



DEPARTMENT OF JUSTICE

Criminal Antitrust Enforcement: Recent Highlights, Policy Initiatives, and What's to Come

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Remarks as Prepared for the
The 29th Annual Antitrust, UCL, and Privacy Section Golden State Institute

San Francisco, California

November 14, 2019

Good afternoon. Thank you, Peter, for the kind introduction. It's great to be back in San Francisco, and I appreciate the invitation to speak at the 29th Annual Golden State Institute. The timing of your event allows me to reflect on the many accomplishments of our outstanding prosecutors and to detail the Antitrust Division's criminal enforcement priorities going forward.

My remarks today will focus on three topics: first, a recap of recent case-related developments; second, two significant policy announcements and their implications; and third, I will close with a few thoughts on our goals and plans for the future.

Before I get into those topics, however, I want to spend a few minutes talking about the state of our program. As many of you know, we've been navigating a period of change and transition at the Division. Over the last few years, we've had a number of significant, highly successful investigations wind down. As that has happened, we have shifted our limited resources to new investigations and new initiatives.

We've also introduced and implemented a number of policy and practice changes. Some of the changes attracted headlines—such as last summer's compliance announcement and the recent launch of the Procurement Collusion Strike Force. Other changes were behind the scenes and involved the details of our day-to-day practice. Additionally, we've promoted talented and experienced prosecutors to key leadership roles at the Division.

We aren't just seeing changes with our leadership; we are growing our trial attorney ranks. We've hired twelve new trial attorneys across three offices in the last few months and are wrapping up a round of lateral hiring in our San Francisco Office. We've also brought in two experienced litigators from other components of the Department of Justice.

For the first time, we've added a Senior Litigation Counsel, Carol Sipperly, who is one of the Department's most seasoned litigators, with experience prosecuting everything from corporate crime to mafia bosses.

William Sloan also joined the Division as counsel to the Assistant Attorney General. Billy excelled as an Assistant United States Attorney in two different districts, and brings significant trial experience to our ranks. As I will discuss later, he has also spearheaded the launch of the Procurement Collusion Strike Force and will serve as its first director.

With new leadership and new trial attorneys in place, we've taken the time to look at our program and our mission, which is to promote economic competition by deterring, detecting, and prosecuting criminal violations of the antitrust laws. In fulfilling that mission, we are grounded first and foremost by our commitment to professionalism and the high ethical standards expected of federal prosecutors. I often emphasize that we are process driven. We will do things the right way, for the right reasons: we will run efficient, organized investigations, and make sound prosecutorial decisions based upon the Principles of Federal Prosecution.

As many of you know, our investigations are lengthy, wide-ranging, and complex. Greed can infect any market, and our duty to deter, detect, and prosecute those who cheat consumers and corrupt the competitive free market spans the U.S. economy.

We investigate and prosecute antitrust crimes knowing that our work will be dissected and challenged at every point. Sometimes, in these high-stakes cases, the defense opts to challenge the integrity of our investigation as a negotiation or litigation tactic, rather than contest the facts or the law. But our job as prosecutors is to put professionalism, ethics, and mission first, and I couldn't be prouder of how our prosecutors handle themselves each day to embody

what the late-Attorney General and Justice Robert H. Jackson called the “spirit of fair play and decency that should animate the federal prosecutor.”¹

In addition to questions that go toward fair play and decency, some have questioned our zeal, particularly when it comes to labor market investigations. In October 2016, the Division reminded the business community that naked agreements among employers to limit competition for employees are per se violations of the Sherman Act that can be prosecuted criminally.

The Division has a number of active criminal investigations into naked no-poach and wage-fixing agreements that began or continued after October 2016.² The investigation and prosecution of employers who collude with other employers to cheat their employees and distort the labor markets remains one of the Division’s highest priorities and an area to which we are devoting substantial resources.

That said, the time and effort required to investigate and build criminal cases is substantial. We will follow the evidence wherever it leads us, including to the C-suite of major corporations, but doing so takes time. These cases, like all of our work, are built and charged based upon the Principles of Federal Prosecution. While we appreciate the public discourse around this topic, sound prosecutions are rooted in our philosophy of professionalism, ethics, and fulfilling our mission guided by the Principles of Federal Prosecution. And this is an area where I can promise you that we will not compromise.

I. Recent Highlights

That brings me to my first topic, recent case-related developments. Back in March, Assistant Attorney General Delrahim told the bar and business community to stay tuned because

¹ Robert H. Jackson, Att’y Gen. U.S. Dep’t of Justice, *The Federal Prosecutor* (Apr. 1, 1940), <https://www.roberthjackson.org/speech-and-writing/the-federal-prosecutor/>.

² See Andrew C. Finch, Principal Deputy Assistant Att’y Gen., U.S. Dep’t of Justice, Antitrust Div., *Trump Antitrust Policy After One Year 5* (Jan. 23, 2018), <https://www.justice.gov/opa/speech/file/1028906/download>.

our prosecutors were hard at work and there was more to come. Since then, we've announced the first charges in six new investigations, and made progress in many other longstanding investigations, which cut across the economy and include several priority areas.

One of the defining themes of our recent enforcement efforts is individual accountability. As we speak, prosecutors from our San Francisco Office are in trial against the former CEO of Bumble Bee Foods who was indicted for fixing prices of packaged seafood. On the east coast, prosecutors from our New York office are in the third week of trial against a former currency trader accused of conspiring to fix prices and rig bids for foreign currencies. And hours ago, a former vice president at a broker-dealer pled guilty for his involvement in a bid-rigging conspiracy involving complex financial instruments.

This focus on individual accountability is a consistent theme through all stages of our investigations and litigation. On average, the Division charges around three individuals for each corporate co-conspirator.³

For example, our investigation into price fixing among freight forwarding competitors has resulted in one corporate and three individual guilty pleas. This conspiracy inflated prices by as much as 20 percent and victimized vulnerable consumers sending gifts and household goods to loved ones in Central America. In June 2018, the FBI arrested two freight forwarding executives in Miami.

At a contested detention hearing that followed the arrests, the court agreed with prosecutors from our Washington Criminal I Section and ordered the freight-forwarding company's CEO detained pending trial. He spent more than five months in jail before agreeing

³ From FY2009-2018, 524 individuals were charged in Division cases, compared to 177 corporations, nearly a 3:1 ratio. See U.S. DEP'T OF JUSTICE, ANTITRUST DIV., ANTITRUST DIVISION WORKLOAD STATISTICS FY 2009-2018 4-5 (2019), <https://www.justice.gov/atr/file/788426/download>.

to plead guilty. This summer, another executive and the CEO were sentenced to 15- and 18-month terms in prison.

Other investigations illustrate the Division's commitment to safeguarding taxpayer dollars and holding responsible those who victimize the government.

Division prosecutors from our Washington Criminal II Section worked with the U.S. Attorney's Office for the Eastern District of Michigan to prosecute a fraud scheme that affected federally funded demolition contracts in Detroit. This fall, a former city official and executive charged in the investigation each received 1-year prison sentences.

In another investigation involving government victims, two executives have pled guilty in our Chicago Office's investigation into bid rigging at GSA's online auctions for surplus equipment.

Beyond government victims, recent cases have also involved particularly vulnerable victims, including hospitals and charities. One executive and one company have pled guilty in our Chicago Office's investigation into bid rigging and price fixing among commercial flooring contractors. The conspiracy spanned the better part of a decade and victimized schools, hospitals, and charities in the greater Chicago area.

Our New York Office has secured guilty pleas from three executives involved in a \$45 million bid-rigging and fraud scheme that inflated bids for commercial insulation contracts by at least 10 percent to New England-area victims, including hospitals and universities.

The insulation investigation is also one where the Division and its partners found criminal conspirators using new tactics and techniques to further their illegal activity. To conceal their misconduct, the conspirators used burner phones to perpetrate the bid-rigging and fraud schemes.

Our recent results also include charges involving other sectors that impact the domestic and global economies, and affect the pocketbooks of every-day Americans. The healthcare industry is at the top of the list of critical markets for many Americans, particularly the elderly.

As part of the Division's ongoing investigation into this vital industry, Heritage Pharmaceuticals was charged for its role in a criminal antitrust conspiracy to raise and fix the prices of a diabetes drug. Heritage entered into a deferred prosecution agreement to resolve the charge, pursuant to which Heritage admitted liability, agreed to pay a criminal penalty and cooperate in the Division's ongoing investigation. Previously, Heritage's former CEO and president also pled guilty to antitrust charges. I can also report that we expect to make additional announcements about this investigation into the generic pharmaceuticals industry.

Division prosecutors have also kept pace with collusion involving online markets. Earlier, I mentioned our work rooting out collusion at online auctions for surplus government equipment.

The Division has also worked to prosecute executives and their companies who conspired to fix prices of customized promotional products sold online. To date, eleven defendants have been charged in the investigation, and five individuals and four companies have pled guilty. Each executive was sentenced to prison and the corporate guilty pleas have resulted in nearly \$10 million in criminal fines.

Like the insulation investigation, this is another example of the Division and its law enforcement partners adapting to new methods of collusion. In the promotional products conspiracy, the defendants and their co-conspirators used social media platforms and encrypted messaging applications to reach and implement their illegal agreement.

The Division also remains committed to rooting out misconduct involving electronics and the financial markets.

From liquid crystal displays and DRAM to electrolytic capacitors, the Division has a noteworthy history prosecuting international conspiracies involving electronic components. Most recently, NHK Spring Co., a Japanese manufacturer of suspension assemblies used in hard disk drives, pled guilty and was sentenced to pay a \$28.5 million fine for its role in a global conspiracy to fix prices.

Like the electronic-components industry, the Division continues to prosecute anti-competitive conduct in the financial sector. I previously mentioned that, just a few hours ago, an executive pled guilty to conspiring to rig bids for financial instruments. This is the fourth guilty plea in the investigation into collusion among broker-dealers to submit rigged bids to borrow pre-release American Depository Receipts (ADRs).

This investigation is a reminder that neither the financial sector nor complex financial instruments are beyond the reach of the antitrust laws. And the results speak for themselves: to date, the Division's munibonds, foreign exchange, LIBOR, and pre-release ADRs investigations have resulted in over forty convictions and substantial corporate criminal fines and penalties.

Of course, when we prosecute hard cases involving complex markets, we do not always prevail at trial, as happened a year ago in a foreign exchange market case. But we remain unwavering in our willingness to prosecute criminal antitrust conduct wherever we uncover it in order to pursue a just result.

We are proud of our charging decisions and our record of corporate and individual convictions in all of these important markets. But our work isn't done. Whether competitors conspire to harm consumers making online purchases or buying life-improving drugs on main

street, whether their anticompetitive conduct distorts our grocery bills or financial markets, the Antitrust Division will vigorously prosecute both corporations and their culpable executives.

Whatever the market, we also stand ready to litigate to ensure that those who scheme and conspire to fix prices, rig bids, and allocate our markets are brought to justice.

The most recent example of our litigation efforts occurred right down the street. Like many of the other examples I've discussed today, it involved a conspiracy to fix prices in a critical market affecting the pocketbooks of American consumers: canned tuna.

More than a year ago, in October 2018, StarKist Co. agreed to plead guilty to conspiring to fix prices of canned tuna. For nearly a year thereafter, Division prosecutors litigated a dispute over StarKist's ability to pay a statutory maximum, \$100 million fine. In September, the district court sided with Division prosecutors and found that StarKist had not proven its financial circumstances justified a lower fine, and ordered it to pay a \$100 million criminal fine.

An even lengthier litigated dispute was also resolved in the Division's favor earlier this year. In 2016, a grand jury in Utah charged an heir location services provider and its co-owner with conspiring to allocate the heir location market.

In June 2017, the district court ruled that the conspiracy alleged in the indictment would be tried under the rule of reason and granted a motion to dismiss the indictment as time-barred. The Tenth Circuit reversed the district court's dismissal on statute of limitations grounds, and encouraged the district court to reconsider its rule of reason order. This February, the district court granted the Division's motion to reconsider and found the per se rule applied. In July, both defendants pled guilty.

These cases stand out as examples of the tenacity and resilience of our prosecutors. Our San Francisco team fought to bring StarKist to justice for its role in a price-fixing conspiracy that

affected hundreds of millions of dollars worth of canned tuna and inflated Americans' grocery bills. Likewise, the efforts of our Chicago-based heir location team highlight the Division's resolve and willingness to litigate to ensure that the antitrust laws are properly applied.

When it comes to litigation, whether before the trial court or on appeal, we take a long-range view. Prosecuting complex crimes in complex markets is hard work. Sometimes we are not able to convince all twelve jurors; some judges may not like our cases. But whether in the face of success or setback, we stand ready to aggressively litigate tough cases to protect American consumers because that is our duty as prosecutors.

II. Policy Initiatives

The past few months have seen no shortage of policy changes and first-of-their-kind initiatives. Behind these changes and new initiatives are a few key themes. As I mentioned earlier, the Division's mission is to promote economic competition by deterring, detecting, and prosecuting criminal violations of the antitrust laws. While we remain steadfast in our dedication to prosecuting antitrust crimes, recent policy initiatives announced by Assistant Attorney General Delrahim focus on the importance of deterrence and—through new incentives, initiatives, and relationships—augmenting our detection capabilities.

a. The Procurement Collusion Strike Force

I'll start with the Procurement Collusion Strike Force (PCSF), which the Department announced last week.⁴ The PCSF is an interagency partnership among the Antitrust Division, thirteen U.S. Attorneys' Offices, the Federal Bureau of Investigation, and four federal Offices of

⁴ Press Release, U.S. Dep't of Justice, Justice Department Announces Procurement Collusion Strike Force: a Coordinated National Response to Combat Antitrust Crimes and Related Schemes in Government Procurement, Grant and Program Funding (Nov. 5, 2019), <https://www.justice.gov/opa/pr/justice-department-announces-procurement-collusion-strike-force-coordinated-national-response>; Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Remarks at the Procurement Collusion Strike Force Press Conference (Nov. 5, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-procurement-collusion-strike>.

Inspector General to deter, detect, investigate, and prosecute antitrust and related crimes that affect government procurement, grant, and program funding.

The Strike Force's mission starts with deterrence. The Strike Force will harness the combined expertise and capacity of its members to conduct targeted outreach to procurement officials and government contractors about antitrust risks in the procurement process. Further, the PCSF will facilitate collaboration among its members and the law enforcement community in developing and using data analytics to detect potential antitrust crimes.

The Strike Force not only will leverage the existing resources and personnel of its partner agencies, but it also has secured additional funding to support outreach and efforts to jointly investigate and prosecute procurement-related crimes. Although the Division has significant experience partnering with law enforcement to investigate procurement collusion,⁵ this initiative will strengthen and expand the scope of our partnerships to cover outreach, investigation, and prosecution.

While the initiative is new, the Division's commitment to protecting taxpayer dollars from collusion and safeguarding the integrity of the public procurement process is not. Collusion affecting public procurement victimizes our federal programs and American taxpayers. As Assistant Attorney General Delrahim explained when we launched the Strike Force, last year the United States spent upwards of \$600 billion in taxpayer dollars on federal contracts and

⁵ An example of the Division's recent efforts is the Korea fuel supply investigation. Five South Korean oil companies agreed to plead guilty and to pay \$156 million in criminal fines for their involvement in a decade-long bid-rigging conspiracy that targeted contracts to supply fuel to U.S. military bases in South Korea. Seven individuals were indicted in the investigation, which involved not only Division prosecutors, but the U.S. Attorney's Office for the Southern District of Ohio, the Defense Criminal Investigative Service, Federal Bureau of Investigation, U.S. Army Criminal Investigation Command, the Defense Logistics Agency Office of the Inspector General, and the Air Force Office of Special Investigations.

grants.⁶ As a result, reducing procurement collusion would not only ensure the integrity of the procurement process but could save taxpayers billions of dollars per year.⁷

The Division's well-established policies concerning the prosecution of antitrust crimes will remain unchanged. For instance, the Division's Leniency Policy applies in the context of procurement-related antitrust crimes just as it does in the context of other antitrust violations.⁸

In addition to the PCSF, let me touch upon another initiative, which similarly promotes the twin goals of deterring and detecting antitrust crimes.

b. Compliance Policy Changes

In July, Assistant Attorney General Delrahim announced another new policy.⁹ The Antitrust Division, for the first time, will consider and allow for crediting corporate compliance programs at the charging stage in criminal investigations. Now, when appropriate under the Justice Manual's Principles and our Corporate Leniency Policy, corporate charges may be resolved by a deferred prosecution agreement (DPA) rather than a guilty plea and criminal conviction. To promote transparency, we also made public a guidance document that outlines our approach to evaluating antitrust compliance programs.

⁶ Delrahim, *supra* note 4, Remarks at the Procurement Collusion Strike Force Press Conference (“Last year, the federal government spent more than \$550 billion, or about 40 percent of all discretionary spending, on contracts for goods and services. . . . The 2018 federal budget included more than \$79 billion in grants to state and local governments to fund major public physical capital investment.”); *see also* Richard A. Powers, Deputy Assistant Att’y Gen., U.S. Dep’t of Justice, Antitrust Div., Remarks at the Am. Bar Ass’n Pub. Contract Law Section’s 2019 Procurement Symposium 5 (Oct. 25, 2019), <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-american-bar>.

⁷ *See* Powers, Remarks at Am. Bar Ass’n Pub. Contract Law Section’s 2019 Procurement Symposium at 6 (“[T]he Organisation for Economic Co-Operation and Development [] estimates that eliminating bid rigging could help reduce procurement costs by 20% or more.”).

⁸ *See* U.S. DEP’T OF JUSTICE, ANTITRUST DIV., FREQUENTLY ASKED QUESTIONS ABOUT THE ANTITRUST DIVISION’S LENIENCY PROGRAM AND MODEL LENIENCY LETTERS FAQ 6 (updated Jan. 26, 2017), <https://www.justice.gov/atr/page/file/926521/download>.

⁹ Makan Delrahim, Assistant Att’y Gen., U.S. Dep’t of Justice, Antitrust Div., Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs (July 11, 2019), <https://www.justice.gov/opa/speech/file/1182006/download>.

The goal of the policy change is to incentivize corporate compliance and good corporate citizenship. Corporate compliance efforts are the first line of defense to antitrust crimes, and part of our effort to both deter and detect violations. Ideally, robust antitrust compliance programs deter wrongdoing altogether, preventing the harm from anticompetitive conduct before it occurs.

When misconduct does occur, prompt detection minimizes the harm and gives companies the opportunity to win the race for leniency. Companies that lose the race for leniency now have the opportunity to earn a DPA and avoid a criminal conviction if they have an otherwise effective compliance program and are committed to a culture of a compliance, as demonstrated by their swift actions and response to misconduct.

In either case, companies that become aware of antitrust violations and self-report not only further our efforts at detecting misconduct and holding those responsible accountable, but they also put themselves in the best position to mitigate the damage.

Effective compliance starts with educating employees. Whether it's communicating HR-specific risks to corporate officials with authority to set wages, or instructing employees about document destruction or obstruction of justice, compliance starts with education that's integrated into the company's business and accessible to its employees.¹⁰ Educated employees can avoid antitrust misconduct altogether and can also detect and flag potential violations.

When employees detect and flag potential violations, it goes without saying that the company's response is critical. Deciding to do nothing or sweep misconduct under the corporate rug can be a costly mistake that deprives the company of the benefits of leniency and severely undermines any subsequent claims for compliance credit. The Division is committed to rooting

¹⁰ See U.S. DEP'T OF JUSTICE, ANTITRUST DIV., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS IN CRIMINAL ANTITRUST INVESTIGATIONS (July 2019), <https://www.justice.gov/atr/page/file/1182001/download>.

out misconduct and ensuring that time provides no antidote to antitrust ills for those who sit on their hands after becoming aware of wrongdoing.

III. What's to Come

Moving forward, our commitment to our work remains the same. The Division ended the fiscal year with over 100 grand jury investigations. A number of those investigations are nearing a tipping point. So, while the markets and the corporations and individuals involved may differ, we remain committed to individual accountability, safeguarding critical markets, and rooting out collusion affecting government victims.

Similarly, we will steadfastly maintain our focus on litigation. As soon as the two ongoing trials end, we'll be preparing for two more involving bid rigging at foreclosure auctions and a fraud scheme to divert funds intended to rebuild and repair an Army facility.

I have no doubt that our compliance policy changes and the PCSF launch will further our efforts to deter and detect antitrust crimes. Our compliance policy incentivizes companies to invest in compliance and act as the first line of defense to anticompetitive conduct. Working with our partners in the district-oriented Strike Force promises to supercharge our deterrence and detection efforts in several ways, including expanding our outreach efforts and using data analytics to detect wrongdoing. In fact, since the announcement last week, the response from our law enforcement partners and the procurement community has been overwhelming. We have already received a significant number of requests for outreach presentations to federal, state, and local groups.

The PCSF will also further our detection efforts by maintaining a public website with a new citizen complaint reporting form. Perhaps most importantly, the PCSF expands and

solidifies the relationship between the Division and our U.S. Attorneys' Office, FBI, and Inspector General law enforcement partners.

As I mentioned at the beginning of my remarks, we are finishing our transition into an era of new leadership, working on new matters, and implementing new policies and initiatives. We are excited about where our program is and where we are headed. More importantly, we will continue to be a professional, process driven organization, focused on conducting diligent and efficient investigations, and dedicated to the principles that guide us as federal prosecutors.

Thank you again for the opportunity to be here and speak with you all today.