



# DEPARTMENT OF JUSTICE

---

## **The Measure of Success: Criminal Antitrust Enforcement During the Obama Administration**

**RENATA B. HESSE**  
Acting Assistant Attorney General  
Antitrust Division  
U.S. Department of Justice

Presented at  
The 26th Annual Golden State Antitrust,  
UCL and Privacy Law Institute

San Francisco, CA

November 03, 2016

Good afternoon.

It's been my honor to serve as Principal Deputy Assistant Attorney General for the past four years, and twice during that time as Acting AAG. Recently I've spoken about our civil enforcement program, its work here at home and with our international partners, and about the importance of our cooperative relationships with state and federal enforcers. I'm grateful for this opportunity to talk to you today about the Division's criminal program.

The statistics from the past eight years are undeniably impressive, and we are justifiably proud of them. But conviction tallies and fine amounts alone are an inadequate accounting of our accomplishments. The measure of success for any criminal-enforcement program is not merely the number of cases it successfully prosecutes, but also the breadth of critical industries it touches in various sectors of the economy, and the impact on American consumers. It's been my privilege to both watch and participate in the development of the Division's criminal program, and I have come to deeply appreciate the sound policy objectives and appropriate exercises of prosecutorial discretion that sustain it.

Throughout the Obama Administration, the Division added steadily to its established record of successful prosecutions in significant sectors of the domestic and global economies. Some cases are big and well publicized. Others are small and relatively unknown. But all demonstrate our prosecutors' commitment to finding, stopping, punishing, and deterring antitrust crimes. We consciously forged an integrated antitrust-enforcement regime, through our relationships with other agencies, and within the Division itself—across civil and criminal sections. And we've demonstrated for the defense bar and business community, in cases I'll touch on briefly today, our positions with respect to important aspects of criminal enforcement—like compliance and corporate probation, our carve-out practice, the requirements of leniency, and how we evaluate the relative culpabilities of both corporate and individual subjects.

As for what we can measure in numbers, in recent years we've obtained the largest fines in the Division's history. The auto parts cases now total nearly \$2.9 billion in criminal fines, surpassing the international cartel investigation before it—the air transportation investigation

totaled \$1.8 billion. And last year we announced over \$2.5 billion in criminal fines and penalties from corporate offenders in a single investigation in the financial-services sector. At the same time, we continue to hold individuals accountable for the crimes imputed to their corporate employers, asking for sentences that reflect their seriousness and send a powerful deterrent message. During the past eight years we obtained well over 300 individual convictions while maintaining a 23-month average prison sentence.

Much has been said about the Yates Memo, and there's no need for me to repeat here its admonitions about corporate cooperation and individual accountability. Most of you knew the Division was committed to this even before the Department emphasized the policy and revised the US Attorney's Manual. It's no secret that we believe the most effective deterrent to antitrust felonies is prison time for those who commit them. But this does not mean that for us the Deputy Attorney General's directive was a redundancy. It was an opportunity to reflect on our practice, and to refine how we assess cases against individuals. It informed how we talk about them within the Division, and publicly. We asked: What more can we do to align our practices and policies with the Department's priorities?

Our real-estate foreclosure-auction cases exemplify individual accountability—we've prosecuted those who would profit from the misfortunes of others, people who suffered foreclosures during a national financial crisis. To date we've obtained convictions against 70 individuals in California, four are on trial this week, and 14 more indicted individuals await trial. In Georgia, in addition to one company conviction, we obtained another 20 individual convictions, and two more await trial there. In Alabama and North Carolina, we've obtained 12 and two individual convictions, respectively, in addition to two company convictions in Alabama.

This investigation is not an exception. If we look at our corporate and individual convictions across all investigations, in the past four years alone we have obtained convictions against 118 individuals and held accountable a corresponding 78 corporate offenders. And looking back across the past eight years, the ratio of individual to corporate convictions is more than two to one—353 individual to 150 corporate convictions.

The criminal program's reach extends outside the United States, and foreign-national fugitives feel its sting, too. Over the past eight years, 56 foreign defendants living abroad were sentenced to serve time in US prisons for their crimes, compared to 34 during the prior 10 years. Just two weeks ago, another fugitive—the third in the past two years—was extradited to the United States on charges brought by Division prosecutors. An Interpol red notice allowed Bulgarian authorities to apprehend and deliver him here to face the charges against him. He was immediately arraigned and remanded to the custody of US Marshals, where he awaits trial.

Our record shows our success in major industrial sectors that impact the domestic and global economies, and hit everyday consumers in the pocketbook—like the real-estate and auto-parts cases I just mentioned. But think about a sector like shipping, and all it includes—how it adds to the cost of almost every product we buy. Throughout the last decade we've discovered and prosecuted conspiracies involving air freight, freight forwarding, and international and domestic ocean shipping. Air and water shipping impact overland shipping logistics, and our presence is felt there, too. In our current international ocean-shipping investigation, four corporate offenders have pleaded guilty, and together will pay nearly \$235 million in criminal fines. Antitrust prosecutors charged eight individuals and have to date obtained convictions against four of them. The rest remain fugitives susceptible to some version of the Bulgarian fate that befell the defendant I just mentioned.

We've made our mark in the electronic-components industry, a sector critical to our information technology, and so to our economy and its connection to the world's. In the Liquid Crystal Displays investigation, at the trial of AU Optronics here in San Francisco—I know many of you are familiar with it—we proved to the jury the overcharge justifying a \$500 million fine. Two senior executives were each sentenced to 36 months in prison and another to 24 months. And now our prosecutors are investigating a long-running conspiracy to fix the prices of capacitors, a small electronic component with myriad uses. Like LCDs, they are ubiquitous in our devices—desktop and laptop computers, flat-screen televisions, game systems, and digital cameras. They are also critical to car-engine and airbag systems, home appliances, and office equipment. Yet another product integral to the daily lives of consumers at home and around the

world. Five corporate defendants have now pleaded or agreed to plead guilty and will together pay over \$34 million in criminal fines. And just yesterday, a grand jury indicted five more individuals in this ongoing investigation, bringing the total to six.

But as I said, the Division's accomplishments comprise more than just successful prosecutions in critical economic sectors. Looking closer, at the details of specific resolutions, we see our prosecutors' commitment to fairness in their pursuit of just outcomes. Like considering the sanctions that other jurisdictions might levy in evaluating the fairness of our own. In a recent auto-parts case, we worked closely with our friends at the Competition Bureau in Canada—the conspiracy affected both our nations. Although the Bureau could have brought charges, it decided to forgo them, and we based the corporate fine on commerce that affected both the United States and Canada. The investigation culminated in a guilty plea and sanctions that appropriately addressed the criminal conduct affecting us both. A reasonable and common-sense resolution furthered a basic principle of criminal justice: no offender should escape the fair consequences of its crimes.

We applied the same principle when confronting ability-to-pay claims. We want defendants with legitimate claims to make them. Our objective is to protect the economy; to punish and deter corporate offenders, yes, but not to put competitors out of business and their employees—many of whom have nothing to do with their employers' crimes—out of work. But we are appropriately skeptical of ability-to-pay claims, and carefully scrutinize them with the help of outside experts, because it would be unfair for an offender who can pay to avoid this consequence. Until recently, we had not given a corporate offender with a fine reduced because of inability to pay any further reduction—for cooperation or otherwise. But if a company in financial distress faces the same fine, regardless of whether it cooperates, it has no incentive to incur the additional cost of cooperating. So we now consider additional sentencing credit for companies that demonstrate inability to pay, but nevertheless provide valuable cooperation. To earn credit for cooperating, any pleader must provide assistance that adds value to our investigation. And if it has value, it does whether an ability-to-pay claim reduces a fine or not. This is fair. And it reinforces the incentive structure we maintain. We can distinguish spurious ability-to-pay claims from legitimate ones while incentivizing cooperation. Three companies

with fines reduced for inability to pay recently received additional sentencing credit for cooperation.

Compliance and remediation have become more central to our corporate resolutions and sentencings. In the AU Optronics case we used a corporate monitor for the first time—where even after conviction at trial the company refused to acknowledge its wrongdoing. More corporate sentences have included probation, especially where our and the sentencing court’s confidence is low that a defendant is committed to rehabilitating itself with appropriate compliance measures. We remain unwilling to credit compliance programs that failed to detect or deter the antitrust crimes for which we prosecute a corporate defendant. The sentencing guidelines do not allow credit for nominal or ineffective programs, and if we’re prosecuting your client, you’ll have a difficult time arguing that its compliance program was neither.

But the news in this area is not all bad. We recognize, and have credited, extraordinary forward-looking efforts to change corporate culture, where senior executives demonstrate that compliance is a top corporate priority, and companies implement structural safeguards—like requiring anyone promoted to a management position to have first served as a compliance officer for a designated period of time. Efforts like these not only weigh against a sentence including probation, but in exceptional cases can also qualify for a modest reduction to a criminal fine.

Two weeks ago today, we announced our decision to consistently initiate criminal investigations from the outset where we find credible allegations that employers have agreed among themselves on employee compensation, or to not solicit or hire each others’ employees. This is not entirely new—we’ve investigated employer collusion criminally before. We’ve also investigated it civilly, like the agreements among technology companies not to poach employees, which resulted in civil consent decrees. But colluding to fix wages is no different than colluding to suppress the prices of auto parts or homes sold at auction. Naked wage-fixing or no-poach agreements eliminate competition in the same irredeemable way as *per se* unlawful price-fixing and customer-allocation agreements do. So we will approach them the same way, using our professional judgment, and considering all the factors that ordinarily weigh on our discretion as criminal prosecutors.

This thoughtful engagement with our work informs the choices we make every day. I've had the privilege of observing and engaging in these exercises of professional judgment from a close vantage point—confronting the interesting and sometimes difficult questions that our investigations and prosecutions present. We are not without guidance. There are statutes, policies, rules of procedure and professional conduct designed to point us in the right direction, or sometimes to at least remind us of what we cannot do.

But every decision comes down to a moment of judgment made in the course of events. And there are many critical moments in every matter, when we make choices from among options. We decide which principles apply, and consider various interpretations of their proper applications. If there were not these moments of decision, if the applicable rules were obvious and pointed us to the one and only right answer each and every time, there would be no room for error. And there would be no need for professional judgment and prosecutorial discretion.

Professional judgment is about seeing more than one possibility, and then choosing the best option from among them. Put simply, prosecutorial discretion is about knowing, all things considered, what is most important and doing what is right. And throughout my time as a Principal Deputy AAG, and now Acting AAG, the one thing I am most confident of is that we've always tried to choose the best option, and do what is right for American consumers. Did we always make the best decision? That's for others to decide. Did we always try to choose the course that benefitted consumers the most—to do what was right? Yes.

This process requires thought, and frankly, humility. Each investigation, negotiated resolution, and trial, is a unique opportunity to ask whether our choices led to outcomes that serve the principles it is our duty to defend. And the answers in *this* investigation inform our judgment in the next. So we learn from our mistakes, ponder the consequences of roads not taken, and wonder about alternative strategies yet to be employed. Our successes too are opportunities to reflect on what we did right, and what we can do better.

We also learn quickly in unfamiliar contexts while applying the same principles of justice to conspiracies operating in new markets, where offenders use complex technologies to commit their crimes. We prosecuted a conspiracy to fix the prices of posters sold online—the antitrust laws reach even crimes committed using algorithms in cyberspace. Our financial-services cases present an ongoing challenge—one we welcome—to extend our criminal enforcement into the most complex markets, to think about how the Sherman Act applies to new scenarios, and to test innovative investigative techniques and analyses for gathering, understanding, and evaluating evidence.

We've obtained corporate and individual convictions in cutting-edge investigations. In the online-posters investigation, a grand jury indicted one corporate conspirator and one individual, and another individual pleaded guilty. In heir location services—another unique market where we found antitrust offenses—one heir-finding firm, its owner, and another individual pleaded guilty. A grand jury indicted another firm and its co-owner. Convictions in the financial-services sector represent an increasingly significant portion of the Division's record. In the LIBOR investigation: six corporate and seven individual convictions, two of these after trial. In tax liens: three corporate convictions and 13 individual convictions, including one after trial. And we prosecuted 20 individuals in the munibonds investigation and obtained 17 convictions—in addition to one corporate conviction—three of them after trials. Accountability in the financial-services cases over the past eight years amounts to a total of over 15 years in prison for 11 individual offenders, and, not counting the extraordinary fines in the foreign-exchange matter, a total of \$1.3 billion in corporate fines and penalties.

We have also redoubled our efforts to protect the integrity of our investigations—civil and criminal. Two weeks ago, prosecutors filed obstruction-of-justice charges against a former executive of a motor-coach-operating company. He concealed evidence and tried to destroy documents during the course of a civil merger investigation, and gave false and misleading statements during litigation. Obstruction crimes like this make headlines, publicizing the consequences of trying to corrupt the merger-review process. Prosecuting them criminally protects the integrity of our civil investigations, and we continue to pursue them with as much vigor as ever. And this is just one example of a civil investigation leading to a criminal



prosecution. Price-fixing prosecutions, too, can begin with evidence referred from civil attorneys.

Department policy requires all components to cooperate with one another and maximize remedies for the United States. We've made this a top priority, not only in our coordination with other agencies conducting investigations parallel to ours, but also within the Division. Antitrust attorneys on both the civil and criminal sides of the house appropriately communicate across civil and criminal investigations when necessary. As a result, civil attorneys can be even more vigilant about finding and referring to prosecutors evidence of possible crimes discovered during civil investigations. Not because they care about this more than before, but because they know what to do—and what not to do—with such evidence when they find it. The risks inherent to cross-proceedings coordination are tempered in light of reliable internal procedures allowing our attorneys to readily consult about referring evidence.

Our leniency policy remains the criminal program's single-most powerful case generator, and continues to serve as an example to our partners around the globe as they develop and improve their own. We learn in this context, too, in an ongoing conversation that requires us to think about the justifications for our choices. We've noted that in type B corporate leniency scenarios, those employees of the applicant who admit to their criminal conduct and cooperate are usually included in the corporate leniency agreement. But we've also thought about how DAG Yates' directive might apply here, too, with respect to some culpable individuals, when the policy allows for more discretion with respect to granting them leniency.

Some suggest that the costs of applying for leniency are becoming too high, especially for multinational corporations that touch the economies of several nations, many of whom have leniency programs of their own. If potential applicants become any less sure about the fate of their people, the argument goes, potential applicants will become more reserved about self-reporting the results of their internal investigations. But the costs of applying are only one side of the scale. The risks of not applying—of waiting—are on the other. And the prospect of individual sanctions is a high risk to run here in the United States, as it will be in other jurisdictions now considering them for their own competition laws.

Like all good prosecutors, ours observe ethical standards. And we should not overlook the most immediate one, if not the most important, in the professional life of every prosecutor—an evidentiary threshold of American criminal law. We must prove our cases beyond a reasonable doubt. And not to just anyone. Not to each other, or to someone at the Division asked to approve a recommendation to prosecute—but to a trial jury. This most basic constraint on our prosecutors’ discretion informs every judgment they make during even the earliest stages of an investigation—whether conducting a voluntary interview, contemplating execution of a search warrant, or evaluating evidence obtained with a grand jury subpoena. It applies to each and every case, whether the defendant is in the United States likely to put us to our proof, or beyond our borders, hoping against red notice, border watches, and extradition. We prosecute because we have evidence, and are prepared to seek indictment and a trial on the merits. As of today we have 15 criminal cases headed for trial across the country over the coming months. And this is in addition to the 26 criminal cases we’ve already tried during the past eight years.

The criminal program’s success is the result of the careful judgment, vigilance, and hard work of its prosecutors. Their accomplishments over the past eight years are significant developments in the Division’s recent history. I have every confidence that the Antitrust Division will continue honing its criminal practice to always better serve traditional principles of criminal justice. Our successes are hallmarks of the thoughtful exercise of discretion we strive to realize in every criminal prosecution we bring. And when our judgment is sound, we feel that we have done it right. We remind ourselves that every judgment we make is a wielding of the government’s power, and that this power ultimately belongs to the people—to those it is the duty of every prosecutor, antitrust or otherwise, to protect. This is the touchstone of our prosecutors’ discretion. And I am proud to be alongside them as they do their part to safeguard the domestic and global economies, and to ensure that the benefits of fair competition inure to us all.