DEPARTMENT OF JUSTICE

The State of Criminal Antitrust Enforcement in 2020

RICHARD A. POWERS
Deputy Assistant Attorney General
Antitrust Division
U.S. Department of Justice

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Good morning. It's great to be in Miami and among so many leaders in the antitrust community. I'd like to thank Margaret [Sanderson] and Jason [Gudofsky] for hosting this event and the opportunity to be here and provide an update on criminal antitrust enforcement.

Whenever we prepare an update on our program, it is a great opportunity for us to step back and think about our mission and consider how what we are doing works towards accomplishing it. For the criminal program, our mission is to deter, detect, and prosecute criminal violations of the antitrust laws. As we have considered how best to apply our limited resources, we have made it a point to address all aspects of our mission. In the last year, many of Assistant Attorney General Delrahim's and my remarks have centered around our efforts to deter and detect antitrust crimes by incentivizing corporate compliance and launching an interagency partnership to combat collusion affecting public procurement, in the form of the Procurement Collusion Strike Force.[1]

Today, however, my focus is on our recent prosecution efforts, how they fit into the Division's priorities, and how they provide transparency into our views regarding several recurring issues we encounter in our investigations. To that end, I plan to address three topics:

First, I will begin with my reflections on our recent trials. Beyond securing guilty verdicts, both trials exemplify the resolve and wide-ranging talents of our prosecutors.

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[1] 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; 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; 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/file/1215336/download; Richard A. Powers, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Remarks at the 29th Annual Antitrust, UCL, and Privacy Section Golden State Institute (Nov. 14, 2019), https://www.justice.gov/opa/speech/file/1217756/download.

Second, I will speak to our program's continuing efforts, as demonstrated by some notable recent results. Like our trials, these enforcement efforts reflect the tenacity of our prosecutors. Our recent charges also illustrate our enforcement priorities, which include individual accountability, safeguarding critical markets and protecting vulnerable victims, and prosecuting collusion that corrupts the public procurement process and cheats the American taxpayer.

Finally, with a number of investigations reaching milestones, it's also a fitting time to reaffirm the benefits of cooperating in the Division's investigations, and to explain the Division's expectations regarding cooperation.

I. Reflections on Recent Litigation

That brings me to my first topic, our recent trials. Late last fall, two trials resulted in guilty verdicts in a two-week span. On November 20, a jury in the Southern District of New York found Akshay Aiyer—a former currency trader—guilty of price fixing and bid rigging in the foreign exchange market. And, on December 3, a jury in the Northern District of California found Christopher Lischewski—the former CEO and president of Bumble Bee Foods—guilty of fixing prices for canned tuna.

Both trials put the wide-ranging talents of our prosecutors on display. A trial team composed of attorneys from our New York Office and Washington Criminal 1 Section prosecuted the Aiyer trial. A team in our San Francisco Office prosecuted the Lischewski trial. Both teams worked tirelessly for years investigating and prosecuting these challenging cases, and we could not be prouder of their efforts and the professional way they comported themselves. I should note that these trials also benefitted from the leadership of Andre Geverola, our Director

of Criminal Litigation, and Carol Sipperly, who joined the Antitrust Division as senior litigation counsel.

Both trials resulted in guilty verdicts that hold executives accountable for cheating consumers and distorting important markets. In the Aiyer case, the conduct involved a multi-year conspiracy to fix prices and rig bids in the global foreign currency exchange market. Among the evidence presented at trial, the jury heard that Aiyer and his co-conspirators engaged in near-daily communications to coordinate trades and collude to protect each other's trading positions.

Aiyer's guilty verdict is just the most recent example of the Division's longstanding commitment to defending the global financial markets from collusion.[2] The team excelled at distilling a complex financial market into an understandable set of facts for a layperson jury. Their work sends a message that complex markets will not be an obstacle to aggressive enforcement.

By contrast, the Lischewski trial showed our prosecutors are just as comfortable tracing collusion all the way to the C-Suite in an important consumer market as they are combatting collusion in global financial markets. Lischewski, the former CEO and president of Bumble Bee Foods, was charged with participating in a three-year conspiracy to fix prices of canned tuna. During those three years, Bumble Bee alone sold over a billion dollars of canned tuna. The evidence at trial focused both on Lischewski's direct communications with competitors, but also his authorization and supervision of subordinates' collusion.

[2] Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Don't "Take the Money and Run": Antitrust in the Financial Sector (May 1, 2019), https://www.justice.gov/opa/speech/file/1159346/download.

Both teams' outstanding efforts show that the Division will take tough cases to trial and litigate them effectively. It's our duty as prosecutors to litigate complex crimes to protect American consumers even if the outcome is not always as we would want it.

Our duty is important but our work is difficult. Complex cases, sophisticated defendants, and skilled adversaries are the rule, not the exception. As a result, win or lose, we're committed to learning from all of our trials and continuing to hone our investigation and litigation capabilities.

Beyond their results and individual lessons, both trials demonstrate our prosecutors' perseverance and commitment to accountability, however long it may take to untangle complex conspiracies, litigate, and bring those responsible to justice.

Both indictments arose following long and complex investigations. Aiyer was indicted in May 2018. Lischewski was indicted less than a week later. In each case, it was more than a year and a half of hard-fought litigation from indictment to verdict. We pride ourselves on having the resilience and tenacity necessary to pursue such long and complex investigations through to verdict. We are proud of these recent examples of our ability to take a long view in our matters and investigate with an eye toward litigation, should that be necessary.

II. Enforcement Highlights

Like the guilty verdicts in Aiyer and Lischewski, other recent results demonstrate our prosecutors' persistence. The indictments, charges, and pleas announced since November also can provide a window into our enforcement priorities.

Perhaps no investigation better illustrates our prosecutors' resolve than our ongoing investigation into the generic pharmaceutical industry. Two executives pled guilty to fixing prices, rigging bids, and allocating customers in January 2017. Last spring, their former

employer accepted responsibility for fixing prices of a diabetes drug. Last fall, on the same day as the Lischewski verdict, another pharmaceutical company, Rising Pharmaceuticals, admitted to fixing prices of a hypertension drug.

And earlier this week, the Division announced charges against a former generic drug executive. A grand jury returned an indictment charging the former Vice President of Sales and Marketing at a generic pharmaceutical company with two Sherman Act counts and a third count for making a false statement. The Sherman Act counts charge two conspiracies to fix prices, rig bids, and allocate customers for generic drugs ranging from medications used to treat and manage arthritis, seizures, pain, various skin conditions, and blood clots.

We're not done. The Division continues its investigations in this sector, which is vital to American consumers. Beyond ensuring the competitive functioning of an important consumer market, these charges also illustrate our commitment to individual accountability, whether by holding executives to account for antirust crimes or by charging those who lie during our investigations.

Another recent result also speaks to our steadfast commitment to individual accountability, even years post-indictment. Meta Ullings, the former senior vice president of Martinair Cargo, was indicted in 2010 for fixing prices for international air cargo shipments. Ullings, a Dutch national, was a fugitive for almost 10 years until she was apprehended by Italian authorities this summer. Following the successful litigation of her extradition, Ullings appeared in the United States, pled guilty and received a fourteen-month sentence, the longest sentence imposed in the air cargo investigation to date.

We understand that the road to accountability can, at times, be a long one. Whether in the face of complex investigations, long and hard-fought trials, or bringing fugitives to justice, it would be a mistake to underestimate the determination of our prosecutors.

Other recent enforcement efforts illustrate our continued focus on thwarting cartels that target vulnerable victims. On Monday, a company and its senior executive pled guilty for participating in a bid-rigging and fraud scheme that inflated insulation prices by around 10 percent for victims including hospitals and schools. Including these pleas, there have been five guilty pleas in the investigation to date.

Also this week, the Division filed an additional charge in an ongoing investigation into bid rigging among commercial flooring contractors. The information charged a flooring manufacturer executive with a bid-rigging scheme that victimized a state-owned post-secondary school. And for the first time in several years, Division prosecutors also charged a money laundering conspiracy for funneling kickbacks through a shell company.

Again, these charges demonstrate our commitment to ensuring that vulnerable victims such as hospitals and schools purchase goods and services at prices set by competition. They also show that when bid-rigging schemes are accompanied by fraud, false statements, or money laundering, our prosecutors are equipped to unearth and charge other violations as warranted.

Other recent charges are a reminder that the Justice Department and its law enforcement partners will investigate and prosecute those who try to cheat the United States government and American taxpayers.

Earlier this week, a Missouri businessman was arrested following his indictment for rigging bids at online auctions for surplus government equipment. The charge is the third in the investigation, which is one of many ongoing investigations involving government victims. As

Assistant Attorney General Delrahim noted in announcing the Procurement Collusion Strike Force (PCSF), more than one third of the Antitrust Division's open investigations relate to public procurement or otherwise involve criminal conduct victimizing the government.[3]

The Division will continue its full commitment to pursuing antitrust violations when the government is a victim. Indeed, the PCSF is already off to a strong start. More than 30 federal, state, and local government agencies have contacted the PCSF seeking outreach training, assistance with ensuring a competitive procurement process, and opportunities to work with the PCSF on investigations.

We've also seen the benefits of the PCSF's district-based approach to outreach and conducting investigations. The advantage of this model is that it is not one-size-fits-all. Our initial 13 partner federal districts span the country and have different mixes of government agencies and federal spending. By putting together district-specific teams, we can create outreach plans tailored to reach the key federal, state, and local agencies spending federal dollars in the district, as well as the key contractors and trade associations in the district.

The PCSF district teams have also welcomed participation as working partners from additional agencies and IGs that have a presence in that district. For example, the Eastern District of Virginia and District of Columbia district teams will be working with the Office of Inspector General of the Washington Metropolitan Area Transit Authority, the tri-jurisdictional agency that plans, develops, builds, finances, and operates the regional transportation system in the national capital area.

This type of district-specific, regional partnership is one of the key advantages of the PCSF's decentralized structure—each district PCSF team of prosecutors and agents is

[3] Delrahim, Remarks at the Procurement Collusion Strike Force Press Conference, *supra* note 1.

empowered to tailor their outreach and investigative resources to focus on the significant government agencies and contractors in that region in order to target where federal dollars are going.

Given the boost the PCSF has provided our efforts to prosecute collusion affecting public procurement, the guilty verdicts secured by our Aiyer and Lischewski teams, our second-ever extradition on a title 15 charge, and a string of charges ranging from bid rigging to money laundering, the state of the criminal antitrust program is strong and building momentum. Indeed, the flurry of enforcement activity in the last ten days has included two indictments, one corporate and one individual guilty plea, and an information charging another individual.

III. Cooperation Benefits and Expectations

That leads me to my final topic. The Division understands that our cases often are built upon the cooperation of companies and individuals who have chosen to do the right thing. We strive to ensure that those efforts are recognized and fairly rewarded. Corporate cooperation and timely and voluntary disclosure of wrongdoing are among the factors that Division prosecutors consider in making corporate charging decisions under the Justice Manual, and in making sentencing recommendations under the U.S. Sentencing Guidelines.[4] Indeed, our compliance announcement last summer underscores our willingness to reward companies that are committed to rooting out wrongdoing within their organization and work with us towards that end.[5]

The Justice Manual rightly notes that "cooperation can be a favorable course for both the government and the corporation."[6] Among the potential benefits, the company receives the opportunity to earn credit for its cooperation efforts. Full, truthful, and continuing cooperation

[4] *See* Justice Manual §§ 9-28.300, 28.700, 28.720, 28.900; U.S.S.G. §§ 8C2.5(g), 8C2.8, 8C4.1.
[5] *See* Delrahim, Wind of Change, *supra* note 1, at 5-6.
[6] Justice Manual § 9-28.700.

allows the Division and its partners to "quickly uncover and address" antitrust conspiracies by using the cooperation of conspirators against their co-conspirators.[7] But it's not a free ride – in order to attain the benefits of cooperation, companies and individuals must meaningfully assist the Division's investigation through truthful, thorough, and timely cooperation. I'd like to take this opportunity to explain and clarify the Division's expectations concerning cooperation on a number of fronts.

The Division recently updated the language in our model plea agreements that relate to cooperation. The Division's model plea agreements have long committed corporate and individual defendants to "full, truthful, and continuing cooperation."[8] Those obligations have been clarified in two areas.

First, the corporate model was updated to prohibit a corporate defendant from making public statements contradicting its acceptance of responsibility through the facts described in the information or the factual basis of the plea agreement.[9] Companies resolving antitrust charges with the Division are pleading guilty to a crime. Turning around and disclaiming any wrongdoing is inconsistent with their admissions in the plea agreement, their acceptance of responsibility, and their ongoing cooperation obligations. The Division's model has been updated with an additional provision to make those obligations clear. That said, the model agreement is clear that this provision in no way affects the paramount obligation of company employees to provide full and truthful information, without falsely implicating any person, and to testify truthfully.[10]

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[7] *Id.*
[8] U.S. DEP'T OF JUSTICE, ANTITRUST DIV., MODEL CORPORATE PLEA AGREEMENT (Mar. 14, 2019), https://www.justice.gov/atr/page/file/1124876/download; U.S. DEP'T OF JUSTICE, ANTITRUST DIV., MODEL INDIVIDUAL PLEA AGREEMENT (Dec. 31, 2018), https://www.justice.gov/atr/page/file/1124881/download.
[9] MODEL CORPORATE PLEA AGREEMENT ¶ 23.
[10] *Id.*

Second, both the corporate and individual plea agreement models were updated to clarify any confusion about what has always been the Division's expectation of "full, truthful, and continuing cooperation."[11] It is important that we, as enforcers, are getting the benefit of the bargain when we enter plea agreements. Those entering and benefiting from plea agreements must provide full cooperation, to the extent possible, in pursuing cases against other conspirators. Accordingly, if the opportunities arise, individuals subject to a corporate plea agreement's terms, such as current employees, and individual defendants cooperating under a plea agreement may be asked to assist the Division with affirmative investigative opportunities.[12]

Participation in covert techniques such as recording conversations has always fit within the ambit of full, truthful, and continuing cooperation. When covert investigative opportunities are presented, we expect individuals to assist in them in order to be fully cooperative and expect their cooperating employers, where appropriate, to help facilitate such assistance. There may be circumstances where such covert investigative measures may not be feasible—for example, when there are legitimate safety concerns or legal considerations in other jurisdictions. In those instances, the Division will take into consideration those concerns in assessing the individual's and employer's good faith and complete cooperation.

Full cooperation also requires that cooperating companies and individuals report all pertinent facts whether favorable or unfavorable. For our prosecutors to consider cooperation at the charging stage according to the Justice Manual, "the company must identify all individuals substantially involved in or responsible for the misconduct at issue" and provide "all relevant facts relating to that misconduct."[13] By contrast, cooperation is not a mitigating factor for

[11] MODEL CORPORATE PLEA AGREEMENT ¶¶ 13-14; MODEL INDIVIDUAL PLEA AGREEMENT ¶ 13.
[12] MODEL CORPORATE PLEA AGREEMENT ¶ 14(e); MODEL INDIVIDUAL PLEA AGREEMENT ¶ 13(e).
[13] Justice Manual § 9-28.700; *see also id.* § 9-47.120(3)(b) (defining "full cooperation" in FCPA matters).

companies that decline "to learn of such facts" or to provide "complete factual information about the individuals substantially involved in or responsible for the misconduct."[14]

As the Justice Manual mandates, Division attorneys meticulously review any information provided and compare it to the results of our own investigation to "ensure that the information provided is indeed complete and does not seek to minimize, exaggerate, or otherwise misrepresent the behavior or role of any individual or group of individuals."[15] Underlying potential cooperation credit is a simple predicate: be candid and provide complete information even when the facts may be unfavorable for your client.

Candor is particularly important when counsel makes representations to our prosecutors about the company's efforts and the evidence. Full and truthful representations can pave the way for a fine reduction or, if warranted under the Justice Manual's Principles of Federal Prosecution of Business Organizations,[16] resolution by deferred prosecution agreement rather than by guilty plea.[17] To be clear, "[c]ooperation is a potential mitigating factor, but it alone is not dispositive."[18] Nevertheless, those who misrepresent or shade the evidence, or omit relevant facts will not only foreclose any credit for cooperation at the charging stage, but also impact the Division's assessment of what amounts to an appropriate fine.

To be specific, I'm not talking about honest mistakes, or early disclosures that were corrected as additional facts came to light. For example, in at least one instance during my tenure, we reduced by half the cooperation credit for a cooperating company's criminal fine

[14] *Id.* § 9-28.700.
[15] *Id.*
[16] *See id.* §§ 9-28.300–400.
[17] Delrahim, Wind of Change, *supra* note 1, at 8 ("The Division's new approach allows prosecutors to proceed by way of a deferred prosecution agreement (DPA) when the relevant Factors, including the adequacy and effectiveness of the corporation's compliance program, weigh in favor of doing so.").
[18] Justice Manual § 9-28.720. "The government may charge even the most cooperative corporation pursuant to these Principles if, in weighing and balancing the factors described herein, the prosecutor determines that a charge is required in the interests of justice." *Id.*

because of deliberate omissions in the information proffered by company counsel. This was not something we took lightly and we provided an opportunity to be heard by the Front Office before making a final decision, but just as there is credit for full and truthful cooperation, there are consequences for providing cooperation that falls short of candor.

Now, I'd like to address our expectations regarding the timeliness of cooperation. As the Division previously has made clear, prompt disclosure of wrongdoing is a necessary element for a compliance program to receive consideration at the charging stage.[19] In addition, the Sentencing Guidelines provide for a potential fine reduction for companies that "fully cooperated in the investigation" in addition to accepting responsibility for criminal conduct.[20] Those companies are eligible for a two-point culpability score reduction, but in order to qualify for that reduction, "cooperation must be both timely and thorough."[21] Consistent with the Justice Manual, thorough cooperation under the Sentencing Guidelines requires "the disclosure of all pertinent information known by the organization."[22]

But the Guidelines require not only thorough cooperation – that cooperation also must be timely. According to the Guidelines, the cooperation must "begin essentially at the same time as the organization is officially notified of a criminal investigation."[23] We apply the Guidelines as written, and will not agree to support a two-point reduction where cooperation did not begin at the start of the company's involvement in our investigation. This does not mean that the company must admit guilt from the outset. But it plainly states that the decision to delay

[19] *See* Justice Manual § 9-28.800 ("Prosecutors should also consider the promptness of any disclosure of wrongdoing to the government" when evaluating a corporate compliance program); *see also id.* § 9-28.900 ("prosecutors may consider a corporation's timely and voluntary disclosure, both as an independent factor and in evaluating the company's overall cooperation and the adequacy of the corporation's compliance program.").
[20] U.S.S.G. § 8C2.5(g).
[21] *Id.* § 8C2.5(g), cmt. (n. 13).
[22] *Id.*
[23] *Id.*

cooperation precludes a two-point reduction at sentencing. As a result, companies should keep in mind that we're taking careful account of their early response to our investigation when assessing whether they've met the Guidelines' requirement of timely cooperation. Of course, to earn the two-point culpability score reduction, timeliness must be coupled with thoroughness. Initial promises of cooperation that prove empty will fail to meet the Guidelines' requirement that cooperation must also be thorough.

In conclusion, we remain committed to transparently outlining our expectations regarding cooperation to ensure that we make predictable assessments, anchored by adherence to the Justice Manual, the requirements of the Sentencing Guidelines, and the Division's policies.

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Thank you again for the opportunity to be here and speak with you all today. As I hope my remarks made clear, the state of the Antitrust Division's criminal enforcement program is strong and grounded by our steadfast commitment to just enforcement. We're proud to be resilient investigators and litigators, whatever the obstacle and whatever the timeline. As we work to further our enforcement priorities ranging from individual accountability to protecting the public purse, we also remain committed to a predictable and transparent process, where recurring issues, expectations, and requirements are outlined for the bar and business community.

Thank you.