” that are “too valuable to renounce” as mere monopolies because of their importance to fueling innovation. His vision carried the day at the Founding, as Article I, Section 8 of the Constitution empowers

Congress to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

Despite its historical origins, the “New Madison” approach to antitrust law and intellectual property is forward-looking: it rests on the idea that dynamic innovation works best through policies that ensure incentives for inventors to innovate and create exciting new technologies, and for licensees to implement those technologies. In recent years, many have expressed a one-sided focus on the so-called problem of patent “hold up” by owners of patents incorporated into technology standards, while overlooking the arguably more problematic concern of patent “hold out” that occurs when licensees refuse to compensate patent holders who have already incurred significant up-front costs of innovation.

Against this backdrop, the Division will take steps to help ensure that enforcers and policymakers do not misapply the antitrust laws to undermine the incentives for innovation. We recognize that antitrust law should not police disputes between patent holders and implementers over licensing disputes where common law remedies are available and more proper. At the same time, we will be skeptical of standard setting organizations that allow blocks of implementers or innovators to engage in concerted action and skew those organizations’ rules and policies in their favor.

In the spirit of self-reflection, the Division is taking a hard look at its approach to antitrust and intellectual property to ensure that our advocacy and enforcement efforts appropriately consider incentives for innovation that benefit consumers. By refining and applying its approach, we hope to fuel the discussion of how enforcers at home and abroad can best apply the antitrust laws.

#### *International Engagement and Exporting the Antitrust Consensus*

As domestic enforcers in a global economy, our work to promote consumer welfare relies heavily on our partnerships and engagement with foreign competition authorities. The Division’s International Section grows stronger by the day, and it has been a particular focus of our resources and efforts in recent months. That trend will continue as we continue to encourage our foreign partners toward convergence on procedural norms for law enforcement.

Our global engagement has yielded real results. Last month, we saw the International Competition Network—an organization first envisioned by former Assistant Attorney General Jim Rill—adopt guiding principles for procedural fairness in competition agency enforcement. The Division took a leading role in bringing about this important document, and it is spearheading the effort to ensure that enforcers adopt norms of procedural fairness, transparency, and nondiscrimination.

This spring, competition enforcers from around the world will gather to share their perspectives and priorities with antitrust practitioners in Washington, DC at the ABA Spring Meeting. The Division looks forward to engaging with our friends to share best practices and other perspectives. We will also continue to explore mechanisms to improve our international norms and interactions as global business relies more and more on predictable, objective, and rules-based approaches to competition enforcement.

## **Meet the Front Office**

***Makan Delrahim*** is Assistant Attorney General for the Antitrust Division, confirmed by the United States Senate on September 27, 2017. He previously served as Deputy Assistant to the President and Deputy White House Counsel and as a partner in a national law firm. He served in the Antitrust Division from 2003 to 2005 as a Deputy Assistant Attorney General, overseeing the Appellate, Foreign Commerce, and Legal Policy sections. He has served on the Attorney General's Task Force on Intellectual Property and as Chairman of the Merger Working Group of the International Competition Network. From 2004-07, he was a Commissioner on the Antitrust Modernization Commission. Earlier in his career, Mr. Delrahim served as antitrust counsel, and later as Chief of Staff and Chief Counsel of the United States Senate Judiciary Committee. He completed his undergraduate studies at UCLA, earned his JD from George Washington University Law School, and holds a masters degree in Biotechnology from the graduate school of Johns Hopkins University.

Fun Fact: Makan was executive producer of the movie "Trashfire."

***Andrew Finch*** is Principal Deputy Assistant Attorney General for the Antitrust Division. He served as Acting Assistant Attorney General of the Antitrust Division from April 2017 until the confirmation of Makan Delrahim as AAG in September 2017. Previously, Andrew practiced antitrust law as a litigation partner in an international law firm. He previously served as Counsel to the Assistant Attorney General of the Antitrust Division from 2003 to 2005. He holds a BA from the University of California, Berkeley, an MA from the University of California, Los Angeles, and a JD from the University of Chicago Law School. He also served as a law clerk to the Honorable Dennis G. Jacobs of the United States Court of Appeals for the Second Circuit.



Fun Fact: Andrew owns a Coton de Tulear, the unofficial dog of the Antitrust Division (Assistant Attorney General Makan Delrahim and Deputy Assistant Attorney General Barry Nigro also own Cotons).



***Roger P. Alford*** is Deputy Assistant Attorney General for International Affairs. He is on leave from the faculty of Notre Dame Law School, which he joined in 2012, and where he is Concurrent Professor at the Keough School of Global Affairs and a Faculty Fellow at the Kellogg Institute for International Studies. Previously, he practiced law with a large law firm in Washington, D.C., and was a senior legal advisor to the Claims Resolution Tribunal for Dormant Activities in Zurich. Earlier in his career, he served as a law clerk to Judge James Buckley of the United States Court of Appeals for the D.C. Circuit, and to Judge Richard Allison of the Iran-United States Claims Tribunal in The Hague. He completed his undergraduate studies at Baylor, and earned his JD at New York University School of Law. He also holds degrees from Edinburgh University and Southern Seminary.

Fun Fact: Since his twenties, Roger has run one marathon a decade to keep in shape.

**Luke Froeb** is Deputy Assistant Attorney General for Economics. He has been a member of the faculty of Vanderbilt's Owen Graduate School of Management since 1993, where he is holder of the William C. Oehmig Chair of Free Enterprise and Entrepreneurship. From 2003-05, he served as Director of the Bureau of Economics at the FTC. Earlier in his career, he was an economist in the Antitrust Division at the U.S. Department of Justice, a Kramer Foundation Fellow at the University of Chicago Law School, and an assistant professor in the economics department at Tulane University. Professor Froeb received his AB from Stanford, and his Ph.D. in econometrics from the University of Wisconsin.



Fun Fact: Luke taught his kids how to add (up to 21) by playing blackjack for money.



**Donald G. Kempf Jr.** is Deputy Assistant Attorney General. He previously was Chief Legal Officer for a major financial institution, and a partner with a national law firm. He also served on the Antitrust Modernization Commission, and was a Senior Advisor to an independent investment bank and to an independent consultant for the legal industry. Mr. Kempf served in the U.S. Marine Corps, and earned his AB from Villanova University, his LLB from Harvard Law School, and his MBA from University of Chicago Graduate School of Business.

Fun fact: Got admitted to Harvard Law School by joining the Marine Corps.

**Bernard (Barry) A. Nigro** is Deputy Assistant Attorney General. He previously was chair of the antitrust department and partner in a national law firm. He served as Deputy Director for the Federal Trade Commission's Bureau of Competition from 2003-05, where he received a commendation for Superior Service awarded by the Chairman. He received his BA from Georgetown University and his JD from George Washington University Law School.



Fun fact: Barry's college graduation speaker was Mother Teresa, and he once golfed with Tom Watson.



**Marvin Price** is serving as the Acting Deputy Assistant Attorney General for Criminal Enforcement, on detail from the Director of Criminal Enforcement position. Prior to becoming Director, he was the Chief of the Chicago Office of the Antitrust Division for about 14 years. He has also served in the Division as an Assistant Chief and Special Assistant, and is one of the Division's Professional Responsibility Officers. Marvin received his BA from the University of California, San Diego, his MBA from the Haas School of Business, University of California, Berkeley, and his JD from George Washington University Law School.

Fun fact: While serving in the U.S. Air Force, Marvin lived for a year on a small island in the East China Sea called Okino Erabu Shima.

**Patty Brink** is the Director of Civil Enforcement, supervising the Division's civil investigations, including reviewing all proposed remedies and coordinating any international cooperation. She participates in the ICN's Merger Working Group and has engaged in technical assistance consultations through the OECD and in several countries. Previously, Patty was the Deputy Director of Operations, Special Counsel for Microsoft Decree Enforcement, and staff attorney in numerous Division sections. She was awarded her AB from Occidental College and her JD from University of California, Davis King Hall.



Fun Fact: Patty is an avid Bruce Springsteen fan and has attended 40+ Bruce concerts.



**Dorothy Fountain** is the Division's Chief Legal Advisor, the Division's principal lawyer for internal risk management and oversight, advising and providing guidance on the Division's jurisdiction and law enforcement authority and potential areas of legal risk or vulnerability. Previously, Dorothy was Assistant Chief of the Litigation II Section for 10 years. She also served in the Division as Deputy Director of Operations and as a staff attorney. Dorothy was a law clerk in the Eastern District of Virginia and an associate in a major law firm. She is a graduate of the University of Virginia School of Law and the University of North Carolina.

Fun Fact: Dorothy is a beekeeper, and her friends are the beneficiaries of the prodigious honey production of her beehives.

**Bob Majure** is Director of Economics where he was recently awarded the Presidential Rank of Meritorious Executive. Prior to becoming Director in 2010, Bob served as Section Chief for one of the economic sections where he focused on cases involving telecommunications, media, and other high technology industries. Earlier in his career, Bob worked as a staff economist and Assistant Chief in the Division. Odd jobs have included advising a European central bank on de-regulation and programming warehouse automation systems for his family business. He received his BA from the University of Virginia and his PhD from Massachusetts Institute of Technology.



Fun Fact: Bob wrote a dissertation on game theory and spends a majority of his free time watching his children play sports he does not understand – especially lacrosse and field hockey.



**Craig Conrath** is the Director of Litigation. Craig is one of the Division's most senior trial attorneys, having spent nearly 40 years working on a wide variety of criminal, civil, regulatory, and policy matters, including stints as a competition advisor in Poland and Mexico. Craig served as lead trial lawyer in the Division's lawsuit against American Express and is currently leading the trial team in *United States v. AT&T/DirecTV and Time Warner*. He graduated from Macalester College and the University of Minnesota Law School.



**John Elias** is the Acting Chief of Staff to the Assistant Attorney General. John joined the Antitrust Division through the Honors Program in 2006. After six years as a Trial Attorney in the Transportation, Energy and Agriculture Section, he became a Special Assistant in the Office of Operations. In 2015, following a detail to the White House’s Presidential Personnel Office, John joined the Office of the Associate Attorney General, where he served for various periods as Counsel, Chief of Staff, and Deputy Associate Attorney General. John joined the Division’s Front Office in January 2017. He was President of DOJ Pride, the Department’s LGBT employee affinity group, from 2013 through 2017. John is a graduate of Stanford Law School and Yale University.

Fun Fact: In July 2011, John joined 5,000 others on the National Mall to set a world record for largest-ever ensemble to play the angklung, an Indonesian bamboo instrument.

**Rene Augustine** is Senior Counsel to the Assistant Attorney General. Most recently, Rene served in the White House Counsel’s Office as Special Assistant to the President and Senior Associate Counsel to the President. Previously, she served as Associate Counsel to President George W. Bush, and Senior Counsel to the U.S. Senate Committee on the Judiciary. Earlier in her career, Rene was a law clerk in the U.S. District Court for the District of Maryland, an associate with an international law firm based in Washington, D.C., and an adjunct faculty member at George Mason University Law School. Her focus in the Front Office is on media, entertainment and professional services, as well as deregulation and federal intergovernmental relations. Rene is a graduate of Vanderbilt University School of Law and Duke University.



Fun fact: Rene learned how to dogsled last year in the Arctic Circle.



**Bryson Bachman** is Senior Counsel to the Assistant Attorney General. He assists in civil investigations, with a focus on vertical mergers, and manages relations with state attorneys general. He has also served within the Department of Justice as a Deputy to the Associate Attorney General, and as a Trial Attorney in which role he contributed to the Antitrust Division’s successful merger litigations against General Electric/Electrolux and Anthem/Cigna. Previously, Bryson served as Chief Counsel to U.S. Senator Mike Lee on the Senate’s Antitrust Subcommittee. Bryson also worked for several years as an associate in the Washington D.C. office of an international law firm and clerked for the Honorable Thomas B. Griffith of

the U.S. Court of Appeals for the D.C. Circuit. He is a graduate of Harvard Law School and Brigham Young University.

Fun fact: Bryson once appeared in a teen romance film, “Drive Me Crazy,” as a basketball player.



**Caroline Anderson** is Counsel to the Assistant Attorney General. Carly is detailed from the Civil Division of the Department of Justice, where she worked as a Trial Attorney. In that capacity, Carly defended the United States in district court litigation against statutory and constitutional challenges and advised the Treasury and State Departments regarding the implementation of financial sanctions. Carly also serves as an Adjunct Professor at Georgetown Law School. Previously, she served as Deputy Associate Counsel to President Barack Obama. Carly's focus in the Front Office is on civil litigation, international issues, and the Division's Chicago

office. Carly clerked for the Honorable Miriam Cedarbaum of the U.S. District Court for the Southern District of New York and for the Honorable Joel Flaum of the U.S. Court of Appeals for the Seventh Circuit. Carly is a graduate of Harvard Law School, the London School of Economics, and Stanford University.

Fun fact: Carly has a black belt in Shotokan Karate.

**Emma Burnham** is Counsel to the Assistant Attorney General, where her work focuses on criminal antitrust matters. From June 2014 to February 2017, Emma served as a Trial Attorney in the Antitrust Division's Washington Criminal I Section. Before joining the Department of Justice, Emma worked as a white-collar criminal defense associate at firms in Los Angeles and Washington, D.C., and as a law clerk for the Honorable Robert W. Gettleman of the U.S. District Court for the Northern District of Illinois. Emma is a graduate of the University of Chicago Law School and Georgetown University.



Fun fact: Emma has two dogs (a lot of people have one dog, but not as many people have two dogs).



**David Lawrence** is Counsel to the Assistant Attorney General. David started his career at the Antitrust Division as an honors attorney in the Telecommunications and Broadband Section, following clerkships on the U.S. Court of Appeals for the Second Circuit, for the Honorable Wilfred Feinberg, and on the U.S. District Court for the Southern District of New York for the Honorable Richard J. Holwell. He joined the Front Office in 2016 as Counsel to Acting Assistant Attorney General Renata Hesse, assisted the management of the Division through the transition between administrations, and now focuses on issues in the telecommunications and transportation sectors. David is a graduate of New York University School of Law and University of Massachusetts at Amherst, where he majored in Physics.

Fun fact: David's identical twin brother, Matthew, also a lawyer, was offered a job at the Antitrust Division the year before David was.

**Taylor Owings** is Counsel to the Assistant Attorney General. Taylor joined the Antitrust Division from private practice in the San Francisco office of an international law firm, where she advised tech clients on the application of antitrust law to high-tech business models. In the Front Office, Taylor serves as a liaison to the Technology and Finance Section, the civil section of the San Francisco office, the Appellate Section, and the Competition Policy and Advocacy Section. Taylor clerked on the U.S. Court of Appeals for the D.C. Circuit, for the Honorable Douglas H. Ginsburg, and on the U.S. District



Court for the District of Columbia, for the Honorable Richard J. Leon. She was also formerly a member of the antitrust practice group in the Washington, D.C. office of another international law firm. Taylor is a graduate of Vanderbilt University School of Law, the London School of Economics, and Harvard College.

Fun Fact: Taylor has practiced dance her whole life and, while at the London School of Economics, she choreographed and performed in a dance show staged on London's West End.

**William Rinner** is Counsel to the Assistant Attorney General, joining the Antitrust Division in September 2017. Among other responsibilities, he has advised the Assistant Attorney General on matters in the Appellate, Healthcare and Consumer Products, and Competition Policy and Advocacy sections, as well as on policy issues involving technology and intellectual property. Before joining the Division, Bill was an antitrust litigator in private practice in Washington, D.C. Bill previously clerked for the Honorable Richard Posner of the United States Court of Appeals for the Seventh Circuit. Bill is a graduate of Yale Law School and University of Notre Dame.



Fun Fact: Bill was a member of his college a cappella group, the Undertones.



**Julia Schiller** is Counsel to the Assistant Attorney General. Among other responsibilities, Julia has advised the Assistant Attorney General on a wide array of civil enforcement matters and policy issues. Julia joined the Division from the Washington D.C. office of an international law firm, where she practiced antitrust law for nearly 10 years, focusing on government merger and nonmerger investigations, civil litigation, and antitrust counseling. Prior to attending law school, Julia served as a Research Assistant at the White House's Council of Economic Advisers. Julia is a graduate of New York University School of Law and holds an A.B. in economics from Princeton University.

Fun fact: Julia once hitchhiked her way out of a volcanic crater.

**M. Brinkley Tappan** is Counsel to the Assistant Attorney General. Brinkley joined the Antitrust Division in September 2014 as International Counsel in the International Section, where she managed the Division's relationships with the Korea Fair Trade Commission and the Competition Commission of India, intellectual property policy issues around the world, and the Division's requests to foreign governments for mutual legal assistance and extradition in international cartel cases. During her time as International Counsel, Brinkley was also detailed to various civil matters, including the Division's litigation to block the merger of Anthem/Cigna. Prior to joining the Division, Brinkley practiced for nine years in the antitrust group of an international law firm based in Washington, D.C. Brinkley is a graduate of the University of Pennsylvania Law School and holds a B.A. from the University of Pennsylvania in history.



Fun fact: Brinkley is a dedicated yogi and has practiced Ashtanga yoga for more than 15 years.

## **Congratulations! The Antitrust Division Recognizes Career Leaders with Promotions and Appointments**

Over the past year, the Division has promoted a number of career attorneys into positions of leadership:

**Craig Conrath** was appointed Director of Litigation. Craig has served as a Trial Attorney in the Antitrust Division for over 30 years and was featured in the 2015 Division Update.

**Sean Farrell** was appointed Assistant Chief in the New York Office, in which he had previously served as a Trial Attorney.

**Scott Fitzgerald** was appointed Assistant Chief in the Healthcare and Consumer Products Section. Scott was previously a Trial Attorney in that office.

**Nathan Goldstein** was appointed Assistant Chief in the Economics Analysis Group, in which he had previously served as an Economist.

**Michael Loterstein** was appointed Assistant Chief in the Chicago Office. Michael was promoted from Trial Attorney in that office.

**Adam Severt** was appointed Assistant Chief in the Technology and Financial Services Section. Adam was previously a Trial Attorney in that section.

**Suzanne Morris** was appointed Chief of the Premerger and Division Statistics Unit. Suzanne was previously a Trial Attorney in the Defense, Industrials, and Aerospace Section.

Several career leaders have taken on additional responsibility in an acting capacity:

**Marvin Price** is serving as the Acting Deputy Assistant Attorney General for Criminal, on detail from the Director of Criminal Enforcement position.

**Ann O'Brien** is serving as the Acting Director of Criminal Enforcement, on detail from the position of Assistant Chief in the Competition Policy and Advocacy Section.

**Jim Fredricks** is serving as the Acting Chief of the Washington Criminal II Section, on detail from the position of Assistant Chief in the Appellate Section.

**More than 35 Years of Service: The Antitrust Division Thanks Its Long-Serving Attorneys and Economists**

American consumers and the Antitrust Division benefit each day from the expertise and experience of its talented attorneys and economists. That experience and expertise only grow over time, making some of the most valuable members of the Division's staff those who have worked at the Division the longest. Among the ranks of the Division's attorneys and economists are several individuals who have more than 35 years of experience at the Division protecting competition and consumers by enforcing our nation's antitrust laws. In recognition of their service, the Division would like to express its gratitude to the following:

Sanford M. Adler (Attorney)

Robin L. Allen (Economist)

John R. Bender (Economist)

Kent Brown (Attorney)

Craig W. Conrath (Attorney)

Norman Familant (Economist)

John F. Greaney (Attorney)

Steven B. Kramer (Attorney)

Rebecca Meiklejohn (Attorney)

Janet A. Nash (Attorney)

Robert B. Nicholson (Attorney)

Howard J. Parker (Attorney)

Frederick H. Parmenter (Attorney)

Russell W. Pittman (Economist)

Marvin N. Price (Attorney)

Greg Werden (Economist)

Robert J. Wiggers (Attorney)

## **Nobel Laureate Speaks at Main Justice: AAG Delrahim Announces Launch of the Jackson-Nash Address Series and Hosts Inaugural Address**

In February, the Antitrust Division officially launched the “Jackson-Nash Address” series, with Nobel Laureate Professor Alvin Roth of Stanford University delivering the inaugural address. The Jackson-Nash Address is named after former Supreme Court Justice Robert H. Jackson and Nobel Laureate Economist John Nash, in order to honor their contributions that have helped shape modern antitrust law and economics.

The inaugural address was held at the Great Hall of the Robert F. Kennedy Department of Justice Building and was well attended by Division attorneys, economists, alumni, and other distinguished guests from the antitrust community. Assistant Attorney General Makan Delrahim introduced the Address series, explaining that its goal is “to provoke discussion about how the latest developments in economics may shed light on antitrust issues we face every day, and how innovation in economic analysis can serve the ultimate goal of continuing to better protect consumer welfare.” He further noted that both Justice Jackson and Professor Nash were “far ahead of their time.”



Professor Roth delivered an exceptional inaugural Address, entitled “Marketplaces, Competition and Market Design.” He focused on two “matching” marketplaces—labor markets for new doctors and kidney exchanges—where stable equilibria emerge as a result of market incentives. Through Professor Roth’s innovative research, clearinghouses in each of these markets have improved the effectiveness of their matches, resulting in greater efficiency and a substantial enhancement of consumer welfare.

The Division will announce the next Jackson-Nash Address speaker in the coming months.

## **Protecting Consumer Welfare: Antitrust Division's Civil Program Protects and Restores Competition in a Number of Industries Impacting American Consumers**

The past year has witnessed a series of important wins for the Division's civil program, preserving competition in consumer product, industrial, agricultural, and defense industries. A few of the markets impacted by the Division's efforts include organic milk, refinery process chemicals used in the oil and natural gas industries, crop-protection chemicals and seed treatments, and sonobuoys used by the Department of Defense.

The Division preserved competition in the U.S. market for organic milk through its challenge of Danone S.A.'s proposed acquisition of The WhiteWave Foods Company, Inc. Danone, a leading U.S. manufacturer of organic yogurt, had for 20 years participated in the raw organic milk and fluid organic milk markets through a strategic partnership and supply and licensing agreements with WhiteWave's closest competitor, CROPP Cooperative. As a result, Danone's acquisition of WhiteWave would have effectively combined WhiteWave and CROPP, the top purchasers of raw organic milk in the Northeastern United States and the producers of the three leading brands of fluid organic milk in the United States. As originally structured, the transaction likely would have resulted in less favorable contract terms for farmers in the Northeastern United States for the purchase of their raw organic milk. It would have also aligned the interests of the producers of the only three national fluid organic milk brands—Stonyfield, Horizon and Organic Valley—risking higher prices and fewer choices for U.S. customers. On April 3, 2017, the Division filed its complaint challenging the transaction, as well as a settlement that required Danone to divest Stonyfield Farm, Inc., including the supply and licensing agreements with CROPP.

The Division preserved competition in the market for refinery process chemicals used in the U.S. crude oil and natural gas extraction market, and also incentivized efficient and effective remedies in its challenge to General Electric's proposed acquisition of Baker Hughes. Baker Hughes and GE were two of the leading providers of refinery process chemicals in the United States, covering over 50 percent of the market. Refineries process hydrocarbons like crude oil and natural gas extracted from wells into finished products like gasoline. GE and Baker Hughes were two of a few firms with the technical capabilities and expertise to provide refinery process chemicals and services in the United States and competed vigorously in price, service quality, and product development. On June 12, 2017, the Division filed its complaint, along with a proposed final judgment that required GE to divest its Water & Process Technologies business unit, which included its refinery process chemicals and services unit, to a named buyer, SUEZ, S.A.

Under the terms of the decree, GE was to complete its divestitures to Suez by approximately the end of September 2017, or, if the United States exercised its discretion to grant an extension, by approximately the end of 2017. After consummating the GE/Baker Hughes merger, GE informed the United States that it would be unable to complete the divestiture until 2018, outside of the agreed-upon timeframe, because in 19 foreign jurisdictions, there were legal and other barriers to Suez operating the assets. On October 16, 2017, the court entered a modified final judgment that added two provisions to the final judgment designed to encourage GE to complete the divestiture promptly. The modified final judgment encouraged prompt divestiture in two ways: (1) it required GE to begin making daily incentive payments as of January 1, 2018, until the divestiture is completed and (2) it required GE to reimburse the United States for attorney's fees and costs incurred in addressing the delay.

The Division's challenge to the proposed merger of The Dow Chemical Company and E.I. DuPont de Nemours and Company, and the resulting settlement, preserved competition in two important markets in the United States: crop-protection chemicals and traited seeds. Dow and DuPont were two of the leading companies in both crop-protection chemicals and traited seeds in the United States. Each company also manufactured a number of petrochemicals, including high-pressure ethylene derivatives that are crucial inputs to a number of important products and industries. The

proposed merger would likely have reduced or eliminated competition in the markets for broadleaf herbicides for winter wheat and chewing pest insecticides, and would have tended to create a monopoly in the markets for acid copolymers and ionomers in the United States, resulting in higher prices and reduced services and innovation in these markets. The Division, along with attorneys general from several states, filed a complaint and proposed final judgment on June 15, 2017. The settlement required DuPont to divest its Finesse-formulated herbicide products and its Rynaxypyr-formulated insecticide products, along with the assets used to develop, manufacture, and sell those products. Dow Chemical also was required to divest its Freeport, Texas acid copolymers and ionomers manufacturing unit and associated assets.

Finally, the Division helped to preserve competition in the market for sonobuoys, which are used by the U.S. Navy in support of underwater missions for detection, classification, and localization of adversary submarines during peacetime and combat operations. Ultra Electronics Holdings plc and Sparton Corporation, the only two companies qualified to supply sonobuoys to the U.S. Navy, abandoned their merger after the Division expressed concerns about the loss of competition that would have resulted from this merger.

### **No More No-Poach: The Antitrust Division Continues to Investigate and Prosecute “No-Poach” and Wage-Fixing Agreements**

The Division protects labor markets and employees by actively pursuing investigations into so-called “no-poach” and wage-fixing agreements between employers. When companies agree not to hire or recruit one another’s employees, they are agreeing not to compete for those employees’ labor. The same rules apply when employers compete for talent in labor markets as when they compete to sell goods and services. After all, workers, like consumers, are entitled to the benefits of a competitive market. Robbing employees of labor market competition deprives them of job opportunities, information, and the ability to use competing offers to negotiate better terms of employment.

A no-poach agreement involves an agreement with another company not to compete for each other’s employees, such as by not soliciting or hiring them. A wage-fixing agreement involves an agreement with another company regarding employees’ salary or other terms of compensation, either at a specific level or within a range.

No-poach agreements are *naked* if they are not reasonably necessary to any separate, legitimate business collaboration between the employers. Naked no-poach and wage-fixing agreements are *per se* unlawful because they eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers.

In October 2016, the Division announced that from that point forward, it intended to proceed criminally against naked no-poach and wage-fixing agreements. Since the October 2016 announcement, the Antitrust Division has consistently reinforced that message. For example, in a speech in January 2018, Principal Deputy Assistant Attorney General Andrew Finch stated that “the Division expects to pursue criminal charges” for agreements that began after October 2016, as well as for agreements that began before but continued after that date. In an exercise of prosecutorial discretion, the Antitrust Division will pursue as civil violations no-poach agreements that were formed and terminated before those announcements were made.

On April 3, 2018, the Antitrust Division filed a civil antitrust lawsuit against Knorr-Bremse AG and Westinghouse Air Brake Technologies Corp. (“Wabtec”), and with it simultaneously filed a civil settlement. The complaint alleges that these companies and a third company, Faiveley, reached naked no-poach agreements beginning as early as 2009 and continuing until at least 2015, in violation of Section 1 of the Sherman Act.

The competitive impact statement, filed simultaneously with the complaint, explains that these no-poach agreements are properly considered *per se* unlawful market allocation agreements under Section 1 of the Sherman Act. In the relevant labor markets, the agreements eliminated competition in the same irredeemable way as agreements to fix product prices or allocate customers, and they were not reasonably necessary for any collaboration between the firms. These no-poach agreements distorted competition to the detriment of employees by depriving them of the chance to bargain for better job opportunities and terms of employment.

The settlement is a strong, first-of-its-kind settlement that contains several provisions intended to terminate each defendant's no-poach agreements and prevent future violations. It includes: (a) a broad injunction prohibiting each defendant from entering into or maintaining no-poach agreements among themselves and with other employers that will be in force for seven years; (b) an affirmative obligation to cooperate in any Division investigation of other potential no-poach agreements between the defendant and any other employer; (c) a requirement that each defendant affirmatively notify its U.S. employees and recruiters and the rail industry at large of the settlement and its obligations; and (d) the Division's new consent decree provisions designed to improve the effectiveness of the decree and the Division's future ability to enforce it.

Market participants are on notice: the Division intends to zealously enforce the antitrust laws in labor markets and aggressively pursue information on additional violations to identify and end anticompetitive no-poach agreements that harm employees and the economy.

### **Clearing the Cobwebs: Antitrust Division Takes Steps to Review and Terminate Legacy Judgments**

As part of a larger effort to streamline and improve the Antitrust Division's use of consent decrees, the Division has identified nearly 1,300 longstanding judgments still in effect, some over 100 years old. These perpetual decrees predate a Division policy, adopted nearly 40 years ago, setting the standard term of its consent decrees at 10 years. In enacting that policy, the Division recognized that markets and competition rarely remain stagnant even for that long; therefore, perpetual judgments are not in the public interest. Since that time, all of the Division's consent decrees have had an express term. However, any judgments entered before that time, including any dating back to the enactment of the Sherman Act in 1890, may still exist on courts' dockets. The Division is currently reviewing these perpetual decrees and addressing any that no longer serve the public interest and are appropriate for termination.

### **Punching Things Up: Antitrust Division Takes Steps to Make Consent Decrees More Enforceable, Less Regulatory**

The Antitrust Division took important steps to improve the enforceability of its consent decrees. In recent decrees the Division has negotiated, it has included provisions under which defendants agree that the Division may establish a violation of a consent decree by a preponderance of the evidence (as opposed to by clear and convincing evidence). These provisions also permit the United States to apply for an extension of a decree's term if the court finds a violation of the decree; enable the Division to seek reimbursement on behalf of taxpayers for attorneys' fees, expert fees, and costs incurred in connection with any consent decree enforcement effort; and allow the Division, after a certain number of years, to terminate the decree upon notice to the court and the defendants.

These provisions are designed to place the risk of failure on the defendants—whose merger or conduct is anticompetitive—not on the American consumer. The Division announced that, going

forward, it will seek to include these provisions in its settlements of merger and civil non-merger actions.

The Antitrust Division also announced a renewed emphasis on seeking structural relief, as opposed to regulatory behavioral conditions, to remedy anticompetitive mergers. Doing so is consistent with the Division's broader emphasis on antitrust as law enforcement, not regulation. The Division continues to review all offers to settle, but made clear its skepticism of behavioral remedies or divestitures that only partially remedy the likely harm.

### **Trial-Tested: Antitrust Division Maintains its Litigation Readiness**

The Antitrust Division demonstrated its litigation readiness across a range of civil cases this past year. On the heels of two major trial victories in the insurance merger context in *United States v. Aetna and Humana* and *United States v. Anthem and Cigna*, the Division's Appellate Section successfully defended the *Anthem* decision on an expedited appeal schedule before the United States Court of Appeals for the D.C. Circuit. The D.C. Circuit affirmed the District Court's decision to block Anthem's acquisition of Cigna, a \$54 billion transaction which would have been the largest proposed transaction in the history of the healthcare industry. The Division has since successfully deployed its litigators to bring challenges in several other industries, including waste management, hospitals, and aviation fuel products.

In *United States v. EnergySolutions, Inc., et al.*, the United States successfully blocked radioactive waste disposal provider EnergySolutions' \$367 million acquisition of rival Waste Control Specialists. Following an investigation beginning in December 2015, the United States filed suit in November 2016, alleging that the proposed acquisition would combine the two most significant competitors for the commercial disposal of low-level radioactive waste available to customers in 36 states, the District of Columbia, and Puerto Rico. During a ten-day bench trial in May 2017 before Judge Sue L. Robinson of the United States District Court for the District of Delaware, 13 Division attorneys put on witnesses. Judge Robinson ruled in the United States' favor by enjoining the merger in June 2017.

The Division achieved a competition-protecting result in its litigated challenge to Deere & Company's proposed acquisition of Precision Planting LLC from Monsanto Company when in May 2017, just a month before trial, the parties abandoned their transaction. In August 2016, the Division had sued to block the transaction between these two firms, which would have resulted in a merger-to-monopoly in high-speed precision planting systems in the United States. This innovative technology enables farmers to accurately plant corn, soybeans, and other row crops at up to twice the speed of a conventional planter. In the months leading up to trial, the Division established not only the strength of its case, but its trial-readiness. The parties' abandonment preserved competition in this market, and in agriculture, one of the most important sectors of the US economy.

In *United States v. Parker-Hannifin Corporation and CLARCOR Inc.*, the United States filed suit in September 2017 to partially unwind Parker-Hannifin Corporation's \$4.3 billion acquisition of aviation fuel filtration product rival CLARCOR Inc. Following a five-month investigation, the United States concluded that Parker-Hannifin's acquisition of its only U.S. rival for qualified ground aviation fuel filtration systems and elements effectively created a monopoly for these critical flight safety products, and deprived U.S. civilian and military customers the benefits of competition. In the course of preparing to file its complaint, staff secured third party testimony from a number of relevant potential witnesses, positioning the Division for a successful result from the outset. The United States ultimately reached a settlement with defendants, entering into a

consent decree which requires defendants to fully divest CLARCOR's filtration business, thereby restoring the competition in the aviation fuel filtration markets eliminated by the merger.

Less than a month before a bench trial was scheduled to begin in *United States, et al. v. W.A. Foote Memorial Hospital, D/B/A/ Allegiance Health*, the United States and the State of Michigan reached a proposed settlement with Henry Ford Allegiance Health for conspiring with a rival hospital in a neighboring county to restrict Allegiance's marketing in that rival's county. In anticipation of the trial, the Division engaged in extensive fact and expert discovery, filed dispositive and evidentiary motions, and responded to the Court's request for briefing. The proposed settlement prohibits Allegiance from further engaging in anticompetitive conduct and requires Allegiance executives to receive training on the proposed settlement's provisions and the antitrust laws. The settlement marks the end of almost three years of litigation. The Division previously settled with three other south central Michigan hospitals at the time the complaint was filed.

The Antitrust Division stands ready to deploy its litigators to protect competition and consumer welfare. On March 21, 2018, Director of Litigation Craig Conrath gave the opening statement on behalf of the United States in *United States v. AT&T/DirecTV and Time Warner*—what some in the press have dubbed the “antitrust trial of the century.” It opened the proceedings that have featured the work of many skilled lawyers, economists, and paralegals throughout the Division, and punctuated months of intense preparation by the Telecommunications and Broadband Section to bring the case quickly and efficiently to trial. Trial is expected to conclude by May.

### **Cartels Beware: Antitrust Division Launches Criminal Investigations in Key Industries**

The past year has seen significant progress in some of the Antitrust Division's long-running criminal investigations, including ocean shipping, foreign currency exchange, and electrolytic capacitors. With these matters reaching successful resolutions or headed to trial, the Division has increased its focus on newer investigations into collusion in industries impacting American consumers, such as packaged seafood.

The Division's investigation into a global conspiracy to allocate the market, rig bids, and fix prices for international shipping services—specifically for roll-on, roll-off cargo like cars, trucks, and heavy machinery—has continued to produce results. Most recently, Höegh Autoliners was charged and pleaded guilty to participating in this conspiracy. Höegh agreed to pay a \$21 million criminal fine and accept terms of corporate probation. Total criminal fines in this investigation now exceed \$255 million. In addition, four executives pleaded guilty and have been sentenced to prison terms; an additional seven executives have been indicted but remain fugitives.

The Division also continues to investigate bid rigging, price fixing, and related offenses in the financial industry. On January 25, 2018, BNP Paribas USA Inc. pleaded guilty to participating in a price-fixing conspiracy in the foreign currency exchange (FX) market. As part of its sentence, BNP has agreed to pay a criminal fine of \$90 million. According to the information filed in the U.S. District Court for the Southern District of New York, BNP conspired to suppress and eliminate competition by fixing prices in Central and Eastern European, Middle Eastern, and African currencies. The conspiracy involved manipulation of prices on an electronic FX trading platform through the creation of non-bona fide trades, coordination of bids and offers on that platform and agreements on currency prices to quote specific customers, among other conduct. BNP Paribas USA Inc. is the sixth major bank to plead guilty to antitrust and fraud crimes in the FX market. As part of its guilty plea, the bank has agreed to cooperate with the government's ongoing criminal investigation into the FX market.

Also in the past year, three U.K.–based former traders, who were indicted in January 2017 for conspiring to manipulate the price of the U.S. dollar and euro exchanged in the foreign exchange spot market, voluntarily surrendered and were arraigned in U.S. court; their trial is set for October 2018. The Division is also preparing for trial, along with the DOJ Criminal Division, against two individuals charged with manipulating the LIBOR benchmark interest rate.

The Division’s investigation into price fixing of electrolytic capacitors—a key component in consumer electronics—has resulted in filed cases against ten executives and eight companies, seven of which have agreed to plead guilty. Leading capacitors manufacturer Nippon Chemi-Con has been indicted, and is set to proceed to trial in October 2018.

The Division is investigating U.S.-based packaged seafood producers for conspiring to fix the price of packaged seafood sold in the United States. In May 2017, Bumble Bee Foods pleaded guilty for its role in the conspiracy to fix the prices of shelf-stable tuna and was sentenced to pay a \$25 million criminal fine, which will be increased to a maximum of \$81.5 million if Bumble Bee is sold, subject to certain terms and conditions. A total of three executives have also pleaded guilty for their roles in this conspiracy.

The Antitrust Division will continue to protect American consumers and taxpayers by investigating and prosecuting criminal antitrust violations across all sectors of the economy.

### **Doing Hard Time: Antitrust Division Sets Records in Number of Individuals Sentenced and in Number of Criminal Trials**

In the past year, the Antitrust Division also devoted substantial resources to individual prosecutions and sentencings. These efforts have resulted in 30 individuals sentenced to prison terms in FY2017—the highest number of individual prison terms imposed since 2012. Many of the Division’s individual convictions were the result of investigations into anticompetitive conduct at public real estate foreclosure auctions in various regions throughout the United States. This conduct was widespread and harmed homeowners and lending institutions. The Division’s prosecutions of real estate investors who rigged bids at foreclosure auctions typically have not resulted in large fines—though the Division has successfully sought substantial amounts of restitution in these cases.

In the past year, the Division’s resources were also focused on trying cases; a record-setting number of criminal cases (nine) went to trial in FY2017. This is the largest number of criminal Antitrust Division trials in the era of modern criminal antitrust enforcement. And with six trials anticipated in the next year, the Division’s pace is not letting up.

In recent years, the Antitrust Division’s criminal enforcement efforts have led to record-breaking statistics. Those statistics, particularly for criminal fines, were driven largely by investigations into collusion in the auto parts and financial services industries. As a result, from 2012 through 2015, the Division assessed criminal fines over \$1 billion each year, with a high of \$3.6 billion in 2015. These investigations are now in their later stages, with corporate plea resolutions largely completed. The Division’s resources in these investigations are now focused on trials against the remaining individuals and companies, with several cases headed to trial in the upcoming months. Other high-priority matters, in key industries for American consumers, are in relatively early stages of investigation.

## **Digital Footprints: Antitrust Division Remains at the Forefront of Emerging Issues in Electronic Evidence**

Over the past decade, dramatic technological advances have brought about fundamental changes in the ways people communicate. For example, email has been the communication tool of choice for many years, but would-be price-fixers are also increasingly using other, more cutting-edge communication tools. Agreements reached in smoke-filled rooms have given way to those reached in chat rooms or by other electronic means. The Division stays ahead of the technological curve by working with the FBI and other law enforcement agencies to identify best practices. We are constantly re-assessing and actively adjusting our investigative practices and tools to counter the increased use of new technology and ensure our evidence-gathering processes are effective.

In recent investigations, the Division has seen conspirators use chat rooms, text messaging services, encrypted messaging apps, and social media platforms to coordinate price increases, discuss upcoming bids, and allocate customers. To take one recent example, the Division filed charges in August 2017 against two companies and their top executives for conspiring to fix the prices of customized promotional products sold online. Their conspiracy was carried out online, through social media and encrypted messaging apps; the conspirators used Facebook, Skype, and WhatsApp to reach and implement their illegal agreements, while attempting to cover their tracks. All four defendants pleaded guilty.

### **Silver Anniversary: The Antitrust Division's Leniency Program Turns 25**

The Antitrust Division's Corporate Leniency Program has existed in its current form since August 1993. Over the past 25 years, the cartel enforcement landscape has changed in many ways—from the expanding number of jurisdictions that have adopted similar leniency policies, to the increasingly sophisticated tools the Division and its law enforcement colleagues are able to marshal in pursuit of cartelists, and the increased penalties that those who violate the antitrust laws face.

Despite all the changes over the past quarter century, the Corporate Leniency Program has remained a constant. The Program (and its counterpart for individual leniency applicants) has been an incredible success in deterring and detecting antitrust crimes—and has served as the model for similar programs across the globe—in no small part because of the Antitrust Division's consistent commitment to administering the program with predictability and transparency. Companies and individuals that are considering applying for leniency know what it is, what the requirements are, and how the policies will be applied to their particular circumstances. That has not changed in 25 years, and it is one of the reasons that leniency remains such an effective tool.

The Antitrust Division is committed to continuing this important work. It is also constantly seeking to identify new and innovative ways to make the Leniency Program even more effective, while at the same time ensuring that transparency and predictability is maintained. To commemorate the Leniency Program's 25-year anniversary this August, the Antitrust Division plans to host a public event to reflect on the history of leniency and discuss its future.

### **Around the Globe: AAG Delrahim and Antitrust Division Engage with International Counterparts**

Since his confirmation, Assistant Attorney General Delrahim has focused heavily on engaging the Antitrust Division's competition enforcer colleagues around the world. In the past six months, Assistant Attorney General Delrahim has engaged with officials from more than a dozen jurisdictions in both formal and informal settings. This commitment demonstrates this Administration's strong interest in deepening the ties between the Antitrust Division and its foreign enforcer colleagues.

Assistant Attorney General Delrahim's first official foreign engagement was hosted by the Division at the Robert F. Kennedy Department of Justice Building in Washington, D.C., in November. Officials from Mexico's Federal Competition Commission and Canada's Competition Bureau met with AAG Delrahim, Deputy Assistant Attorney General for International Roger Alford, International Section Chief Lynda Marshall, other Division officials and staff, and U.S. Federal Trade Commission colleagues for the four agencies' annual trilateral meeting. Discussions at the meeting focused on the respective agencies' developments and priorities, antitrust in the digital economy, and future opportunities for cooperation and convergence on sound antitrust principles.

In December, the Division participated in the semiannual meeting of the Competition Committee of the Organization for Economic Cooperation and Development in Paris. DAAG Alford represented the United States in discussions on the extraterritorial reach of remedies in antitrust cases, the role of safe harbors and presumptions in antitrust law, and emerging issues related to common ownership by institutional investors.

The first quarter of 2018 was a particularly busy period for the Division's international program. In January, DAAG Alford traveled to Seoul, South Korea to meet with officials of the Korea Fair Trade Commission, and to speak on antitrust enforcement and remedies in a global economy. In early February, AAG Delrahim, along with DAAG Alford, led the Division's delegation at meetings with high-level officials from the three Chinese antimonopoly agencies. The meetings took place in Beijing, and provided an opportunity for the Division and its U.S. FTC colleagues to discuss topics such as the treatment of intellectual property and the importance of sound and effective enforcement procedures with their Chinese counterparts. Later in February, AAG Delrahim and DAAG Alford traveled to Paris, Brussels, Bonn, and London for a series of meetings, speaking engagements, and workshops with high-level officials from the European Commission, the German Bundeskartellamt, and other European competition agencies. During that trip, AAG Delrahim delivered a speech in Brussels about the important relationship between the Division and the European Commission, and DAAG Alford spoke in London about the role of antitrust in promoting innovation.

In March, a Division delegation led by DAAG Alford participated in the annual conference of the International Competition Network, held in Delhi, India. At the conference, the organization adopted sound guiding principles for procedural fairness in competition agency enforcement—evidence that the Division's work is yielding real results. In addition, DAAG Alford spoke on a panel about online markets and vertical restraints. The panel was part of the Unilateral Conduct Working Group's ongoing work on vertical restraints. The Working Group, co-chaired by the Division, presented an interim report examining a series of hypothetical vertical restraints and their effects on competition and potential resulting efficiencies.

In addition to these engagements by Division leadership, the Division's investigative teams continue to cooperate with their international counterparts on both the civil and criminal sides of the Division. Since April 2017, the Division has engaged with 16 international counterparts on 18 different merger and civil non-merger matters. On the criminal side, the Division continues to engage with its counterparts in working to detect and punish international cartels.

International engagement will continue to be a top priority of AAG Delrahim, and the Division is at work planning upcoming bilateral meetings and additional initiatives for promoting sound enforcement policy and procedures around the world.

## **Learning from History: The Antitrust Division Embraces the “New Madison” Antitrust and Intellectual Property Project**

Following the successful release of the 2017 Joint Federal Trade Commission-Department of Justice “Antitrust Guidelines for the Licensing of Intellectual Property,” the Division has continued its advocacy and guidance regarding the sound application of antitrust principles to intellectual property disputes.

In November 2017, Assistant Attorney General Delrahim delivered a speech at the USC Gould School of Law on the role of antitrust law in the context of standard setting organizations (“SSOs”). In particular, AAG Delrahim explained that “the hold-out problem poses a more serious threat to innovation than the hold-up problem,” and that “antitrust law should not police FRAND commitments to SSOs.” He explained further, however, that antitrust enforcers “should scrutinize concerted action within SSOs that causes competitive harm to the dynamic innovation process.”

In March 2018, at the University of Pennsylvania Law School, AAG Delrahim expanded his analysis of antitrust law and intellectual property, called the “New Madison” approach, based on the original understanding of intellectual property rights held by James Madison, the principal drafter of the Constitution. The four premises of the “New Madison” approach are (i) patent hold-up is not an antitrust problem; (ii) SSOs should increase their focus on implementer hold-out, rather than exclusively focus on patent hold-up, to ensure maximum incentives to innovate; (iii) SSOs and courts should avoid restricting the right to seek or obtain an injunction; and (iv) from the perspective of the antitrust laws, a unilateral and unconditional refusal to license a valid patent should be considered per se legal.

The Division hopes to continue its leadership on these issues in the coming years, both through advocacy and policy efforts in the United States, and through international engagement with other competition authorities.

### **Antitrust Meets Deregulation: The Division’s Spring Roundtables**

The Antitrust Division is hosting a series of roundtable discussions on competition and deregulation. As AAG Delrahim, indicated in his keynote address at the ABA Antitrust Section’s Fall Forum, “Antitrust is inherently deregulatory – in other words, competition law enforcement contributes to a well-functioning free market economy, and our prosecution efforts will support a more limited overall Federal Government role in the markets.”

As the Division seeks to protect the competitive process to maximize consumer welfare, determining the optimal role of antitrust enforcement and deregulation is an issue of vital importance. The roundtables are intended to help the Department pursue effective and appropriate competition policy and identify related regulatory burdens on the American economy.

The roundtables provide a forum for a discussion of the economic and legal analyses of competition and deregulation. The Division has invited panelists from a number of organizations, including the American Bar Association’s Section of Antitrust Law.

The first roundtable, held on March 14, 2018 in the Great Hall of the Robert F. Kennedy Department of Justice Building, examined exemptions and immunities from the antitrust laws. Representatives of interest groups discussed topics including the impact of the express statutory exemptions and implied immunities from the antitrust laws, and how these immunities and exemptions have affected antitrust enforcement. Panelists also discussed whether the state action doctrine in its current form strikes the proper balance between state sovereignty and the federal policy favoring competition in interstate commerce.

The next roundtable will be held on April 26, 2018, and will examine existing consent decrees, the propriety of perpetual consent decrees, and the role of antitrust law enforcement. The third roundtable will examine the consumer costs of anticompetitive regulations, and will be held on May 31, 2018.

Details about the roundtables, registration information, and access to written submissions are available on the Department's Public Roundtable Discussion Series on Regulation & Antitrust Law website.

### **About Your House: Antitrust Division Promotes Competition in the Real Estate Industry**

Buying or selling a home is the largest financial transaction most Americans will ever undertake. New business models are emerging that allow consumers to save thousands of dollars when they buy or sell a home. Where these practices are allowed, some buyers' brokers are offering refunds on commissions, and some sellers' brokers are charging only for services actually used. Beyond the Division's foreclosure auction prosecutions in California, Florida, Georgia, and Mississippi, the Division plays an important role in ensuring the competitiveness of these markets through workshops and advocacy.

#### *Workshops*

On June 5, 2018, the Antitrust Division and the Federal Trade Commission will co-host a public workshop to examine recent developments in residential real estate brokerage competition. The agencies last hosted a workshop on competition in the real estate brokerage industry in October 2005. There have been significant advances in this industry over the last decade, and this summer's workshop will provide an important forum for a broad array of experts from government, business, and academia to discuss these advances. Panelists are expected to discuss the increased availability of consumer-facing platforms for accessing listings information over the internet, the growth of alternative fee and service models, and regulatory issues that may affect competition in this space.

#### *Advocacy*

In addition, the Division has a long history of engaging in competition advocacy to ensure that consumers benefit from competition in the real estate services industry. Most recently, the Division sent a letter to the Kansas Real Estate Commission expressing its concerns regarding a proposed regulation that would bar Kansas real estate brokers from agreeing to offer gift cards to home buyers. According to the Division, this regulation would reduce competition and the likely effect would be to harm home buyers in Kansas. The Commission subsequently moved to table the proposed regulation.

### **Oyez Oyez! Antitrust Division Expands Its Appellate and Amicus Program**

The Appellate Section has been very active in recent months, briefing the *United States v. American Express Co.* case in the Supreme Court, as well as a number of important criminal and civil appeals. The Supreme Court has also sought the views of the United States in multiple antitrust cases at the certiorari stage.

For example, the Supreme Court granted certiorari in the Vitamin C case—*Animal Science Products v. Hebei Welcome Pharmaceutical Co.*—to review the Second Circuit's dismissal of price fixing complaints on the theory that it was "bound to defer" on international comity grounds to the Chinese government's statement that the defendants' actions were required by law. The United

States successfully urged the Court to grant certiorari to review the Second Circuit’s ruling, and submitted an amicus brief in support of petitioners on the merits. In response to another call for the views of the Solicitor General, the Division, in conjunction with the Solicitor General, is also reviewing the *Apple v. Pepper* case regarding the indirect purchaser rule set forth in the Supreme Court’s *Hanover Shoe* and *Illinois Brick* decisions. And in *Salt River Project v. Tesla Energy Operations*, the United States submitted an amicus brief arguing that the denial of a state action defense at the pleading stage is not subject to immediate appeal under the collateral order doctrine.

In addition, the Division has embarked on an effort to expand its amicus program and significantly increase its participation in antitrust cases before they reach the Supreme Court. The goal of this effort is to help shape the development and application of antitrust law in the earliest stages of private litigation. Two cases involved applications of state action immunity. First, this past Fall, the Division jointly filed an amicus brief with the FTC in *Chamber of Commerce v. City of Seattle* (9th Cir.), urging the court of appeals to reverse a finding that a Seattle ordinance permitting independent drivers for car services like Uber and Lyft to bargain collectively was entitled to immunity under the state action doctrine. Second, in March 2018, the Division filed a statement of interest in *TIKD v. Florida Bar* (S.D. Fla.), arguing that the Florida Bar is not automatically immune under the state action doctrine, but must instead show “active supervision” and “clear articulation,” as required under the Supreme Court’s *North Carolina Board of Dental Examiners v. FTC* decision. The Division also filed a statement of interest in *Marion Healthcare v. Southern Illinois Healthcare* (S.D. Ill.), to rebut an argument that short-term exclusive contracts are always legal as a matter of law.

The Division welcomes requests from parties to district court and court of appeals proceedings—and from courts themselves—to solicit the views of the Antitrust Division on the proper interpretation and application of the antitrust laws.



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