DEPARTMENT OF JUSTICE

Antitrust in the Financial Sector

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Thank you for this opportunity to discuss the application of the antitrust laws to the financial sector.[1] It's an important topic that deserves the continued attention of the financial industry and antitrust practitioners.

As some of you may know, during my years in private practice, I represented various financial institutions that were under investigation by the Antitrust Division in civil and criminal matters. Since returning to the Antitrust Division last year, I haven't been involved in any of those matters, of course. But as the Division's Principal Deputy Assistant Attorney General over the past year, I have been responsible for overseeing the Division's criminal enforcement program, and I have been immersed in the Division's other cartel enforcement efforts.

This evening, I will share some views informed by my two perspectives and conclude with some observations about the important topic of antitrust compliance.

The Antitrust Division, and the Department of Justice as a whole, has an impressive record of recent enforcement in the financial services industry. Examples over the past decade range from the investigation into municipal bond derivatives, to interest rate benchmarks, to—most recently—the Division's investigation into collusion in the foreign currency exchange, or "FX," market. The FX investigation, which is still ongoing, is focused on agreements regarding the exchange rates of various currency pairs. In that investigation to date, five banks and two individuals have pleaded guilty to criminal Sherman Act violations and three other individuals have been indicted and await trial later this year.

Over the past several years, the Division has also uncovered and prosecuted numerous bid-rigging schemes at real estate foreclosure auctions around the country. In these matters,

[1] Thanks also to Emma Burnham, Carrie Syme and Brinkley Tappan, who assisted me with these remarks.

individuals who were purchasing real estate at foreclosure auctions agreed not to bid *up* the prices for foreclosed properties, sometimes even gathering on courthouse steps before and after auctions to discuss their illegal agreements. The Division's ongoing investigations have, to date, resulted in convictions of three corporations and 129 individuals.

If you studied the history of the Antitrust Division's criminal enforcement program, you would observe that many of its investigations that span an entire industry have a certain trajectory or "lifecycle." This is often true regardless of the industry in which the conduct under investigation takes place. At the beginning of the lifecycle, an industry participant might apply for leniency with regard to a particular product or service. Other companies might decide to plead guilty and cooperate with our investigation, seeking cooperation credit at sentencing and a reduced fine. Over time, investigations gain momentum. Because of incentives created by our "leniency plus" program, one investigation often leads to additional investigations in the same industry, but involving different conspiracies affecting different products or services within that industry.

The Division's work in the financial services sector is well into that lifecycle. I can't tell you when it will be over because—as I mentioned—I am not involved in those ongoing investigations. Nevertheless, I can identify from my experience—both inside and outside of government—certain lessons that are common across financial services investigations, as well as some important differences between the financial services investigations and the investigations in other industries.

I will start with the similarities. First among them is the conduct itself. While financial products may be more complicated than widgets—or auto parts, or computer screens—illegal agreements involving price fixing and bid rigging tend to look similar across industries. Lately,

there has been discussion about whether certain conduct—the use of computer algorithms to set prices, for example—should attract the same level of scrutiny as "traditional" price fixing conduct. To be clear, where competitors agree to restrict competition between them, whether by agreeing to display identical gasoline prices at gas stations on opposite street corners, or by fixing prices using advanced technology like online trading platforms or algorithms, they violate the Sherman Act. The agreement to fix the price is the illegal act; the means through which the agreement is carried out is less important.

Another similarity across industries is the significant penalties that antitrust violations can carry. Criminal violations of the Sherman Act—regardless of what product or service was at issue—can result in fines of up to $100 million for corporations, or twice the gain or loss from the crime, and for individuals, jail sentences of up to 10 years. If you review the statistics available on the Division's website, or the press releases the Division routinely issues, you'll see that the Division's criminal cases across industries consistently result in substantial fines for companies that are convicted of antitrust crimes. Regardless of industry, the statutory maximum is the same, and courts calculate fines using the same sentencing guidelines.

A final similarity across industries is that defendants and defense counsel raise many of the same arguments. The Division spends a significant amount of time engaging with defendants and their counsel during the course of its investigations. It's important for the Division to understand each defendant's arguments, because that's key to making just, appropriate, and considered decisions.

But the arguments the Division hears from subjects of investigations and their counsel across industries are often familiar: They say "the government doesn't understand this industry," or "this is mere parallel conduct, there is no agreement here," or "this is a better case for the Rule

of Reason." And finally they often say: "what we have here is just one rogue employee." In some cases these arguments may be persuasive, and sometimes there is just one rogue employee. But the chances that these arguments will carry the day in a financial services case are probably about the same as they are in a case involving any other industry.

There are also some notable differences between the financial sector investigations and investigations in other industries. One major difference is that the financial services sector may only have come over the last decade to fully recognize that this industry, like any other, is susceptible to antitrust crimes.

For a long time, awareness of antitrust issues—and collusion in particular—was more commonplace in what some might consider more traditional industries like manufacturing, whereas the recognition of antitrust concerns in financial services is newer. There is the story of a young antitrust lawyer in New York who, in roughly 2005, was looking for creative ways to develop clients. He proposed to present an antitrust training specifically for members of the financial services sector. His proposal didn't attract much interest, because, as he was told at the time, "banks don't really have antitrust problems." Today, I think we all recognize that when it comes to antitrust enforcement, the financial services sector is in many ways no different than any other industry.

But some important differences do exist. These differences stem from how financial firms work, how they're regulated, and the central role of the financial sector to economies worldwide.

With respect to how financial firms work, and how employees of financial firms do their jobs, there are significant differences from more traditional manufacturing companies. Two competing banks may have far more frequent interfirm communications than two manufacturing

companies, for example. One reason for that is that banks are often trading counterparties, sometimes on a daily or hourly basis. In addition, brokers and traders may be greater in number and may naturally have more freedom and privacy in how they perform their jobs than an employee in a more traditional industry, such as a vice president of sales and marketing at a manufacturing company. As a result, financial companies may find it more difficult to detect and prevent instances in which their employees contact competitors to reach collusive agreements.

Another difference is that, in addition to penalties under the Sherman Act, financial services entities also potentially face unique collateral consequences from other regulatory bodies. For example, to enable it to plead guilty to a Sherman Act charge, a bank may need to apply for and obtain waivers from various regulators to ensure that its license to operate in the United States will not be revoked. That is just one example of the many collateral consequences that the Division and financial sector defendants must take into account in determining the appropriate resolution of a criminal antitrust investigation.

Finally, while the rise of global commerce means that the Division's work in all markets has become more international in scope, this is especially true in financial markets. Almost all financial products are sold across national borders, and many financial markets are truly global and not "owned" by any one nation. Furthermore, financial markets are at the heart of every domestic economy, and are therefore of critical concern to governments across many jurisdictions. Where there is real evidence of problematic conduct in any country's financial services sector, it's hard for any government to look the other way. For these reasons, investigations in the financial services sector are especially likely to be international in nature.

As many of you here today may have witnessed firsthand, a multi-jurisdictional investigation often results in simultaneous and overlapping document requests, interview demands, amnesty applications, and fines, not to mention the obligation to comply with a host of document privacy laws. Whether you see this as an impressive show of international cooperation or a regulatory feeding frenzy probably depends on who you work for. But for everyone involved in one of these investigations—from upper management at DOJ to the IT personnel handling document requests for a target company—having an understanding of international civil and criminal enforcement regimes and regulations is critical, and reaching a resolution requires cooperation on many fronts.

This is especially true as privacy laws around the world become a central concern for companies and their compliance teams, and the Division recognizes that subjects of investigations are navigating a complex constellation of laws and policies. We are certainly giving thought to ways to streamline the process of cooperating with Division investigations while enabling compliance with the laws of other jurisdictions.

When multiple U.S. and international authorities have parallel investigations into the same misconduct, that understandably increases everyone's desire for coordination and efficiency. There have been examples of effective coordination in LIBOR and FX especially. In those cases and others, DOJ has reached out to a variety of U.S. and foreign authorities with parallel investigations into the same subject matter, not to join or merge the investigations, but to get the benefit of certain efficiencies, such as streamlining document requests and reducing the number of repetitive interviews or proffers any single company or individual is subjected to.

The Antitrust Division understands that few companies relish the idea of being investigated by a dozen authorities. But from the government's perspective, everyone—

including potential targets—benefits from DOJ being able to coordinate and focus its efforts. And the more often it happens, the more closely coordinated those efforts have become.

Finally, I want to say a few words about antitrust compliance programs, and the investment that I know many financial institutions are making to develop and implement antitrust compliance programs. Attention to antitrust compliance programs is truly critical in the financial industry—to prevent violations from occurring in the first place, and to ensure that when violations do occur, they are quickly detected, reported, and handled appropriately.

Attention to compliance has tangible benefits. The Division has sought to take into account the compliance efforts of companies that choose to cooperate with the government in financial investigations. For example, Barclays received a modest reduction in its criminal fine in connection with the FX euro/USD case because of its compliance efforts. Similarly, the Division took into account the compliance efforts of BNP Paribas in arriving at the ultimate fine amount for that bank. In both cases, the Division focused on acknowledging extraordinary *prospective* compliance measures taken after criminal antitrust activity was detected.

On the other hand, the Antitrust Division—like the Department of Justice as a whole—almost never considers a corporate defendant's *pre-existing* compliance program as warranting a sentencing reduction under the U.S. Sentencing Guidelines. But it is important to explain why that is the case, especially in the context of an antitrust violation. Under the Sentencing Guidelines, a company is eligible for credit based on its pre-existing compliance program only when its compliance program is deemed to be generally "effective."[2]

[2] U.S.S.G. §§ 8B2.1, 8C2.5

It can be a challenge to convince the Antitrust Division that a pre-existing compliance program was "effective" under the Sentencing Guidelines if it failed to stop the misconduct for which the company has been found criminally liable. By its nature, an antitrust crime requires the participation, or perhaps at least willful ignorance, of the individuals with discretion to set prices or reach other anticompetitive agreements. The Sentencing Guidelines are clear that the involvement of personnel at such a level creates a presumption, albeit rebuttable, that the organization lacked an effective compliance program.

That said, just last month, the Division hosted a very productive public roundtable on criminal antitrust compliance. [3] We are now in the process of assessing the thoughtful contributions of the various stakeholders who participated in the roundtable—including not only government officials but also in-house counsel and members of the antitrust bar.

Taking into account the discussions and feedback from that recent roundtable, we are considering how best to recognize corporate compliance efforts. That includes carefully examining whether and how pre-existing compliance programs might merit our consideration, whether at the charging stage or at sentencing. That's not to say that the Division will definitely be changing its current practice in this regard, but only that we're currently examining whether and under what circumstances it may be appropriate to consider pre-existing compliance programs in those contexts.

While this process is in its early stages, the Division's recent enforcement activities illustrate that any company designing or updating a compliance program should ensure that its program is appropriately tailored to the particular employees for whom the program is intended,

[3] Materials associated with that event are available on our website, https://www.justice.gov/atr/public-roundtable-antitrust-criminal-compliance#agenda.

and to the particular types of antitrust offenses that those categories of employees are most likely to engage in.

For example, traders on a desk or trading floor may need to be monitored and trained very differently than a manufacturing company's sales executives. HR professionals, and the managers and executives who supervise them and participate in recruiting and hiring of employees, will also need their own type of monitoring and training. Our experience, including recent and ongoing investigations into agreements between employers not to poach each other's employees, has made clear that all of those categories of HR personnel are, in their own ways, equally capable of effecting anticompetitive agreements.

Given my experience both inside and outside the Antitrust Division, I recognize that the financial services industry has in the past ten years or so become acutely aware of potential antitrust issues, and that much has been done in the industry to mitigate these risks. Of course that does not mean that more can't or shouldn't be done. In fact, ensuring antitrust compliance is a lot like participating in the financial markets themselves. Both endeavors require constant monitoring and frequent adjustments to mitigate new risks. I know that many of you in this audience are well-positioned to ensure that antitrust compliance remains a top priority in the financial services sector.

Thank you.