DEPARTMENT OF JUSTICE

Criminal Antitrust Enforcement: Individualized Justice in Theory and Practice

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It is an honor to speak here today, at what I know will be the first of many informative programs on the important topics of corporate enforcement and individual accountability. This is an exciting time for the Antitrust Division, for many reasons, one of which is that just yesterday President Biden announced that he plans to nominate Jonathan Kanter as our Assistant Attorney General. The Division's career officials and staff—myself included—eagerly await his arrival and look forward to carrying out his priorities. Of course, right now I can't speak to what those priorities will be, and my remarks today should not be taken as an indication otherwise. But I welcome the opportunity to reflect on the recent accomplishments of the Division's Criminal Program, which I have now been leading for over three years, and shed some light on the principles underlying that work.

I. Theory

Everything I will say today starts from one simple premise. At the Antitrust Division, our criminal enforcement mission is to deter, detect, and prosecute crimes that corrupt markets and prevent fair, open competition. Our goal is to always carry out that mission in a principled, transparent, and predictable way. We set clear rules. And we make sure those rules can be understood. Not just by the most sophisticated businesses and antitrust lawyers, but by everyone.

The reason for that may be obvious, but it bears repeating, particularly because the same concept is at the heart of the Division's unique mission. Our job is to stop criminals from cheating the system and skewing the economy's playing field in their favor. In the same way, it is critical that everyone who appears before the Division is on a level playing field. The outcome the Division reaches in a particular case should not—and does not—depend on whether defense counsel has special access or inside information about how we make decisions or what factors we consider. Nor does the Division's treatment of defendants depend on the resources and influence they wield or preconceived notions that certain companies or industries should be treated more leniently because of their size or the markets in which they operate.

In contrast, when we consistently apply written, publicly available policies and guidance to the facts of each case, and when we make our decisionmaking principled and transparent, that increases confidence in our justice system. It guarantees that we, as prosecutors, come to well-reasoned, equitable outcomes. And finally, it ensures that subjects, targets, and defendants know what to expect and are treated—and, where warranted, punished—based on appropriate considerations.

As Department policy reminds us, "equal justice depends on individualized justice, and smart law enforcement demands it."[1] Put another way, when we take a process-driven approach based on the unique facts of each case, justice is equally available to all. It means that businesses and executives know what to expect and can make risk assessments accordingly. When that system works properly, fewer antitrust crimes occur, which in turn allows Americans to benefit from the free-market competition on which our economic system is premised.

We are constantly working to administer equal, individualized justice. One way we do that is by comparing our practices to our policies and internal guidance documents, and making sure that what we do lives up to what we say, including what's in the Justice Manual. That Manual provides internal guidance to all federal prosecutors and gives outside parties detailed information about what to expect—though of course it does not create enforceable rights.

To be sure, over the past several years, most things have stayed the same. But no organization can continue to succeed in a changing world by remaining static. So we are always looking for ways to make our work even more effective and to make sure we are living up to our obligations in the best way we can.

[1] Eric Holder, Att'y Gen., U.S. Dep't of Justice, Department Policy on Charging and Sentencing (May 19, 2010), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf.

Please indulge me for a minute as I repeat something I said in my first public remarks back in June 2018, which set the tone for the past few years. "The Antitrust Division has its own important policies, procedures, and institutional practices—but it is not an isolated agency acting alone. It operates within the larger institution of the U.S. Department of Justice, and is guided by . . . Department-wide policies."[2]

That's far from a radical statement, but it is critically important to our enforcement, and it is is a unifying principle for the work we've done since then. Over the past several years, a common theme has been to ensure our practice, which remains tailored to address difficult-to-detect antitrust crimes, is in line with Department-wide policies. This even-handed approach increases predictability and transparency and ensures our decisions are principled and neutral—critical features of any well-functioning law enforcement body.

[2] Richard A. Powers, Acting Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Remarks at the Organisation for Economic Co-operation and Development (June 5, 2018), https://www.justice.gov/opa/speech/ acting-deputy-assistant-attorney-general-richard-powers-delivers-remarks-organisation.

II. Practice

With that framework in mind, I'll now turn to some of our recent policy and practice updates and place them in context.

A. Compliance

An appropriate place to begin is compliance, where the Division made a significant policy change in recent years. That policy change is a good example of my focus on ensuring that we are taking a consistent approach—including with the rest of the Department—while also adapting our policies and practices to reflect the realities of a changing world. It's also an important reminder that by incentivizing good corporate citizenship, we can stop crime before it starts.

As you are undoubtedly aware if you follow developments in criminal antitrust enforcement, in 2019 the Division revised its approach to evaluating corporate compliance programs. And consistent with our commitment to a process-driven, transparent approach, we immediately enshrined that change in the Justice Manual.

As a result, we now consider crediting compliance programs when making charging decisions the same way the rest of the Department does. The Division previously reasoned that if a company committed an antitrust crime, its compliance program clearly failed. The Division also took the view that the prospect of leniency was incentive enough for a company to invest in compliance, and further

that we risked weakening that incentive if we credited compliance programs when deciding what charges were appropriate for companies that did not qualify for leniency.

But experience and common sense tell us that antitrust crimes might sometimes occur even when a company makes real efforts to implement a compliance program. We've recently also seen that crediting forward-looking compliance commitments at the sentencing phase can incentivize investments in compliance. We took the time to hear and learn from members of the bar and business community in a public roundtable. And we have learned from other components' practices, including the Criminal Division's experience with its FCPA Corporate Enforcement Policy, which creates similar incentives to self-report. Based on all of those experiences, we concluded that adapting our approach would best serve our enforcement goals.

Earlier I mentioned that the Division's criminal enforcement mission is deterring, detecting, and prosecuting antitrust crimes. While we often talk about those three in the same breath, it's worth taking a minute to reflect on their proper priority. It's simple: The most important is deterrence. True success would prevent all antitrust crimes and allow American markets to operate free from collusion, driving innovation, lower costs, and a higher standard of living.

As Ulysses S. Grant—whom we can thank for creating the Justice Department—once observed: "Although a solider by education and profession, I have never felt any sort of fondness for war, and I have never advocated it except as a means for peace."[3] We feel the same way about prosecuting criminals. We do it not simply to punish wrongdoers, but to deter crime.

That said, while effective compliance programs prevent crime, they also allow early detection if a violation nonetheless occurs. A company with a robust compliance program will be more easily able to identify the misconduct and bring it to our attention, including giving us the evidence we need to make determinations about its responsible individuals. That early detection and cooperation may very well allow the company to qualify for leniency. And even if it does not, under our policy—which is the policy across the entire Department—that company might still qualify for a deferred prosecution agreement rather than a guilty plea.

This structure enhances the incentives to self-report by seeking leniency. A deferred prosecution agreement is much closer to a guilty plea than leniency, which has unmatched benefits. Companies should understand that there's no tactical advantage in deciding not to apply for leniency and instead holding out for

[3] Ulysses S. Grant, Speech, June 15, 1877, *in* THE PAPERS OF ULYSSES S. GRANT, 216, 217 (John Y. Simon ed., 2005).

a DPA; a company that makes that choice will most certainly not be eligible for anything short of a criminal conviction. We are willing to take the hypothetical risk that occasionally a company with an otherwise effective compliance program might be poorly counseled not to seek leniency. That is at most a minor cost, which is well worth incurring for the immense benefit of investments in antitrust compliance, which should mean that companies and their employees commit fewer crimes in the first place.

B. Deferred Prosecution Agreements

Outside of the compliance context, over the past several years we have worked to ensure that our approach to corporate resolutions is consistent with Department policy, including the Justice Manual's Federal Principles of Prosecution of Business Organizations. Those Principles enumerate a common list of factors that all prosecutors weigh when deciding whether to bring corporate charges and what the appropriate mechanism is for a company that seeks to resolve its liability.

Given the nature of corporate antitrust crimes, in our run-of-the-mill case, the Principles typically lead us to conclude that an indictment or guilty plea is the appropriate path forward. A comprehensive review of our record over the past several years bears this out: Since FY2018, we have indicted 15 companies and 30 have entered into guilty pleas. But in some instances, a careful, fact-specific

analysis under those Principles has led the Division to enter into deferred prosecution agreements resolving antitrust charges.

The Justice Manual acknowledges the Division's "firm policy" that leniency is available to only the first corporation that makes full disclosure of its role in a criminal antitrust conspiracy to the government. As the Justice Manual recognizes, that policy is tailored to the specific challenges of destabilizing and uncovering antitrust conspiracies. But outside of that well-understood policy, the Justice Manual does not absolve the Antitrust Division's prosecutors from administering individualized justice. Indeed, it requires them to make a fact-specific assessment in each case and consider the full range of resolution mechanisms available across the Department.

In the early days of the leniency policy, it was, of course, not as established as it is today. At the same time, our prosecutors relied more heavily on leniency as an investigative tool. That led Antitrust Division officials to observe that the Division "disfavors the use of . . . DPAs for antitrust crimes."[4] But the landscape has changed over the years. The Division's ability to investigate and prosecute without a leniency applicant has never been stronger, for myriad reasons including

[4] Scott Hammond, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Global Competition Roundtable (Feb. 2012), https://globalcompetitionreview.com/the-gcr-cartel-roundtable-0.

our ever-growing partnerships with law enforcement agencies and ever-increasing litigation readiness.

Especially in light of those changed circumstances, considering the full range of resolution mechanisms has complemented, rather than compromised, criminal antitrust enforcement. And a faithful reading of the Justice Manual—the most predictable, transparent, and fair approach—guides us to consider the Principles the way the rest of the Department does. The first of those Principles is the crime's nature and seriousness. For antitrust crimes that go to the heart of a company's business, this is a critical factor weighing in favor of criminal charges. But that is just the first of eleven factors. We also weigh considerations like the collateral consequences that a conviction would cause and the pervasiveness of the conduct within the company. As part of our commitment to transparency, when the Principles lead us to resolve a charge by DPA, the publicly filed agreement includes a section identifying the factors that weighed most heavily in our decision, given the individual facts and circumstances of that particular case.

By considering all of the Principles and making our analysis as transparent and predictable as possible, we also encourage companies to self-report. That incentive structure, including our leniency policy, works best when companies know the full range of available options. For instance, a company that is unsure whether it will ultimately qualify for leniency and faces truly ruinous collateral

consequences from a conviction may reasonably be more willing to come forward knowing that the Division will hear the company's arguments, consider the Principles of Federal Prosecution of Business Organizations, and seek to avoid an outcome that would unduly harm innocent third parties.

The Division's Criminal Program does not shy away from vigorous enforcement, even in heavily regulated industries or in atypical fact-specific situations where corporate criminal convictions will have truly unjust effects on innocent third parties. Even in those circumstances, we have not hesitated to indict companies that do not accept responsibility for their crimes. But for companies that choose to cooperate and admit wrongdoing, in certain circumstances a DPA may be the best way to allow us to restore integrity to the markets. Our prosecutors apply the analysis neutrally to companies of all shapes and sizes. It has sometimes led us to conclude that a DPA is appropriate for a significant player in the market, for instance where a company's mandatory debarment would have considerable consequences for health care patients. And that neutral analysis has also led us to enter into DPAs with much smaller companies when their convictions would cause similar consequences.

When we follow Department policy, that leads to just outcomes for each defendant that appears before us. It guarantees that our enforcement promotes, rather than hinders, competition, including in critical sectors of the economy. And

by securing cooperation from corporate wrongdoers, we best position ourselves to prosecute the individuals responsible for corporate crime, as evidenced by our ongoing work in the health care space and recent cases in the financial industry.

C. Engagement with Targets on Charging Decisions

The Division takes process and transparency equally seriously when it comes to our interactions with targets and their defense counsel. Here again we follow the protocols in the Justice Manual, which apply to all Department prosecutors, and which our Division Manual echoes. These procedures guide how we decide whether to discuss prospective charging decisions with defense counsel, and how we decide when to inform targets of their status—which is often a precursor, and a necessary prerequisite, to discussions about charging decisions. Consistent with the principle of individualized justice, we apply that guidance based on the specific case and circumstances before us. The result of that process-driven approach is, of course, that we don't come to the same outcome in every case: some situations warrant more engagement than others. Let me describe how this approach works in practice.

First, the Justice Manual outlines the analysis all prosecutors undertake when deciding whether to exercise their discretion to notify a subject when they

become a target.[5] The Manual guides us to notify a target "in appropriate cases." But it also provides a number of circumstances where notification is not appropriate. That includes "routine clear cases" and instances in which notifying a subject could compromise an ongoing investigation or cause undue delay.[6]

Occasionally, we cannot delay our investigation for targets to be notified, and sometime situations arise where notification creates other risks we cannot bear. Otherwise, the Antitrust Division typically takes a generous approach, particularly when a subject and counsel have engaged productively and affirmatively with staff throughout the investigation.[7] But this process is a two-way street. When a subject and counsel make clear they are not interested in meaningful, good-faith interactions—the kind that enhance the Division's ability to reach a just result rather than serving as a distraction—the Division's prosecutors are under no obligation to notify a target of its status.

As the Justice Manual further provides, "[i]n investigations handled by the Antitrust Division, a target's counsel is usually afforded an opportunity to meet with staff and the office or section chief regarding the recommendation being

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[5] Justice Manual § 9-11.153; *see id.* at § 7-3.400 ("The Antitrust Division follows the Department's practice of informing individuals under certain circumstances that they are targets of the investigation.").
[6] Justice Manual § 9-11.153.
[7] U.S. DEP'T OF JUSTICE, ANTITRUST DIV., ANTITRUST DIVISION MANUAL, Ch. 3 § G.2.c (updated July 2019) ("Staff ordinarily will inform defense counsel that it is seriously considering recommending indictment.").

considered."[8] But that is far from absolute. If the target and counsel have declined to engage throughout the investigation, or made apparent to staff that further engagement will not be productive, then the Division will not continue to spend its valuable time and resources on pointless meetings—and if we have decided not to notify the target of its status, of course there will not be an opportunity for a meeting.

Absent such circumstances, the Division typically grants a request for a meeting with line prosecutors and their managers to argue against indictment "for factual, legal, or prosecutorial policy reasons."[9] When we follow that process, prosecutors and their direct supervisors—in other words, the people who know the most about the case and who will make charging recommendations to Division leadership—are best able to make "efficient[]" and "informed" assessments.[10] That team then discusses counsel's presentation with the Criminal Program's leadership, and communicates any requests from defense counsel to meet with the Front Office. After discussing with the team, the Criminal Program's leadership will take meetings at our discretion. While, as the Justice Manual describes, we "ordinarily" agree to a meeting,[11] we are especially likely to do so if the case raises

[8] Justice Manual § 7-3.400.
[9] *Id.*
[10] *Id.*
[11] *Id.*

a significant issue with policy or legal implications. Regardless, rest assured that the team thoroughly evaluates defense counsel's arguments and ensures they are considered by the Front Office, including the Assistant Attorney General—who is the final decisionmaker for Division charging decisions but takes meetings with a target's counsel in "[o]nly very unusual circumstances."[12]

Following these procedures results in efficient, well-reasoned, and individualized outcomes. It inspires confidence that enforcement decisions are based on the merits and the merits alone, and dispels any perception of two systems of justice.

D. Leniency

You might have noticed that I haven't said much today about the Division's marquee enforcement tool, the leniency program. That's certainly not because it's not important—the leniency program remains one of our most powerful tools. It's because that's one area where we haven't made significant changes. Not one word of the leniency policy has changed since the early 1990s. The policy is in many ways a model of the clear, transparent, predictable enforcement that I've been discussing today.

There's no doubt why the leniency program has stood the test of time and readily withstands incremental changes in our practice and policy. At various

[12] *Id.*

times in recent years, a litany of developments has been predicted to precipitate leniency's demise, but, from where I sit, none of these have hampered our enforcement efforts.

In fact, our enforcement is stronger now than ever before. Although our resources have steadily declined over the last decade, we have risen to the challenge by becoming more nimble and creative. A few instructive statistics: Last fiscal year we had the highest number of corporate fines and penalties in the past five years. We have the most grand jury investigations open in the last decade. And we have never been more able and willing to take cases to trial. We currently have 17 indicted cases across 14 different investigations, against 9 companies and 31 individuals—the largest number in the modern era of antitrust enforcement. That includes pending charges against eight current or former CEOs or company presidents, demonstrating our ongoing commitment to individual accountability at the highest levels.

Our talented prosecutors stand ready to litigate these cases. And I'm pleased to announce that they will be supported by two new Acting Co-Directors of Criminal Litigation: Brian Young (who is participating on the panel to follow) and Carol Sipperly. Both have spent significant time in other parts of the Justice Department and bring a wealth of litigation experience and unique perspectives to our teams.

III. Conclusion

I will close by emphasizing what the recent executive order made clear: Fair and vigorous antitrust enforcement is crucial to protecting economic liberty and "providing an environment conducive to the preservation of our democratic political and social institutions."[13]

Our Criminal Program is on the frontlines of that mission. To translate it into action requires us to enforce the law zealously and apply Department policy faithfully.

On his first day, Attorney General Garland reaffirmed the central norm that fuels that work across the Department: the principle of equal, individualized justice. As the Attorney General put it, we do not have "[o]ne rule for friends and another for foes" or "[o]ne rule for the powerful and another for the powerless."[14] We have one justice system equally available to all.

The process-driven approach I have described today ensures that we live up to that ideal. And it gives us the best chance at making our enforcement so effective that someday antitrust prosecutions will be nothing but a distant memory.

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[13] *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958), quoted in Executive Order on Promoting Competition in the American Economy Sec. 2(b) (July 9, 2021).

[14] Merrick Garland, Att'y Gen., Attorney General Merrick Garland Addresses the 115,000 Employees of the Department of Justice on His First Day (March 11, 2021), https://www.justice.gov/opa/speech/attorney-general-merrick-garland-addresses-115000-employees-department-justice-his-first.