DEPARTMENT OF JUSTICE

Don’t “Take the Money and Run”[*]: Antitrust in the Financial Sector

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Antitrust in the Financial Sector: Hot Issues and Global Perspectives

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Good afternoon. It's great to be here again at Fordham University and to discuss the application of the antitrust laws to the financial sector. As many of you know, the application of the antitrust laws to the financial sector has a long history.

That history was recently highlighted during our dedication of the Anne K. Bingaman Auditorium and Lecture Hall. The dedication was an opportunity to celebrate former Assistant Attorney General Bingaman, the first woman to lead the Antitrust Division, whose many accomplishments included launching the Division's trailblazing leniency program.

In preparing to speak with you today, I came across remarks AAG Bingaman delivered in 1995 about antitrust and banking. Anne explained that "Banking is important. It has been, and will continue to be, an industry whose financial soundness and competitive structure are essential to the fulfillment of our nation's economic potential."[1]

Indeed, when she spoke at the dedication last month and reflected on her time at the Division, Anne said that her "proudest case" involved uncovering price fixing among two dozen NASDAQ securities firms.[2]

More than twenty years later, banks and the financial sector remain at the heart of our economy. That is why the Division continues to prioritize, through both enforcement and competition advocacy, ensuring that the financial markets operate competitively and free from anticompetitive effects.

While many of AAG Bingaman's remarks continue to resonate, the "hot issues" on the agenda for today's panels look very different from the focus of her remarks in 1995: "the

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* THE STEVE MILLER BAND, *Take the Money and Run* (Capitol Records 1976).

[1] Assistant Attorney General Anne K. Bingaman, Remarks before the Comptroller of the Currency's Conference on Antitrust and Banking (Nov. 16, 1995), available at https://www.justice.gov/atr/speech/antitrust-and-banking.

[2] Brian Baker, Former Antitrust Chief Remembered for Energy, Passion, FTC Watch (Apr. 9, 2019), available at https://www.mlexwatch.com/articles/4698/print?section=ftcwatch.

importance of antitrust policy with regard to bank mergers."[3] Instead, today's panelists will focus on the limits of fund and exchange collaboration, syndicate coordination, and ensuring antitrust compliance.

With changing markets and today's hot topics in mind, I will address three issues.

First, I will offer my thoughts on the limits of fund and exchange collaboration and the spectrum of antitrust issues relating to common ownership and institutional investors.

Second, I will focus on unlawful coordination and provide some highlights of the Division's criminal investigations in the financial sector over the last decade.

Finally, I will conclude with thoughts on the financial sector and antitrust compliance.

I. The Range of Antitrust Issues Posed by Common Ownership and Institutional Investors

A rather recent debate, both in the United States and abroad, revolves around the role of institutional investors in today's economy, and whether or not their common ownership of competing firms has an impact on competition.

It has been only a few years since the first papers were written about this issue as it relates to the U.S. airline industry, and since then we have seen more scholarship by some prominent thinkers about antitrust issues, including some of our colleagues here today. The debate surrounding this issue has been vigorous and lively, as we saw at recent gatherings including the ABA Spring Meeting, and as I'm sure we'll see later this afternoon during the panel discussions at this conference.

Much of the scholarship on these common ownership issues brought up by institutional investors has considered how to quantify the impact of this phenomenon, and perhaps identify situations where common ownership may adversely affect competition. Whether antitrust

[3] Assistant Attorney General Bingaman Remarks, supra note 1.

enforcers should evaluate the effects of common ownership using existing measures, or use new approaches, is one of the main points of discussion in the literature, and we follow that discussion with interest.

Another issue, of course, that we also think about is what the appropriate remedies should be that address potential adverse effects on competition from the common ownership of competing firms by investors. As this debate goes on, there are some things that I would ask participants in this discussion to keep in mind.

First, let's remember that from where I sit as an enforcer of the antitrust laws, concerns about common ownership need to be rooted in theories of harm that can be proven in a court of law. So while we encourage people to think creatively about these issues, remember that the Antitrust Division brings cases when we can prove that certain actions harm competition.

Second, I would encourage the financial community to pay attention to this dialogue so we can understand what the knock-on effects of different remedy mechanisms would be. The world of finance is a great example of how markets can expand choice for consumers via innovation. I want to make sure that as we consider the competitive factors, we don't inadvertently harm the capital markets.

If there is an issue with common ownership of competitors by institutional investors, and the Antitrust Division acts to address the effect on competition, we want to ensure any fix doesn't chill innovation or harm investors.

The scholarship is interesting, the debate is exciting, and I look forward to seeing the discussion evolve and continue to develop this important area of the law. I look forward to hearing from the participants in this sector, including members of the private equity and institutional investor community.

A different, related area that the Division is looking into is the law governing interlocking directorates and bringing it forward to account for modern corporate structures. Section 8 of the Clayton Act generally prohibits a person from simultaneously serving as an officer or director of competing corporations that meet a size threshold unless certain de minimis exceptions apply.

This prohibition addresses the concern that a director or officer could exchange competitively sensitive information and coordinate business decisions between competitors. For officers and directors who find themselves in violation of Section 8, the statute provides them a one-year grace period to resign from their positions. The Division regularly encounters potential Section 8 violations and it is top-of-mind when reviewing transactions that involve interlocking directorates.

The use of the term "corporation" in the statute has raised many questions about whether Section 8 applies to non-incorporated entities such as limited liability companies or other structures. Section 8 pre-dates the use of LLCs, and certainly predates the widespread acceptance of structures like limited liability corporations as an alternative corporate form to a traditional "corporation." To date, courts have not directly addressed this question, although we believe the harm can be the same regardless of the forms of the entities.

Of course, we are familiar with the arguments both for and against interpreting the statute to apply to LLCs. It is not clear from our review of the legislative history that Congress intended to limit the application of Section 8 solely to corporations. Moreover, whether one LLC competes against another, whether two corporations compete against each other, or whether an LLC competes against a corporation, the competition analysis is the same. We and the FTC review mergers in this way, and we investigate our conduct matters this way too. We are thinking about how to bring this thinking to Section 8 as well.

While much of the discussion about these issues surrounds Section 8, institutional investors risk liability under Section 1 of the Sherman Act if they coordinate conduct between competing firms in which they have investments. For example, if an institutional investor has an ownership interest in multiple competitors, and its investment manager calls those competitors and discourages them from entering into price wars, there is a thin line, if any, between common ownership and collusion that violates Section 1.

II. Criminal Enforcement in the Financial Sector

Speaking of collusion, I would like to turn to our criminal enforcement efforts. There is no industry where preserving competition is more important or where our prosecutors have been more active over the last decade than the financial services industry. Our investigations and prosecutions touching the financial services industry have had a considerable range, from international cartels to more local bid rigging.

For example, we've been involved in a number of investigations relating to collusion among real estate investors and bidders at foreclosure and tax lien auctions. Those investigations uncovered schemes to keep purchase prices artificially low to the detriment of lenders and lien holders, as well as communities and financially distressed homeowners.

Beyond individual bidders and investors, we also have investigated and prosecuted some of the most complex cases in this industry where the unlawful conduct struck at the heart of our financial markets. Our investigations and prosecutions have included markets for municipal bond derivatives, interest rate benchmarks, and foreign currency exchange. By my count, our actions in these markets have resulted in thirty-nine convictions, including the conviction of twenty-seven individuals, and criminal corporate fines of over $3.9 billion. Let me begin with a brief sweep of these investigations.

The first charges in our municipal bonds investigation were in October 2009. The munibonds investigation focused on bid-rigging and fraud conspiracies related to municipal bond investments in communities across the country. The schemes involved agreements to rig the bidding process on municipal investments and related contracts, which are financial instruments used to invest the proceeds of, or manage the risks associated with, bond issuances by municipalities and other public entities.

One financial services firm pled guilty and twenty individuals were charged in the nearly ten-year investigation. Of those individuals, seventeen individuals were convicted. In addition, four other financial institutions entered into non-prosecution agreements and agreed to pay over $600 million in restitution, penalties, and disgorgement.

At the same time the Division prosecuted the munibonds cases, we also were partnering with the Department's Criminal Division to investigate and prosecute the manipulation of the LIBOR and other interest rate benchmarks. The London Interbank Offered Rate or LIBOR is the primary benchmark for short-term interest rates globally. It is also used as a reference rate for many interest rate contracts, including home mortgages, credit cards, and student loans. Some have called LIBOR the beating heart of the financial markets.

The LIBOR investigation focused on brokers and traders who colluded to manipulate benchmark interest rates for the purpose of improving trading positions. In December 2012, the Antitrust Division and Criminal Division team announced the first charges in the investigation. These investigations resulted in six corporate convictions of banks, which agreed to pay $1.3 billion in criminal fines. We also charged sixteen individuals in the investigation. To date, eight individual defendants have been convicted.[4]

[4] Two of these convictions currently are subject to pending post-trial motions.

As our LIBOR prosecutions continued, we began our investigation into the foreign currency exchange markets. In May 2015, we announced the first charges in our investigation into the foreign exchange markets when Citicorp, JPMorgan Chase & Co., Barclays PLC, and the Royal Bank of Scotland agreed to plead guilty to conspiring to manipulate the dollar-euro spot market.

The corporate fines totaled $2.52 billion, and included Citicorp's $925 million fine, Barclays's $650 million fine, and JPMorgan's $550 million fine. In January 2018, a fifth bank, BNP Paribas, agreed to plead guilty for fixing prices in Central and Eastern European, Middle Eastern and African currencies. We charged six individual traders for their role in foreign exchange conspiracies. To date, two individual traders have been convicted with another trial set to begin in October.

Like any long running and complex investigation, these investigations were marked by successes and setbacks. The successes speak for themselves. In addition to significant corporate fines and convictions via guilty pleas, of the twenty-seven individuals held accountable, a number of those convictions were obtained at trial. In the LIBOR investigation, last October, two former Deutsche Bank traders were found guilty after a month long trial.

Pursuing complex prosecutions risks disappointment and we certainly encountered that here as well. For example, last fall a jury acquitted three U.K.-based traders who were indicted for conspiring to manipulate the Eurodollar foreign exchange market. While we were disappointed in the result, we respect the jury's verdict. We also are committed to learning from all of our trials, and will do so whether trial ends in a conviction or otherwise.

The same holds true for the Second Circuit's decision in *United States v. Allen*,[5] which reversed the convictions at trial of two Rabobank traders found guilty of manipulating their LIBOR submissions. The Second Circuit's decision and guidance on the Fifth Amendment's limits on compelled testimony by foreign enforcers continues to shape our approach to cross-border investigations. Again, this is what happens when you bring complex cases involving increasingly complex financial instruments, as well as multiple jurisdictions with different legal regimes.

We at the Department of Justice take a great deal of pride in our willingness to pursue these lengthy, difficult investigations from start to finish with dogged persistence and professionalism. To clarify, when I say difficult, I mean hard to build, hard to charge, and hard to explain to a layperson jury. It's no understatement to say that these cases were complex. We faced difficult decisions at each turn. Moreover, when confronted with challenging cases in such a critical industry, we have devoted and will continue to devote the necessary resources. Often this has meant shifting our finite resources, including assigning attorneys from multiple offices across the country, to prosecute these matters.

Despite the complexity resulting from cross-border investigations, LIBOR and FX were also examples of particularly effective coordination among the Division and its law enforcement partners, along with financial service regulators around the globe. While the Division did not conduct joint investigations, there were efficiencies realized in the course of parallel investigations into similar conduct, such as coordinating interview requests and streamlining document demands. These investigations only further solidified the successful working relationship the Division has with numerous other components and agencies, including the

[5] 864 F.3d 63 (2d Cir. 2017).

Criminal Division, FBI, the FDIC, Office of the Inspector General, and CFTC at home, along with counterparts abroad such as the U.K.'s Financial Conduct Authority and Serious Fraud Office.

As a result, nearly a year ago, when Deputy Attorney General Rosenstein encouraged prosecutors "to enhance relationships with our law enforcement partners in the United States and abroad, while avoiding unfair duplicative penalties,"[6] drawing upon our experiences in LIBOR and FX, we were pleased that such a policy already was longstanding Antitrust Division practice.

We, however, are not content to rest on our record. As the Deputy Attorney General explained, "[w]e need to think about whether devoting resources to additional enforcement against an old scheme is more valuable than fighting a new one."[7] With that in mind, our work in the financial service sector continues through to this day as we have multiple open investigations in this field.

A little over one month ago, Deputy Assistant Attorney General Richard Powers told the audience at the American Bar Association's Spring Meeting that there is more to come for our criminal enforcement program. Shortly afterwards, we announced the first charges in four new investigations involving collusion in the commercial construction industry and crimes affecting government victims.

I am pleased to report that we expect additional announcements this month, including an announcement in an investigation involving the financial sector. There is not much more I can say about that investigation at this time. Rest assured, however, that our prosecutors are actively investigating anticompetitive conduct, including in the financial markets. Complex markets are

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[6] Deputy Attorney General Rod Rosenstein, Remarks to the New York City Bar White Collar Crime Institute (May 9, 2018), available at https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar.
[7] *Id.*

not beyond the reach of the antitrust laws and the technical nature of a particular market has not and will not deter our enforcement efforts.

III. The Financial Sector and Antitrust Compliance

With that, I want to conclude with a few additional thoughts on corporate compliance. Our investigations in the financial sector have kept us in close contact with a number of financial institutions. For some firms, the commitment to a culture of compliance as a result of our investigations is readily apparent. We can see the changes, and they matter to us when we are making our decisions about how to resolve possible charges with a firm.

As Deputy Attorney General Rosenstein recently explained, "strong corporate compliance programs are the first line of defense" to white-collar crime.[8] That, of course, includes price fixing. He noted, "[w]hen crimes occur, good corporate citizens investigate it, report it to the authorities, cooperate in investigations, and implement appropriate remedies."[9] I share Deputy Attorney General Rosenstein's view that effective and robust compliance and good faith self-reporting and remediation are hallmarks of good corporate citizenship. These companies should want to work with us to root out criminal misconduct within their organizations and help us hold accountable the individuals who created this liability for the organization.

If a financial institution ends up face to face with our prosecutors, investment in compliance should have benefits. In an ideal world, corporate compliance programs prevent wrongdoing altogether. If violations do occur, robust compliance programs should lead to prompt detection, which not only nips the conduct in the bud, minimizing the harm to

[8] Deputy Attorney General Rod J. Rosenstein, Remarks at the Wharton School's Legal Studies and Business Ethics Lecture Series (Feb. 21, 2019), available at https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-wharton-school-s-legal-studies.
[9] *Id.*

consumers, but also gives companies the greatest chance of winning the race for leniency. If a company does not win the race for leniency, then it has an opportunity to be an early-in cooperator and receive a substantial penalty reduction for timely, useful, and thorough cooperation.

The Division's financial market cases, and the severe results that followed for many of the firms, are illustrative of the need for robust compliance programs and the benefits of extraordinary prospective compliance measures.

Several of the resolutions in the Division's financial markets investigations involved significant corporate liability for the illegal conduct of a single business unit or even a single wrongdoer. Moreover, these firms realized this liability after years of costly internal investigations.

For example, in April 2015, Deutsche Bank AG entered into a deferred prosecution agreement and its London subsidiary agreed to plead guilty and collectively pay $775 million in criminal penalties for its role in manipulating LIBOR. Deutsche Bank's LIBOR Deferred Prosecution Agreement explains that of Deutsche Bank's approximately 100,000 employees, the conduct at issue primarily involved a unit with around 300 to 400 employees.[10] Within that unit, the DPA identifies approximately thirty members involved in the interest rate benchmark misconduct.[11]

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[10] *United States v. Deutsche Bank AG*, 3:15-cr-00061 (D. Ct. Apr. 23, 2015), Deferred Prosecution Agreement at Paragraph 4(d), available at https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/23/db_dpa.pdf.

[11] *Id.*

Similarly, in May 2015, Barclays PLC agreed to plead guilty and pay a $650 million fine for conspiring to fix prices and rig bids for U.S. dollars and euros exchanged in the FX spot market. Its misconduct involved two of its traders.[12]

Most recently, BNP Paribas pled guilty and agreed to pay $90 million fine for its involvement in a conspiracy to suppress and eliminate competition by fixing prices in Central and Eastern European, Middle Eastern, and African currencies traded on the foreign exchange market. BNP Paribas pled guilty to an offense "committed by one employee, among thousands, who was employed by a subsidiary of the Defendant for less than two years."[13]

Whether wrongdoing takes place in one unit or at the hands of a single employee, the potential for corporate liability for its employee-misconduct should incentivize robust compliance.

Beyond rooting out misconduct, Barclays's and BNP Paribas's plea agreements also show that extraordinary prospective compliance has tangible benefits. Barclays's foreign exchange criminal fine was modestly reduced because of its compliance efforts.[14] The Division's sentencing memorandum noted the "dramatic steps" Barclays took "to change its corporate culture and instill a new attitude toward compliance and good corporate citizenship."[15] Specifically, Barclays:

- Conducted a global review of its risk and control programs, which was "truly comprehensive," "detailed," and "extensive;"[16]

[12] *United States v. Barclays PLC*, 3:15-cr-00077 (D. Ct. Dec. 1, 2016), Sentencing Mem., at 2.
[13] *United States v. BNP Paribas USA, Inc.*, 18-cr-00061 (S.D.N.Y. May 22, 2018), Sentencing Mem., at 7.
[14] *United States v. Barclays PLC*, 3:15-cr-00077 (D. Ct. May 20, 2015), Plea Agreement at Paragraph 13, available at https://www.justice.gov/atr/file/838001/download.
[15] *United States v. Barclays PLC*, 3:15-cr-00077 (D. Ct. Dec. 1, 2016), Sentencing Mem., at 10.
[16] *Id.*

- Separated its legal and compliance functions from its business functions, and implemented an "expanded effort to monitor [its employees'] electronic communications;"[17] and
- Showed "commendable" and "extraordinary dedication to the timely reporting of potential misconduct."[18]

Similarly, the Division also considered BNP Paribas's extraordinary prospective compliance efforts in arriving at its fine. The Division's sentencing memorandum outlined BNP Paribas's "substantial efforts" to prevent the recurrence of an antitrust offense.[19] In particular, the bank introduced surveillance tools to identify collusive trading behavior and implemented active monitoring of its traders' communications.[20]

These examples are insightful for both those charged with ensuring compliance and enforcers who seek to promote and reward compliance when appropriate. With that in mind, last April, we hosted a public roundtable on criminal antitrust compliance. We have spent the past year considering whether and how to further credit effective compliance. While I have nothing to announce in that regard today, I can report that there are a range of options that I am considering to further encourage the adoption of robust compliance programs.

Whether or not the Division makes formal changes to its policies, I can clearly say that we share the Department's commitment to ensuring that good corporate citizens who invest in compliance, self-report, and remediate get a "fair shake."[21] Stay tuned.

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[17] *Id.* at 11.
[18] *Id.*
[19] *United States v. BNP Paribas USA, Inc.*, 18-cr-00061 (S.D.N.Y. May 22, 2018), Sentencing Mem., at 9.
[20] *Id.*
[21] Assistant Attorney General Benczkowski, Remarks at 33rd Annual ABA National Institute on White Collar Crime Conference (Mar. 8, 2019), available at https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-33rd-annual-aba-national.

Of course, the Antitrust Division long has been home to the ultimate credit for an effective compliance program that detects and allows prompt self-reporting—leniency.

IV. Conclusion

Whether you look back to former AAG Bingaman's tenure and the NASDAQ case or at the past decade, the Antitrust Division has a long history of enforcing our nation's competition laws in the financial sector. We are proud of the hard work and the dedication that we have shown over the years to continue our understanding of complex financial markets and to bring tough cases in this space. We are also proud of our work and partnership with other agencies, such as the SEC, CFTC, and others, to help improve the integrity and efficiency of the financial markets. While we applaud the efforts we have seen to invest in compliance following our prior investigations, our commitment to vigilant enforcement in this critical field is unwavering.

In terms of antitrust compliance, however, we hope that our future policy changes will further improve the integrity and efficiency of the financial sector.

Thank you.