Department of Justice

STATEMENT OF

MAKAN DELRAHIM
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION
U.S. DEPARTMENT OF JUSTICE

BEFORE THE

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

FOR A HEARING ENTITLED

"Oversight of the Enforcement of the Antitrust Laws"

SEPTEMBER 17, 2019

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Chairman Lee, Ranking Member Klobuchar, and distinguished members of the Subcommittee, it is an honor for me to appear before you today on behalf of the Antitrust Division of the Department of Justice. This Committee enables our efforts to enforce the antitrust laws effectively, in order to ensure that our markets continue to be competitive and benefit American consumers. I want to thank Chairman Lee and Ranking Member Klobuchar in particular for your steadfast support of the Division's efforts.

History has taught us that properly functioning competitive markets result in innovation, lower prices, and higher quality goods and services. As the Assistant Attorney General for the Antitrust Division, I take immense pride in the important work of the Division's antitrust enforcement and competition advocacy, which support the free-market competition at the heart of the American economy. Cognizant of the importance of our mission, we at the Antitrust Division strive to maximize the effectiveness of our efforts to protect the American consumer.

Despite limited resources to address ever-evolving and complex markets, the Division has risen to the occasion. My testimony today will review our extensive efforts in criminal and civil enforcement, our work in competition advocacy and policy, and our efforts to promote competition internationally.

Criminal Enforcement

Our criminal program also has been very active. We had 91 pending grand jury investigations at the close of FY 2018, the highest total since 2010. We are preparing for four trials that will begin between August and January. Since April alone, we have announced the first charges in six investigations.

The Division's work protects more than the interests of consumers; it protects the interests of taxpayers as well. Five South Korean companies pleaded guilty, and agreed to enter into civil settlements, for rigging bids on U.S. government fuel supply contracts.[1] Together the companies must pay over $150 million in criminal fines and an additional $200 million in civil damages for their involvement in a decade-long bid-rigging conspiracy affecting contracts to supply fuel to the U.S. Army, Navy, Marine Corps, and Air Force bases in South Korea. The civil recoveries are the largest the Antitrust Division has obtained under Section 4A of the Clayton Act, which permits the United States to obtain treble damages when it has been injured by an antitrust violation.

These cases, which also resulted in pending charges against seven executives, required cooperation among the Antitrust Division's civil and criminal sections, the Department of Justice's Civil Division, the U.S. Attorney's Office for the Southern District of Ohio, and agents from the Federal Bureau of Investigation and Department of Defense. These cases will help set an example for how separate criminal and civil investigations can satisfy the twin objectives of holding companies and individuals accountable for their criminal conduct while expanding the Division's Section 4A recovery efforts. Moreover, the charges arising out of this investigation protect the integrity of our Defense Department's acquisition process and help ensure the U.S. military receives goods and services at the best possible prices.

As American consumers purchase more online, they should know that the antitrust laws protect them from collusion in online markets. In January, a former e-commerce executive pleaded guilty to conspiring to fix the prices of posters sold online and was sentenced to serve six months.[2] This indictment is part of the

[1] Press Release, U.S. Dep't of Justice, More Charges Announced in Ongoing Investigation into Bid Rigging and Fraud Targeting Defense Department Fuel Supply Contracts for U.S. Military Bases in South Korea (Mar. 20, 2019), https://www.justice.gov/opa/pr/more-charges-announced-ongoing-investigation-bid-rigging-and-fraud-targeting-defense.

[2] Press Release, U.S. Dep't of Justice, Former E-Commerce Executive Pleads Guilty to Price Fixing; Sentenced to Six Months (Jan. 28, 2019), https://www.justice.gov/opa/pr/former-e-commerce-executive-pleads-guilty-price-fixing-sentenced-six-months.

Division's first online marketplace prosecution involving algorithmic pricing tools. The Division has worked to prosecute companies and executives who fixed prices for customized promotional products sold through websites. The conspiracy not only corrupted online markets, but was carried out using social media platforms and encrypted messaging applications such as Facebook, Skype, and WhatsApp. To date, 11 defendants have been charged; five individuals and four companies have pleaded guilty, resulting in jail time for each executive and corporate criminal fines totaling nearly $10 million.[3]

Another recent criminal investigation resulted in significant prison sentences for guilty executives. At the beginning of the summer, two freight transportation executives were sentenced for their role in a conspiracy to fix prices of international freight forwarding services. The price fixing agreement, which raised prices by as much as 20 percent, victimized everyday consumers sending gifts and household goods to loved ones for the holidays. The CEO of a Louisiana-based freight-forwarding company was sentenced to 18 months' imprisonment, and the company's manager was sentenced to 15 months. Each executive also was sentenced to pay a $20,000 criminal fine and three years of supervised release.

Additionally, in June, a district court unsealed the indictment of two Norwegian shipping executives charged with participating in a long-running conspiracy to allocate certain customers and routes, rig bids, and fix prices for the sale of international ocean shipments. These executives remain fugitives.

The Division continues its effort to prosecute wrong-doing in the financial services industry. Last spring, two broker-dealers pleaded guilty to rigging bids for American Depository Receipts, negotiable securities that represent the shares of foreign stocks and enable Americans to invest in foreign companies, and were sentenced to pay criminal fines of more than $5 million collectively.[4] In addition, a former trader at one of the broker-dealers pleaded guilty for his participation in the bid-rigging conspiracy and is scheduled to be sentenced in October.

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[3] Press Release, U.S. Dep't of Justice, E-Commerce Company Pleads Guilty to Antitrust Charge (June 27, 2019), https://www.justice.gov/opa/pr/e-commerce-company-pleads-guilty-antitrust-charge.

[4] Press Release, U.S. Dep't of Justice, Second New York Broker-Dealer Pleads Guilty to Rigging Bids for Financial Instruments in Violation of Antitrust Law (June 14, 2019), https://www.justice.gov/opa/pr/second-new-york-broker-dealer-pleads-guilty-rigging-bids-financial-instruments-violation; Press Release, U.S. Dep't of Justice, New York Broker-Dealer Pleads Guilty To Violating U.S. Antitrust Laws by Rigging Bids for Financial Instruments (May 10, 2019), https://www.justice.gov/opa/pr/new-york-broker-dealer-pleads-guilty-violating-us-antitrust-laws-rigging-bids-financial; Press Release, U.S. Dep't of Justice, Former Financial Services Executive Pleads Guilty to Rigging Bids for financial Instruments in Violation of Antitrust Law (June 27, 2019), https://www.justice.gov/opa/pr/former-financial-services-executive-pleads-guilty-rigging-bids-financial-instruments.

The Antitrust Division also continues its efforts to identify and prosecute unlawful conduct in the generic pharmaceuticals industry—which is of vital importance to many Americans. As part of our ongoing investigation, Heritage Pharmaceuticals was charged for conspiring with its competitors to fix prices, rig bids, and allocate customers—which was resolved through a deferred-prosecution agreement under which the company admitted liability and promised to pay a criminal fine and cooperate with ongoing investigations into price fixing, bid rigging, and customer allocation of generic drugs.[5] In a separate civil resolution, Heritage has agreed to pay $7.1 million to resolve allegations under the False Claims Act related to the price-fixing conspiracy.[6]

In April, the Division secured its first plea agreement in its investigation into bid rigging at online auctions for surplus government equipment, which protects our government from paying unlawfully inflated prices.[7] These prosecutions have put on notice companies that engage in anticompetitive conduct to the detriment of our government and taxpayers.

Criminal enforcement of the Sherman Act is an essential tool to protect competition and consumers. Criminal enforcement can be resource intensive, but it is one of our most powerful deterrents against serious violations such as price-fixing, bid-rigging, and market allocation that unambiguously disrupt the integrity of the competitive process, harm consumers, and reduce faith in the free-market system. Such harmful agreements among competitors are subject to a rule of per se illegality, and individuals who engage in such conduct—including high-level executives—appropriately face criminal accountability along with the corporations they serve. The threat of prison for corporate decision-makers cannot easily be dismissed as the cost of doing business and thus serves as a powerful deterrent.

Given the importance of the per se rule to our criminal program, it is notable that a number of criminal defendants this past year tried to argue that the rule of reason applies to anticompetitive conduct that has long been condemned as categorically illegal. Unlike the per se standard, the rule of reason requires the

[5] Press Release, U.S. Dep't of Justice, Pharmaceutical Company Admits to Price Fixing in Violation of Antitrust Law, Resolves Related False Claims Act Violations (May 31, 2019), https://www.justice.gov/opa/pr/pharmaceutical-company-admits-price-fixing-violation-antitrust-law-resolves-related-false.

[6] *Id.*

[7] Press Release, Texas Bidder Pleads Guilty to Rigging Bids at Online Auctions for Surplus Government Equipment (Apr. 10, 2019), https://www.justice.gov/opa/pr/texas-bidder-pleads-guilty-rigging-bids-online-auctions-surplus-government-equipment.

court to evaluate the pro-competitive features of a restrictive business practice against its anticompetitive effects in order to determine whether the practice is unlawful. In each such case, the court ruled that the Division's application of the per se rule was correct. One noteworthy case involves heir location providers, a service to identify people who may be entitled to an inheritance from someone who died without a will. The service providers enter into contracts with those people to help secure their inheritances in exchange for a fee.

The Division charged an heir location services provider and its co-owner with entering a conspiracy with another provider to suppress and eliminate competition between them on estates they both pursued. The charge alleged that the two companies agreed that when they contacted the same heir, the first company to contact the heir would win the business and the second would not compete for that and certain remaining heirs. In exchange, the first would share a portion of the contingency fees ultimately collected from those allocated heirs. The Division was surprised when the district court agreed with defendants that they should be tried under the rule of reason and granted a motion to dismiss on statute of limitations grounds. Subsequently, the Tenth Circuit reversed the district court's dismissal and ruled it did not have jurisdiction to address the application of the rule of reason, but encouraged the district court to reconsider its rule of reason order. In February of this year, in a victory for the Division and for consumers, the district court reconsidered and found that the per se standard applied. Both defendants pleaded guilty in July.

When I addressed you last fall, I described the Division's efforts prosecuting bid rigging and fraud relating to real estate foreclosure auctions. To date, 140 individuals have been charged, of whom more than 120 have pleaded guilty and 12 individuals were convicted after trial. Those efforts continue. Last winter, nine real estate investors were sentenced for their role in a conspiracy to rig bids at public real estate foreclosure auctions in Southern Mississippi.[8] One defendant awaits trial in Sacramento. Our enforcement efforts will continue to protect competition in such markets and hold accountable investors who conspire to line their pockets through illegal bid rigging and fraud while diverting money from the homeowners and mortgage holders entitled to any proceeds.

[8] Press Release, U.S. Dep't of Justice, Nine Real Estate Investors Sentenced for Rigging Bids at Mississippi Public Foreclosure Auctions (Feb. 21, 2019), https://www.justice.gov/opa/pr/nine-real-estate-investors-sentenced-rigging-bids-mississippi-public-foreclosure-auctions.

On July 11, the Division announced policy changes to incentivize corporate compliance. Division prosecutors, consistent with Department of Justice policy, now consider corporate compliance programs at the charging stage in criminal antitrust investigations. Crediting compliance at charging is the next step in our efforts to deter antitrust violations and reward good corporate citizenship. A company with a robust compliance program can actually prevent crime or detect it, minimizing harm to consumers early and saving precious taxpayer resources. In concert with these changes, to promote transparency, we also announced revisions to our Division Manual. For the first time, we published a public guidance document that outlines what Division prosecutors look for when evaluating antitrust compliance programs.

More broadly, the Division will continue diligently to detect and deter collusion that harms American consumers, and we will remain focused on industries that have profound effects on Americans' lives.

Civil Enforcement

Mergers

Mergers can be an important tool for increasing productivity in the U.S. economy—by combining complementary assets or increasing scale—but they also can threaten harm to competition. Protecting American consumers and businesses from anticompetitive mergers is an essential element of the Division's mission. Though our resources have limits, we review, and when necessary challenge, mergers whose scope and complexity span the U.S. economy, including healthcare, advanced technology, and U.S. Government procurement. We continue to invest substantial portions of our limited resources to our merger review program to protect consumers, as well as taxpayers, and preserve competition.

On July 26, 2019, we announced[9] that the Department of Justice and attorneys general for five states[10] had reached a settlement with T-Mobile and Sprint regarding their proposed merger. The settlement requires a substantial divestiture package in order to enable a viable facilities-based competitor to enter

[9] Press Release, U.S. Dep't of Justice, Justice Department Settles with T-Mobile and Sprint in Their Proposed Merger by Requiring a Package of Divestitures to Dish (July 26, 2019), https://www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package.

[10] A sixth state later joined the settlement. *See* Consent Motion for Leave to File Amended Complaint, United States v. Deutsche Telekom AG, No. 1:19-cv-02232 (D.D.C. Aug. 15, 2019), ECF No. 26.

the market. To obtain merger clearance, the companies promised to sell Sprint's prepaid business and certain spectrum assets to Dish Network. The merger and accompanying divestiture expand output significantly by ensuring that large amounts of currently unused or underused spectrum are made available to American consumers in the form of high quality 5G networks.

In addition to securing divestitures and remedies, the Division—even with its constrained resources—remains willing and able to litigate when a proposed acquisition is likely to substantially lessen competition in a relevant market. For instance, the United States filed a complaint last month to enjoin a proposed merger between Sabre and Farelogix. The Division's investigation found that the merger would eliminate head-to-head competition to provide booking services to airlines and that Sabre seeks to acquire Farelogix to eliminate a disruptive competitor that has introduced new technology to the travel industry and is poised to grow significantly. We look forward to litigating the case and preventing Sabre from stifling competition in the travel industry.

Just two weeks ago, the Division filed suit to block the merger between two of only four North American manufacturers of rolled aluminum sheet for automotive applications.[11] In a novel approach for the Division, we agreed with the defendants to refer the matter to binding arbitration. Alternate dispute resolution is an important tool that the Antitrust Division can and will use, in appropriate circumstances, to maximize the effectiveness of its enforcement resources in protecting American consumers.

At the beginning of the summer, we also pursued an injunction against the merger between Quad/Graphics and LSC Communications. The Division's thorough investigation uncovered evidence that the merger would combine the only two significant providers of magazines, catalogs, and book printing services, and would deprive publishers and consumers the benefits of competition that has spurred lower prices, improved quality, and greater printing output. The parties abandoned their planned merger rather than continue with litigation.[12]

[11] Press Release, U.S. Dep't of Justice, Justice Department Sues to Block Novelis' Acquisition of Aleris (Sep. 4, 2019), https://www.justice.gov/opa/pr/justice-department-sues-block-noveliss-acquisition-aleris-1.

[12] Press Release, Quad/Graphics and LSC Communications Abandon Merger After Antitrust Division's Suit to Block (July 23, 2019), https://www.justice.gov/opa/pr/quadgraphics-and-lsc-communications-abandon-merger-after-antitrust-division-s-suit-block.

A prominent example of our efforts in healthcare is our review of the CVS Health Corporation, the nation's largest retail pharmacy chain, and its $69 billion agreement to acquire Aetna, the nation's third-largest health insurance company. Prior to the agreement, the two companies competed vigorously in the sale of individual prescription drug plans under Medicare's Part D program. On October 10, 2018, the Division filed a proposed settlement that requires Aetna to divest its nationwide individual prescription drug plan business to WellCare along with other tools Wellcare needs to compete effectively.[13] On October 25, 2018, the district court entered an order allowing the transaction to close and the settlement provisions to take effect during the pendency of the Tunney Act review process, which requires a public comment period and district court review of consent decrees. After an unusually lengthy review, the district court approved the settlement as well within the public's interest, on September 4, 2019;[14] meanwhile Wellcare completed its acquisition on November 30, 2018.

As another example of the Division's continued vigilance in protecting competition in healthcare and related markets, on May 30, the Division obtained divestitures from Amcor's $6.8 billion acquisition of Bemis.[15] The competitors were two of only three significant suppliers of heat-seal, coated medical packaging products that are critical to the safe transportation and use of medical devices, and the divestiture will ensure ongoing competition in those markets.

In addition to price and quality effects, the Division also evaluates mergers for their effects on innovation. In February 2019, the Division secured divestitures from Thales in order for it to proceed with its proposed $5.64 billion acquisition of Gemalto.[16] Prior to this transaction, Thales and Gemalto were the world's leading providers of General Purpose Hardware Security Modules (GP HSMs), which are components important to complex encryption solutions used to safeguard sensitive government and corporate data. Successful entry into this market requires significant time and capital to design and develop offerings with comparable

[13] Press Release, U.S. Dep't of Justice, Justice Department Requires CVS and Aetna to Divest Aetna's Medicare Individual Part D Prescription Drug Plan Business to Proceed with Merger (Oct. 10, 2018), https://www.justice.gov/opa/pr/justice-department-requires-cvs-and-aetna-divest-aetna-s-medicare-individual-part-d.
[14] United States v. CVS Health Corp., Civ. No. 18-2340, 2019 U.S. Dist. LEXIS 150645 (D.D.C. Sept. 4, 2019).
[15] Press Release, U.S. Dep't of Justice, Justice Department Requires Amcor to Divest Medical Flexible Packaging Assets in Order to Proceed with Bemis Acquisition (May 30, 2019), https://www.justice.gov/opa/pr/justice-department-requires-amcor-divest-medical-flexible-packaging-assets-order-proceed.
[16] Press Release, U.S. Dep't of Justice, Justice Department Requires Divestiture of Thales' General Purpose Hardware Security Module Business in Connection With its Acquisition of Gemalto (Feb. 28, 2019), https://www.justice.gov/opa/pr/justice-department-requires-divestiture-thales-general-purpose-hardware-security-module.

functionality, interoperability, and reliability. Competition also promotes improvements and upgrades to the quality and functionality of existing offerings. The Division secured the divestiture of the Thales GP HSM business, including certain intellectual property and research capabilities, to preserve competition to quickly develop innovative data security solutions and bring them to market.

Government procurement programs (and taxpayers) also benefit from competition to provide high-quality, low-cost goods and services—including procurement of mission critical technologies for the U.S. military. On June 20, 2019, the Division announced that it had required divestitures in a proposed merger between Harris and L3 Technologies.[17] Both companies were the only DoD suppliers of U.S. military-grade image intensifier tubes for night vision devices such as goggles and weapon sights. Under the proposed settlement, Harris must divest its entire night vision business, including its manufacturing facility, to an acquirer approved by the United States. In so doing, the divested business will preserve competition that has resulted in lower prices, higher quality, and shorter delivery times and has promoted innovation of image intensifier tubes with higher sensitivity and resolution.

The Hart-Scott-Rodino (HSR) Act—which imposes notification and waiting period requirements for transactions meeting certain size thresholds—is critical to modern antitrust enforcement because it allows the DOJ and FTC to identify and challenge anticompetitive mergers before transactions close. As such, the Division must protect the integrity of the HSR process. On June 10, the Antitrust Division filed a complaint and reached a settlement with Cannon and Toshiba for their scheme to evade the waiting period required by the HSR Act for Canon's acquisition of a Toshiba subsidiary.[18] The transacting parties created a special purpose company to hide the transaction and evade the HSR Act waiting period so that Toshiba could quickly improve its financial statement after the public discovery of financial irregularities at the company. To resolve the charges, the companies agreed to pay $2.5 million each to settle the charges and to implement

[17] Press Release, U.S. Dep't of Justice, Justice Department Requires Harris and L3 to Divest Harris's Night Vision Business to Proceed with Merger (June 20, 2019), https://www.justice.gov/opa/pr/justice-department-requires-harris-and-l3-divest-harris-s-night-vision-business-proceed.

[18] Press Release, U.S. Dep't of Justice, Canon Inc., Toshiba Corporation Agree to Pay $5 Million for Violating Federal Antitrust Laws (June 10, 2019), https://www.justice.gov/opa/pr/canon-inc-toshiba-corporation-agree-pay-5-million-violating-federal-antitrust-laws.

HSR compliance programs and comply with inspection and reporting requirements, among other obligations.

Conduct

The Division also continues to investigate, and when appropriate, challenge conduct that may unlawfully deprive consumers of the benefits of robust competition.

On November 15, 2018, the Antitrust Division and the North Carolina Attorney General's Office announced a settlement with Atrium Health (formerly, Carolinas HealthCare System) resolving litigation that had commenced with a June 2016 complaint.[19] Atrium used its market power in the Charlotte, N.C. area to prevent health insurers from encouraging consumers to choose healthcare providers that offer better overall value. The restrictions also constrained insurers from providing consumers and employers with information regarding the cost and quality of alternative health benefit plans. The settlement prevents Atrium from enforcing anticompetitive steering restrictions in its contracts with health insurers or otherwise preventing or penalizing procompetitive steering by insurers in the future.

The Division has found some ways to leverage its limited resources to stay vigilant against anticompetitive conduct. As one example, on May 20, the Division filed an unopposed motion to intervene in a private antitrust class action challenging alleged agreements between Duke University and the University of North Carolina not to compete for each other's medical faculty.[20] The Department joined the parties' proposed settlement agreement for the limited purpose of obtaining the right to enforce an injunction designed to prevent the maintenance or recurrence of any unlawful no-poach agreements. This case is also an example of the Division's ongoing efforts against no-poach agreements to ensure that labor markets across the economy are free from anticompetitive conduct and that workers receive the benefits of robust competition for their labor.

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[19] Press Release, U.S. Dep't of Justice, Atrium Health Agrees to Settle Antitrust Lawsuit and Eliminate Anticompetitive Steering Restrictions (Nov. 15, 2018), https://www.justice.gov/opa/pr/atrium-health-agrees-settle-antitrust-lawsuit-and-eliminate-anticompetitive-steering.

[20] Press Release, U.S. Dep't of Justice, Justice Department Seeks to Intervene in Private Class Action to Enforce Prohibition on Unlawful "No-Poach" Agreements (May 20, 2019), https://www.justice.gov/opa/pr/justice-department-seeks-intervene-private-class-action-enforce-prohibition-unlawful-no-poach; the Division also filed a statement of interest in this case, as described, below.

Of course, our work against anticompetitive conduct involves numerous industries. A recent example in media, on June 17, the Antitrust Division reached settlements with CBS, Cox, E.W. Scripps, Fox, and TEGNA to resolve a lawsuit brought as part of an ongoing investigation into exchanges of competitively sensitive information in the broadcast television industry.[21] The Division already had reached settlements with seven other broadcast television companies resulting from the same investigation last November and December.[22] By exchanging information, the broadcasters were better able to anticipate their competitors' inventory levels and pricing conduct, which in turn helped inform the stations' own pricing strategies and negotiations with advertisers. As a result, the information exchanges distorted the normal price-setting mechanism in the spot advertising process and harmed the competitive process. The Division obtained a settlement agreement from the parties that prohibits the sharing of such competitively sensitive information.

As announced in July, the Department of Justice has opened a broad inquiry into competition involving digital platforms. We are reviewing whether and how market-leading online platforms have achieved market power and whether they have been engaging in practices that have reduced competition, stifled innovation, or otherwise harmed consumers. We are considering the widespread concerns that consumers, businesses, and entrepreneurs have expressed about search, social media, and some retail services online. We are making this review a priority of the Division, and we are proceeding in an objective and fair-minded manner and will wait to see where the evidence leads before reaching a decision on next steps. Depending on the nature of any antitrust concerns that the evidence may present, we could look to both law enforcement and policy options as solutions. We have been meeting with consumers, competitors and other participants in the digital markets to learn from their perspectives, and we welcome further input from not only those market stakeholders, but also from members of Congress, particularly

[21] Press Release, U.S. Dep't of Justice, Justice Department Reaches Settlement with Five Additional Broadcast Television Companies, Including One National Sales Representative Firm, In Ongoing Information Sharing Investigation (June 17, 2019), https://www.justice.gov/opa/pr/justice-department-reaches-settlement-five-additional-broadcast-television-companies-0.

[22] Press Release, U.S. Dep't of Justice, Justice Department Requires Six Broadcast Television Companies to Terminate and Refrain from Unlawful Sharing of Competitively Sensitive Information (Nov. 13, 2018), https://www.justice.gov/opa/pr/justice-department-requires-six-broadcast-television-companies-terminate-and-refrain-unlawful; Press Release, U.S. Dep't of Justice, Justice Department Reaches Settlement With Nexstar Media Group Inc. in Ongoing Television Broadcaster Information Exchange Investigation (Dec. 13, 2018), https://www.justice.gov/opa/pr/justice-department-reaches-settlement-nexstar-media-group-inc-ongoing-television-broadcaster.

this Subcommittee. While I cannot comment on the existence or progress of any specific investigations, I can assure the Subcommittee that the Division is working hard and expeditiously on this important issue to reach the right outcome under the law. Based on our expertise and our especially talented attorneys and economists, including our investigations of various matters in the digital economy and the evolving media and communications landscape over the past two decades, the Antitrust Division is well positioned to conduct this review.

Historic Decrees and Judgments

When I addressed this Committee last fall, I spoke to you about the start of our Judgment Termination Initiative. Those efforts are now moving at full pace, and we have made great progress in eliminating legacy judgments that clog court dockets, burden defendants, and no longer serve to protect competition. Our review of over a thousand such "legacy" judgments considers changes in conditions since their entry to determine whether these decrees are necessary to protect competition and consumers or, in some cases, if they are affirmatively harmful to competition. We have posted for public comment judgments proposed for termination in over 75 district courts throughout the country and have already been granted hundreds of terminations in nearly 70 district courts from Alaska to the Virgin Islands. For instance, we obtained termination of a 93-year old judgment that prohibited defendants from activities related to the sale of amusement park tickets here in Washington, D.C.; this summer, a Chicago federal court terminated dozens of decades-old judgments, including several relating to telegraphs, phonographs, and railroad strikes.

Relatedly, we have been reviewing the Paramount Consent Decrees, which for over seventy years have regulated how certain movie studios distribute films to movie theatres. As part of our review, we received more than 75 public comments[23] from members of the motion picture industry and the antitrust community. These comments will better inform our analysis of the continued effectiveness of the Paramount Decrees.

Nearly 80 years ago, the Division entered into consent agreements with The American Society of Composers, Authors and Publishers (ASCAP) and Broadcast

[23] *Paramount Consent Decree Review Public Comments 2018*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/paramount-consent-decree-review-public-comments-2018.

Music, Inc. (BMI) to address competitive concerns arising from the market power each organization acquired through the aggregation of public performance rights held by their member songwriters and music publishers. The ASCAP decree was last amended in 2001, and the BMI decree in 1994 –a surprisingly long time ago when we think about how dramatically the music industry has changed in recent years. In light of this history, the Division recently opened a new review of both consent decrees,[24] and the public comment period ended on August 9. We received over 800 comments. The Division has begun to review those comments, along with other relevant evidence, and will consider both when determining whether to keep, modify, sunset, or terminate those decrees.

Competition Advocacy and Policy

In addition to our direct enforcement efforts, the Division has implemented a wide range of initiatives designed to advance competition both nationally and internationally. Although our policy and advocacy efforts do not always draw the same interest from outside observers as our enforcement cases, often they are just as essential in protecting American consumers and businesses. Let me describe a few of them.

Appellate: Amicus Initiative

While the vast majority of the Division's resources are devoted to directly enforcing the antitrust laws, the amicus program is a valued complement to enforcement. Private litigation is an important aspect of the antitrust regime that Congress created, and in particular its treble damage provision provides an additional tool to deter anticompetitive acts. The Division's involvement in these cases, however, is important in providing guidance to the courts, to ensure they reach sound interpretations of the antitrust laws – which apply in both private and government cases – enabling effective and appropriate enforcement.

Through amicus filings, the Division is able to address developments in the case law earlier and more frequently, offering us the opportunity to have an outsized impact with our resources. The Division weighs in not out of a desire to support any particular party, but rather with an eye to assisting courts in interpreting and applying the antitrust laws according to up-to-date economic

[24] Press Release, U.S. Dep't of Justice, Department of Justice Opens Review of ASCAP and BMI Consent Decrees (June 5, 2019), https://www.justice.gov/opa/pr/department-justice-opens-review-ascap-and-bmi-consent-decrees.

principles, thereby ensuring that robust competition can flourish throughout the U.S. economy.

In FY 2018, the Division filed five statements of interest in the district courts and eight amicus briefs in the U.S. Supreme Court and lower appeals courts in cases where the United States is not a party, as compared to just three such amicus briefs and no statements of interest in FY 2017. So far in FY 2019, the Division has filed eight statements of interest and nine amicus briefs.

These briefs touch on diverse aspects of U.S. antitrust law and related doctrines. To illustrate, the Division has weighed in three times this fiscal year through statements of interest on the topic of no-poach agreements, whereby firms agree not to poach one another's employees. The Division articulated the general rule to courts in the Western District of Pennsylvania[25] and the Middle District of North Carolina[26] that such agreements are per se unlawful unless they are ancillary to a separate legitimate transaction or collaboration. To the Eastern District of Washington, the Division explained that franchisor-franchisee businesses relationships are often legitimate collaborations with both vertical and horizontal elements and accordingly a no-poach agreement may need to be reviewed under the rule of reason to determine whether it is anticompetitive.[27] Consistent with the Division's position, this summer the Western District of Pennsylvania court adopted the per se rule for naked no poach allegations at the pleading stage in *In re Railway Industry Employee No-Poach Antitrust Litigation*.[28]

As another example of the doctrines addressed by these filings, the Division urged the Seventh Circuit in *Viamedia v. Comcast* to adopt the "no economic sense" test for unilateral refusal to deal claims under Section 2.[29] In May, the

[25] Statement of Interest of the United States, In Re: Railway Industry Employee No-Poach Antitrust Litigation, No. 2:18-mc-00798-JFC (W.D. Pa. Feb. 8, 2019), https://www.justice.gov/atr/case-document/file/1131056/download.
[26] Statement of Interest of the United States, Seaman v. Duke University, No. 1:15-cv-462 (M.D.N.C. Mar. 7, 2019), https://www.justice.gov/atr/case-document/file/1141756/download (also arguing that the state action doctrine does not apply).
[27] Corrected Statement of Interest of the United States of America, Stigar v. Dough Dough, No. 2:18-cv-244 (E.D. Wash. Mar. 8, 2019), https://www.justice.gov/atr/case-document/file/1141731/download.
[28] In Re: Railway Industry Employee No-Poach Antitrust Litigation, No. 2:18-mc-00798-JFC, 2019 U.S. Dist. LEXIS 102906 (W.D. Pa. June 20, 2019).

[29] Brief for the United States as Amicus Curiae in Support of Neither Party, Viamedia Inc. v. Comcast Corp., No. 18-2852 (7th Cir. Nov. 8, 2018), https://www.justice.gov/atr/case-document/file/1110056/download.

Division filed a brief[30] in *Mountain Crest v. Anheuser-Busch InBev & Molson Coors*, also being heard by the Seventh Circuit. Fewer than two weeks ago, the Circuit issued a decision thanking the Division for its comments and adopting the Division's views that Mountain Crest's claims went beyond the Ontario, Canada government's restrictions not to sell beer in packages with more than six containers, and therefore were not entirely exempted from Sherman Act scrutiny by the act of state doctrine.[31]

Competition Advocacy with the States

The Division has a long history offering a competition perspective on the effects of state legislation or regulation to state government officials upon request. Often in the form of an advocacy letter, the Division generally "promote[s] reliance on competition rather than on regulation where appropriate and to ensure that where regulation is appropriate, it is aligned as much as possible with competition principles."[32]

During the current fiscal year, the Division has submitted four such letters either independently or jointly with the FTC. Each letter builds on prior advocacy and enforcement efforts by one or both agencies. In one letter, the Division discouraged Texas from restricting which entities are permitted to develop facilities for the transmission of electricity in Texas.[33] In two joint letters, the Division and FTC staff encouraged Alaska[34] and Tennessee[35] to consider our longstanding guidance on curtailing or repealing certificate-of-need laws that may suppress healthcare competition. In another joint DOJ-FTC letter, the agencies

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[30] Brief for the United States as Amicus Curiae in Support of Neither Party, Mountain Crest, LLC v. Anheuser-Busch InBev SA/NV, No. 18-2327 (7th Cir. May 8, 2019), https://www.justice.gov/atr/case-document/file/1161171/download.

[31] *Mountain Crest, LLC v. Anheuser-Busch InBev SA/NV*, No. 18-2327, 2019 U.S. App. LEXIS 26840 (7th Cir. Sept. 5, 2019).

[32] U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL, ch. 5 (5th ed. 2018), https://www.justice.gov/atr/file/761151/download.

[33] Letter from Daniel E. Haar, Acting Chief, Competition Pol'y & Advocacy Section, Antitrust Div., U.S. Dep't of Justice to Rep. Travis Clardy, Tex. House of Reps. (April 19, 2019), https://www.justice.gov/atr/page/file/1155881/download.

[34] Letter from Daniel Haar, Acting Chief, Competition Pol'y & Advocacy Section, Antitrust Division, and Bilal Sayed, Director, Office of Pol'y Planning, Fed'l Trade Comm'n, to Sen. David Wilson, Alaska State S. (Mar. 11, 2019), https://www.justice.gov/atr/page/file/1146346/download.

[35] Letter from Daniel Haar, Acting Chief, Competition Pol'y & Advocacy Section, Antitrust Division, and Bilal Sayed, Director, Office of Pol'y Planning, Fed'l Trade Comm'n, to Rep. Martin Daniel, Tenn. House of Reps. (Mar. 7, 2019), https://www.justice.gov/atr/page/file/1146241/download.

encouraged Nebraska to consider our past guidance on removing unnecessary restrictions on the distribution method automobile manufacturers choose to bring their vehicles to market for consumers.[36] In each of these letters, the Division seeks to bring a competition perspective to the state's policy discourse that might not otherwise be fully heard and that might encourage more pro-consumer policies.

Thought Leadership

Through workshops and roundtables, the Division provides a forum for industry participants, academics, consumer advocates, and other interested parties to discuss important developments in particular business sectors, the appropriate scope of various legal doctrines, or recent advancements in our understanding of relevant economic principles.

The Division has scheduled a workshop on September 23, 2019 to discuss the role of antitrust labor markets in promoting robust competition for the American worker. The workshop will explore the practical considerations that antitrust enforcers and private litigants face in bringing cases that involve labor markets, including approaches to defining labor markets, labor restraints arising out of competitor collaborations, and statutory and non-statutory antitrust exemptions for labor union activities. This workshop highlights the Division's commitment to protecting workers through addressing competition issues in our society's evolving labor markets.

The Division held two other important events this past spring. In April, the Division held a public roundtable to discuss the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA), which reduces the civil damages exposure of a company granted leniency under the Antitrust Division's Leniency Policy if the company provides civil plaintiffs with timely, satisfactory cooperation.[37] The roundtable provided a public forum for the Division to engage with the antitrust community and gain insights from judges, attorneys, academics, the business community, and other interested stakeholders on the topic of

[36] Letter from Daniel Haar, Acting Chief, Competition Pol'y & Advocacy Section, Antitrust Division, and Bilal Sayed, Director, Office of Pol'y Planning, Fed'l Trade Comm'n, to Sens. Tony Vargas and Brett Lindstrom, Neb. State S. (Mar. 14, 2019), https://www.justice.gov/atr/page/file/1146236/download.

[37] Roundtable on Antitrust Criminal Penalty Amendment and Reform Act (ACPERA), ANTITRUST DIV., U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/events/public-roundtable-antitrust-criminal-penalty-enhancement-reform-act-acpera (last updated June 10, 2019).

ACPERA. The Division also received written comments from members of the public on the efficacy of ACPERA.

In early May, the Division held a public workshop to explore industry dynamics in media advertising and the implications for antitrust enforcement and policy, including merger enforcement.[38] The workshop covered different types of television and online advertising, and highlighted, among other develops in the industry, the role of online and mobile advertising networks. Panelists discussed a range of topics, including the economics of advertising, developments in advertising technologies, and the competitive dynamics of media advertising in light of the rise of digital advertising. The Division is working on its analysis of the workshop and anticipates issuing a report summarizing key information discussed at the hearings, as well as public comments, later this year.

The Division derives important lessons from our engagement with experts and thought leaders, including through these workshops, complementing the expertise we develop through investigations and enforcement. In recent remarks, I highlighted one such lesson: in markets with zero-cost products, the antitrust laws still protect competition and consumers because the antitrust laws protect both the price and non-price components of competition.[39]

For digital markets in particular, where consumers often pay nothing, price effects alone do not provide a complete picture of market dynamics. Harms to innovation and quality are also important dimensions of competition that can have far reaching effects. Privacy, for example can be an important dimension of quality, and so by protecting competition, we can have an impact on privacy and data protection. The Division has the legal tools to address such concerns and is up to the task of ensuring that our technology markets are competitive and provide the highest quality, most innovative, and most affordable products for American consumers.

Staff Education & Enrichment

[38] Public Workshop on Competition in Television and Advertising, ANTITRUST DIV., U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/public-workshop-competition-television-and-digital-advertising (last updated June 26, 2019).

[39] Makan Delrahim, Assistant Att'y General, Antitrust Div., U.S. Dep't of Justice, "…AND Justice for All": Antitrust Enforcement and Digital Gatekeepers, Remarks as Prepared for the Antitrust New Frontiers Conference (June 11, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-antitrust-new-frontiers.

Whether in our enforcement or policy efforts, I am a firm believer that key to our success is maintaining a talented and devoted staff. The Division must continue to attract and retain bright, talented, and passionate individuals—whether they be attorneys, economists, paralegals, or support staff.

One way we will draw talent is through the recently established James F. Rill Fellowship Program.[40] The Fellowship is designed to provide elite candidates of the Honors Program with a special opportunity to participate in antitrust enforcement actions and in the development and implementation of antitrust policy. Our inaugural Rill fellow will soon begin at the Division.

As I told the Subcommittee last fall, the Division also recently established the Jackson-Nash Addresses, a lecture series to inspire and educate Division staff and the public about cutting-edge issues and developments in the field.[41] The most recent Jackson-Nash Address given by the Nobel Prize winning economist Paul Romer provided valuable insights into innovation, competition, and possible threats facing the modern digital economy.

We also have recently launched a rotation program, which provides the opportunity for Division attorneys to spend a one-year detail in the Appellate, Competition Policy & Advocacy, and International sections as a means to broaden their expertise and experience as well as help balance Division needs and resources. Six Division attorneys will be on detail in the first year of this program.

International

International engagement continues to be a top priority for the Antitrust Division. Through both case-specific cooperation and forward-thinking policy initiatives, the Division's International Program has spent the past year working with enforcers from around the world to encourage effective competition law development and enforcement. The Division's investigative teams continued to cooperate closely with their international counterparts. In FY 2019, the Division cooperated with 11 international counterparts on 20 different merger matters. For civil non-merger matters, the Division cooperated with 4 international counterparts

[40] *The James F. Rill Fellowship*, ANTITRUST DIV., U.S. DEP'T OF JUSTICE, https://www.justice.gov/oarm/james-f-rill-fellowship (last updated May 22, 2019).

[41] Press Release, U.S. Dep't of Justice, Antitrust Division Establishes the "Jackson-Nash Address" and Announces Professor Alvin Roth as Inaugural Speaker (Feb. 8, 2018), https://www.justice.gov/opa/pr/antitrust-division-establishes-jackson-nash-address-and-announces-professor-alvin-roth.

on 5 different matters. On the criminal side, Division staff collaborated with at least 18 jurisdictions on cross-border investigations and global cartel enforcement.

When I spoke to this Committee last fall, I described for you the proposal we introduced last June, the Multilateral Framework on Procedures in Competition Law Investigation and Enforcement (MFP), part of our partnership with leading antitrust agencies around the world to develop a core set of norms which would establish fundamental due process principles with meaningful review mechanisms. With the proliferation of antitrust agencies around the world, American businesses have faced antitrust reviews that are conducted pursuant to varying standards and processes in the areas of attorney client privilege to transparency to confidentiality to non-discrimination, among others. I am pleased to report that our proposal has become a reality. At the request of several partner agencies, we implemented the framework through the International Competition Network (ICN) to take advantage of existing structures and to reduce administrative burdens. In April, the ICN's Steering Group unanimously approved the framework, which has come to be known as the Framework on Competition Agency Procedures (CAP). The CAP came into effect in May with 70 founding competition agencies. Adopting the CAP is a remarkable and historic achievement for antitrust enforcement. It sends a clear signal that competition agencies across the globe—despite differences in their structures and proceedings, as well as the legal systems in which they operate—are committed to procedural fairness.

One particularly important principle in the CAP relates to attorney-client privilege. The CAP seeks to obtain participating agencies' commitment to recognize applicable privileges, including the attorney-client privilege. This is a critical procedural norm to ensure that American businesses are treated fairly by competition agencies around the world. The Division has gone to great lengths to secure proper recognition of the privilege and appropriate treatment of materials subject to it by foreign competition authorities. For example, in negotiating the United States-Mexico-Canada Agreement, the Division succeeded in adding a clause recognizing the privilege. The U.S. Trade Representative has also included it in the negotiating objectives for competition policy chapters for future trade agreements.

Over the past year, the Division has continued to maintain and expand its relationships with competition agencies around the globe. During FY 2018, we participated in over 60 meetings with fellow enforcement agencies at home and

abroad. We participated in the ICN's workshops focused on key enforcement areas, including cartels, unilateral conduct, mergers and advocacy. We also were a part of the OECD's biannual Competition Committee meetings, during which we discussed the digital economy, competition issues relating to intellectual property licensing, labor, education and fintech markets, and legal privilege and judicial review in antitrust proceedings, among other topics. We also continue to provide technical assistance to other enforcement agencies around the globe, offering programs on topics such as merger enforcement, economic investigative tools, and leniency programs.

In terms of future initiatives, the Division, with the Federal Trade Commission, will host the ICN Annual Conference in 2020. The ICN Annual Conference is the most important conference for global competition agencies and is regularly attended by a majority of ICN's 139 member-agencies. This will be the first time that the United States antitrust agencies will host the conference. We are excited to demonstrate Division's global leadership on competition policy, showcasing our multilateral efforts to promote fundamental due process through the CAP, and engage with the world on a range of other policy issues, including digital platform economy, cartel enforcement, and merger policy.

Conclusion

Having had the honor of serving as the AAG of the Antitrust Division for nearly two years, I continue to find the experience deeply rewarding. I am enormously grateful to work collaboratively with this Committee, and alongside the dedicated women and men of the Antitrust Division, as we protect American consumers. I am proud of the work we have done, but I recognize that we still have a lot more to do to ensure that Americans continue to benefit from a competitive economy. We will continue to leverage our limited resources to the fullest in order to meet the coming challenges, knowing the importance of our work in every American's life.

Mr. Chairman, thank you for the opportunity to testify here today. I look forward to further discussion of these issues.