



Department of Justice

STATEMENT

OF

**WILLIAM J. BAER
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION**

BEFORE THE

**SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES**

HEARING ON

**“OVERSIGHT OF THE ANTITRUST
ENFORCEMENT AGENCIES”**

PRESENTED ON

NOVEMBER 15, 2013

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Chairman Bachus, Ranking Member Cohen, Vice-Chairman Farenthold, and distinguished members of the Committee, thank you for inviting me to appear before you today to discuss the work of the Antitrust Division. I am honored to be here and to be part of the proud and successful tradition of antitrust enforcement at the Department of Justice. I am also pleased to be appearing with Federal Trade Commission Chairwoman Ramirez. She is an exceptional public servant and a friend. We are privileged to be able to work together on behalf of American consumers and to promote fair and effective antitrust enforcement both here and abroad.

We at the Antitrust Division appreciate this subcommittee’s support of our enforcement efforts. Competition is the cornerstone of our nation’s economic system. When markets are working properly, consumers benefit from lower prices and higher quality goods and services. The antitrust laws serve to promote and protect a robust free-market economy by prohibiting anticompetitive agreements, conduct, and mergers that distort market outcomes and harm consumers.

The division devotes substantial attention to the goods and services that consumers use every day—the items we buy at the grocery store, media and entertainment, communications, consumer electronics, and new technologies—as well as other goods and services that have a significant impact on our nation’s economy, including health care, agriculture, transportation, energy, and financial services.

We fulfill our competition mission in several distinct ways:

- detecting and prosecuting hardcore criminal antitrust violations—price fixing, bid rigging, market allocation, and other cartel behavior;
- halting or restructuring mergers that would raise prices and harm quality and innovation, and challenging unilateral (single-firm) conduct that would do the same;
- challenging illegal coordination/collusion by companies that result in serious harm to consumers; and
- cooperating with colleagues at the FTC, other federal agencies, and state and international authorities to promote free markets and consumer interests.

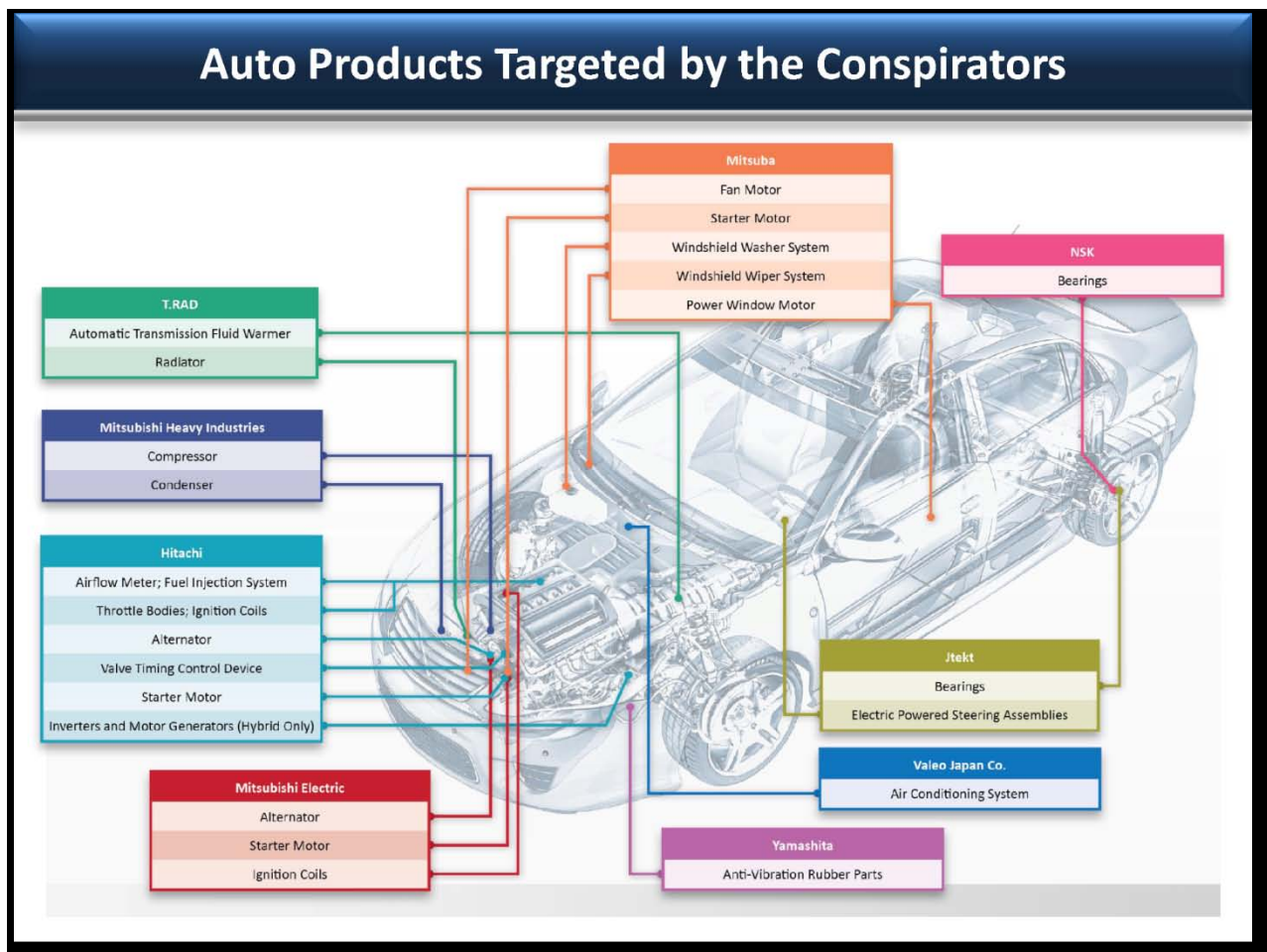
We appreciate that fiscal resources are limited. The division uses the scarce resources entrusted to us by Congress to provide the biggest return for American consumers, businesses, and taxpayers. In criminal prosecutions alone, the division regularly brings in more than 10 times its annual direct appropriation. Those fines are deposited pursuant to statute into the Crime Victims Fund, a major source of funding for assistance to victims of crime throughout the country. And, our civil and criminal enforcement efforts protect, preserve, and restore competition in markets across the entire U.S. economy, ensuring lower prices and more innovation and choices to American consumers.

Cartel Enforcement

Let me start with our efforts to uncover and prosecute cartel behavior. Price fixers and bid riggers do serious and demonstrable harm to consumers and the economy. We target cartels that rob consumers of their hard-earned dollars. We pursue both corporate and individual wrongdoers, foreign and domestic. In Fiscal Year 2013 alone, the division filed 50 criminal cases. We charged 21 corporations and 34 individuals for crimes affecting tens of billions of dollars of commerce in U.S. markets. The division obtained criminal fines totaling over \$1 billion and courts sentenced 28 individuals to jail terms that average more than 2 years per defendant.

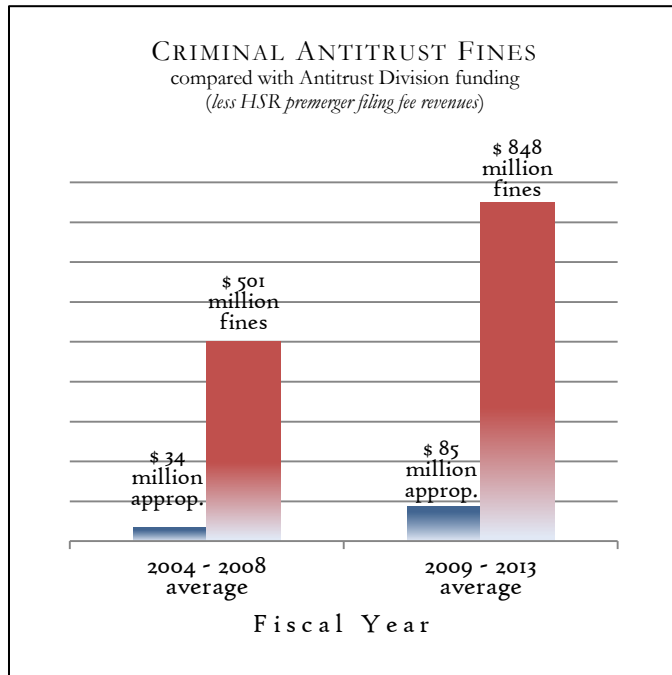
Aggressively pursuing cartel participants benefits consumers in multiple ways. Not only is the illegal conduct stopped, but other wrongdoers are put on notice that they should halt their illegal conduct, and those contemplating collusion are deterred from committing the crime in the first instance.

For example, a few weeks ago, Attorney General Holder announced major developments in our ongoing investigation of auto parts cartels and noted that this is “the largest criminal investigation the Antitrust Division has ever pursued, both in terms of its scope and the commerce affected by the illegal conduct.” The investigation uncovered more than a dozen separate conspiracies spanning more than a decade and involving numerous auto parts suppliers around the globe that, as the Attorney General noted, “all had one thing in common—they targeted U.S. manufacturing, U.S. businesses and U.S. consumers.” Companies rigged bids and fixed prices for critical parts of cars sold in the U.S.—including seatbelts, airbags, steering wheels, antilock brake systems, instrument panel clusters, and electric wire harnesses.



These illegal actions harmed American automobile manufacturers as well as American consumers who bought or leased a car. It serves as a prime example of how antitrust enforcement protects both businesses and consumers. Thus far, 21 companies and 21 executives have been charged and have agreed to pay more than

\$1.6 billion in criminal fines, and 17 executives have been sentenced to serve time in U.S. prisons or have entered into plea agreements calling for significant prison sentences. The cases filed to date involve conduct affecting over \$8 billion in auto parts sold to car manufacturers in the U.S. and parts used in more than 25 million cars purchased by American consumers. The investigation continues.



Consumers are well-served by the vigorous prosecution of criminal cartels because enforcement delivers to them the benefit of more competitive markets. Taxpayers are well-served too, as the division continually produces results that more than justify its annual appropriation. In the last ten fiscal years, the division has obtained criminal fines averaging nearly \$675 million per year. That is more than 10 times our average annual appropriation of \$60 million (net of the division's share of offsetting collections of Hart-Scott-Rodino fees). In the last

five fiscal years we averaged nearly \$850 million in criminal fines versus an average appropriation of about \$85 million (again, net of HSR fees). These fines do not go to the Antitrust Division, but rather are contributed to the Crime Victims Fund, which helps victims of all types of crime throughout the country. They are provided assistance with medical and counseling expenses, assistance in the form of shelter, crisis intervention, and justice advocacy, and money for state and local services to crime victims.

Civil Enforcement

The Antitrust Division's civil enforcement record sends a strong message to companies that if they engage in conduct that shackles free competition or try to gain a competitive advantage through anticompetitive mergers, the division will act to protect competition and consumers. Here too we focus our resources where they will have the greatest bottom-line impact to the economy and create tangible and lasting gains for American consumers.

For example, earlier this year a federal court held that executives at the highest levels of Apple, Inc. orchestrated a conspiracy with five major book publishers to raise e-book prices and end e-book retailers' freedom to compete on price. The court issued an order requiring Apple to modify its existing agreements with the five publishers to restore price competition at retail and to eliminate the collusion that led to higher e-book prices. Reintroducing competition for e-books has greatly benefited U.S. consumers. In the last year, the average price of e-book bestsellers has already fallen from a little over \$11 to closer to \$6. Consumers are being compensated for past unlawful overcharges. The average refund for the bestsellers purchased during the time of the conspiracy is estimated by the claims administrator to be over \$3, thanks to our state co-plaintiffs and private plaintiffs who to date have obtained over \$160 million for a consumer fund from the settling publishers. The court found Apple's antitrust compliance culture to be sub-optimal. To deter Apple from engaging in similar collusive conduct in the future, the court ordered the appointment of an external monitor, whose salary and expenses will be paid by Apple, to work with a new, full-time internal antitrust compliance officer on observance of the Final Judgment and compliance with the antitrust laws generally. All around this is a big win for U.S. consumers.

This subcommittee recently held a hearing on competition in health care and the role antitrust enforcement plays in protecting competition in health care provider and insurance markets. The Antitrust Division has been working to eliminate anticompetitive conduct through which health care insurers and providers acquire or expand market power, raising health care costs. One focus for us is most favored nation clauses (MFNs). Such provisions potentially distort the competitive process by raising the costs of health insurance and hospital services, preventing other insurers from entering the market, and discouraging discounts. In 2010, the Antitrust Division filed a lawsuit challenging Blue Cross Blue Shield of Michigan's (BCBSM) use and enforcement of MFNs in its contracts with Michigan hospitals. These provisions required hospitals to charge BCBSM no more than they charge its competitors or to charge competitors more than they charge BCBSM, making it harder for its rivals to compete and survive. In addition to this lawsuit, in 2012 the division and the FTC held a workshop on MFN clauses that examined how MFNs can present competitive concerns in health insurance markets and in a number of other industries. This combination of enforcement and public discussion has shined a spotlight on the problems MFNs can cause, leading a number of states to take a hard look at these practices. In March of this year, Michigan enacted a statute to ban the use of MFNs in health care provider

contracts, becoming the latest in a growing list of over a dozen states that statutorily restrict or prohibit such provisions.

Anticompetitive mergers also have the potential to harm consumers. In January of this year, the division filed suit to stop Anheuser-Busch InBev's (ABI) proposed acquisition of Grupo Modelo, the largest and third-largest firms selling beer in the United States. The division reached a settlement that required the companies to divest Modelo's entire U.S. business, which created an independent, fully integrated and economically viable competitor. Since U.S. consumers spend tens of billions of dollars annually on beer, even small price increases would have resulted in sizeable harm to consumers. If preserving competition in this market makes just a one percent difference in prices, U.S. consumers will save almost \$1 billion a year.

We have a number of matters in active litigation as well:

- In August of this year, the division and several state attorneys general filed a lawsuit to block the proposed merger of US Airways and American Airlines, a deal that would result in the creation of the world's largest airline and substantially lessen competition for airline travel in local markets throughout the United States. On November 12, 2013, the division reached a proposed settlement with the parties that, if approved by the court, will resolve the division's competitive concerns and the lawsuit.
- Trial just recently ended in the division's challenge to Bazaarvoice Inc.'s acquisition of PowerReviews Inc., a merger of the only two significant U.S. providers of ratings and reviews software. Consumer-generated product ratings and reviews are a ubiquitous part of the online shopping experience and are displayed on retailers' and manufacturers' websites.
- The division continues to litigate against American Express (Amex), challenging its rules that limit merchants' ability to promote competition among credit card networks by offering discounts to consumers who use certain payment methods offered by Amex's competitors, and that effectively foreclose lower cost payment methods, holding merchants' costs higher and potentially influencing the prices of all goods.
- In November 2012, the division filed suit against eBay, Inc., challenging an agreement not to competitively recruit employees, which hurt employees by lowering the salaries and benefits they might have received and by depriving them of job opportunities.

- And finally, in December 2012, the division challenged a joint venture between Coach USA Inc. and City Sights LLC, alleging that the joint venture, known as Twin America LLC, has resulted in higher prices for hop-on, hop-off bus tours in New York City.

These actions reflect the division's consistent commitment to American consumers. The division's focus is to ensure that companies adhere to the antitrust laws so consumers benefit from lower prices and higher quality goods and services.

Advocacy, Interagency Collaboration, and Public Workshops

Effective enforcement is central to the division's mission, but we can achieve positive results for American consumers in other ways as well, often in close collaboration with other parts of the government. For example, the department and the U.S. Patent and Trademark Office jointly issued a Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments, which concluded that in many circumstances it would be inappropriate for a patent holder to seek injunctive relief in a judicial proceeding or seek an exclusion order if it has promised to license the patent on fair, reasonable and non-discriminatory terms. The Policy Statement was referenced by the U.S. Trade Representative in overturning a recent ITC exclusion order involving smartphones. In 2012, the division and the FTC jointly conducted a workshop to study the growth of and competitive implications associated with patent assertion entity (PAE) activities. Workshops such as this provide a forum for open discussion on what are among the most challenging and cutting-edge competition issues of the day.

Consumers and businesses also benefit from the division's effective and increasing coordination with foreign competition authorities. The division regularly cooperates on civil matters with competition agencies in Australia, Brazil, Canada, Chile, Colombia, the European Union (EU), Germany, Japan, Mexico, South Africa, and the United Kingdom, among others. International case cooperation is particularly important to our criminal enforcement program. It allows for coordinated raids in international cartel investigations, helping to preserve crucial evidence. Recent criminal investigations where we have worked with international enforcers include our auto parts investigation, where we are cooperating with our counterparts in Japan, the EU, and Canada, among others, and our air cargo cases, where we worked with the Australian Competition and Consumer Commission, the

European Commission, the New Zealand Commerce Commission, the U.K. Office of Fair Trading, and other agencies.

Additionally, the division participates, along with more than 100 other antitrust agencies, in the International Competition Network (ICN). The ICN's most recent conference highlighted cartel enforcement, including work on an Anti-Cartel Enforcement Manual, a reference tool for antitrust agencies around the world. The division also is an active participant and leader in the global dialogue on procedural fairness and transparency issues through the Organization for Economic Co-operation and Development (OECD), a key international forum for in-depth discussion of technical antitrust matters and competition policy issues.



Jurisdictions with member organizations in the International Competition Network

Reducing Burden on Business

While active antitrust enforcement makes our markets more competitive and saves consumers money, we appreciate that dealing with antitrust enforcers can be expensive and time consuming for the business community. The Antitrust Division appreciates that it needs to make enforcement as efficient as possible, without compromising our mission.

Improving electronic discovery is one promising avenue for reducing the burdens our investigations can impose. For example, our website includes a model civil electronic production letter that shows how the division structures its demands for electronic productions. This transparency helps parties understand and plan for productions to the division, making the process more predictable and less burdensome.

Further, the division has been a pioneer among government agencies in experimenting with the use of predictive coding methods in large volume document productions. Predictive coding is a type of technology-assisted document review that more quickly and accurately identifies relevant documents in a large collection, saving the parties time and money, while providing the division the

documents it needs to effectively conduct its investigations. Law firms have told us that use of predictive coding for document production to the division saved them and their clients millions of dollars—indeed, one firm issued a statement detailing how it saved over \$2 million in a single production to the division.

The division is always looking for ways to make our investigations more efficient. With that goal in mind, we are also increasing our efforts to review our investigations post hoc. By understanding what we have done well and where we might have fallen short, we strive to create division-wide best practices, which should result in more efficient and cost-effective investigations and get parties through our processes more quickly and at lower cost.

Conclusion

The Antitrust Division's dedicated public servants are working hard to enforce the antitrust laws for the benefit of American consumers. We use our tools—criminal and civil enforcement, together with focused and effective competition advocacy—to ensure that consumers get the full advantage of our free-market economy. We have been and we need to continue to be effective and efficient at protecting competition for products and services that businesses and consumers use every day, in industries that have a significant impact on our nation's economy, and with the least burden and most benefit. I am honored to be part of this hard-working team and to be fulfilling a law enforcement mission that is delivering real benefits to American consumers.