U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 24, 2014

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Mr. Chairman:

Enclosed please find responses to questions for the record arising from the appearance of William Baer, Assistant Attorney General, Antitrust Division, at the hearing before the Committee on November 14, 2013, entitled "Cartel Prosecution: Stopping Price Fixers and Protecting Consumers." We hope this information is of assistance to the Committee.

Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter. The Office of Management and Budget has advised us that, from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Peter J. Kadzik
Principal Deputy Assistant Attorney General

Enclosures

cc: The Honorable Charles E. Grassley
Ranking Member

Responses of William Baer, Assistant Attorney General, Antitrust Division, U.S. Department of Justice To Questions for the Record Arising from the November 14, 2013, Hearing before the Senate Committee on the Judiciary Regarding "Cartel Prosecution: Stopping Price Fixers and Protecting Consumers"

Questions posed by Senator Klobuchar

1. **The Antitrust Division does not often use its authority to obtain restitution for victims of price-fixing or other cartel conduct. Instead, we rely on victim companies and consumers to bring private civil litigation to get redress for the higher prices they paid as a result of price-fixing. How important are these private civil suits? Should we be concerned about any barriers faced by private litigants bringing these cases?**

   Private civil antitrust suits are an important part of the overall antitrust enforcement scheme and should not be deterred by unwarranted barriers. The division's criminal enforcement program often promotes successful private civil suits. For example, convictions in Antitrust Division criminal cartel prosecutions constitute "prima facie evidence against" those convicted in follow-on damages actions (per 15 U.S.C. § 16). Moreover, private damage actions may benefit from the cooperation of leniency applicants seeking to take advantage of the damages limitation in the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. 108-237, 15 U.S.C. § 1 note. However, to the extent there are legitimate problems with effectively pursuing private damage actions, we welcome those with concerns to discuss them with the division.

2. **Civil cases are often running concurrently with the Justice Department's investigations and prosecutions. Does the Justice Department make an effort to coordinate with plaintiffs, to the extent that it can, so that private enforcement efforts are not unnecessarily impeded? How can the DOJ provide more outreach to cartel victims so that these individuals or businesses can play a more active role in helping to discover cartel conduct?**

   The Antitrust Division recognizes the importance of timely and effective private enforcement of the antitrust laws. At the same time, consumers benefit and private enforcement is facilitated when the division is able to investigate criminal misconduct confidentially and prosecute it expeditiously. The division works with civil plaintiffs to protect our investigations while recognizing the need for them to proceed with litigation. The division considers whether certain types of civil discovery would interfere with an investigation and, if it will, the appropriateness of seeking a stay.

Our attorneys are in contact with plaintiffs' attorneys and receive status updates on the progress of the civil litigation and information regarding the effect of any stays as the civil cases progress.

Outreach is important. Antitrust Division attorneys make presentations to various groups including procurement officials, in-house counsel, private attorneys, state attorneys general, and business and law students in an effort to raise awareness of antitrust violations and to encourage the reporting of suspected violations to the division. Our press releases in criminal cases routinely include an invitation for persons with information about the investigated matter to contact the division and also include the telephone number of the pertinent Antitrust Division criminal section and the FBI. We also frequently work with federal agents to detect and prosecute cartel activity that harms federal agencies.

The division is continuing its outreach efforts; however, limited resources constrain the types of engagement we are able to offer.

3. **The leniency program has been enormously successful at detecting cartels. Besides the leniency program, how else does the DOJ detect cartels? What is your view on the use of economic screens to detect cartels and should the DOJ use them in certain industries that are more conducive to economic screening, like financial markets?**

While the leniency program is important to cartel detection, we obtain leads from a variety of additional sources, including customer complaints, a variety of outreach efforts with auditors, trade groups and others, suspicious documents uncovered in civil investigations, and our Citizen Complaint Center. We have also received leads in response to our press releases about other cartels or resulting news stories. An important additional method of detection results from our outreach with and training of federal employees, such as purchasing agents, that focuses on cartel behavior that can affect federal procurement. For example, the IG's Office for the Environmental Protection Agency referred to the division allegations of bid rigging and fraud related to Superfund cleanup sites, and this investigation resulted in the successful prosecution of 3 companies and 10 individuals. Similarly, the IG's Office for the U.S. Department of Veterans Affairs referred to the Antitrust Division allegations of payoffs that prevented the VA from obtaining competitive bids for the renovation of foreclosed homes that had been financed using VA loans, and this investigation resulted in the successful prosecution of 6 individuals.

While screens can have value, in our experience they can also lead to false positives, which is a concern in light of limited resources. In addition, it is important to be able to develop documentary and testimonial support for cartel violations to complement potential concerns that might arise from application of an economic screen.

4. **Concerns have been raised by criminal defense lawyers about the 1996 Memorandum of Understanding (MOU) between the Antitrust Division and the Immigration and Naturalization Service (now Immigration and Customs Enforcement). They claim that antitrust offenses should not be considered crimes involving "moral turpitude" and they argue that the DOJ should revise its policy to extend the waiver of the MOU to foreign nationals who choose to stand trial in the U.S. rather than plead guilty. Can you please respond to those concerns?**

In general, moral turpitude has been held to be conduct that is inherently dishonest and contrary to accepted rules of morality and the duties owed between persons or to society in general. Tax fraud, mail fraud, securities fraud, and theft offenses, for example, have been held to be crimes of moral turpitude. Similarly, price-fixing, bid-rigging, and market allocation agreements among companies that hold themselves out to the public as competitors are inherently deceptive and defraud consumers who expect the benefits of competition. Thus, the division's MOU with INS states that INS, now the Department of Homeland Security as successor to INS, considers criminal antitrust offenses to be crimes involving moral turpitude, which may subject an alien defendant to exclusion or deportation. However, an alien defendant who is convicted of an antitrust offense at trial retains the ability to contest his removability from the United States.

In today's global marketplace, many culpable executives involved in international cartels affecting U.S. consumers and commerce are foreign nationals. They may live and work outside the U.S., but their cartel conduct affects billions of dollars of U.S. commerce yearly and takes money out of consumers' pockets. The MOU was drafted in order to allow the Antitrust Division to secure jurisdiction over and cooperation of these foreign nationals in the division's investigations and prosecutions of international cartels and to hold these foreign nationals accountable for antitrust crimes, just as domestic defendants are held accountable.

The cooperation of defendants receiving immigration relief under the MOU is critical to the division's ability to investigate and prosecute international cartel activity. A foreign defendant's willingness to cooperate with the division provides the basis for the waiver of inadmissibility under the MOU, and fulfilling the continuing cooperation requirements with the division is a condition of a defendant's retention of the waiver. Having cooperating witnesses from multiple companies is essential to fully investigate cartels and to hold responsible individuals at each corporate conspirator accountable. Moreover, having defendants who have pleaded guilty is important at Antitrust Division trials. Extending the MOU waiver to non-cooperating defendants would undermine the incentives provided by the MOU and be unjust to those foreign nationals who are willing to accept responsibility for their criminal conduct, submit to U.S. jurisdiction, cooperate with the division, and serve time in U.S. prison. It would also be unworkable to require pleading foreign defendants to continue their cooperation to maintain the waiver while at the same time giving the MOU waiver to non-pleading defendants who have not accepted responsibility and fully cooperated with the division.

5. **Concerns have been raised that the DOJ would effectively limit the carriers that are eligible to obtain gates and slots that are divested as a result of DOJ's settlement with American Airlines and US Airways. By limiting the carriers that can compete for the divested gates and slots to Southwest, JetBlue and similar carriers, they assert that this will result in market winners without regard to those airlines' ability to connect passengers to competitive international and domestic networks that can compete effectively with the New American Airlines. In fact, as the DOJ noted the complaint that initially challenged the proposed merger, carriers like Southwest and JetBlue "have less extensive domestic and international route networks than the legacy airlines," in addition to limited fleets. It also noted that "[i]n many relevant markets, these [non-legacy carriers] do not offer any service at all." How do you respond to these concerns?**

The Proposed Final Judgment does not prohibit any airline from seeking any of the divestiture assets. However, the Proposed Final Judgment also requires that the divestitures remedy the harms alleged in the complaint. The complaint identifies harm from, among other factors, a lack of aggressive competition between and among the legacy airlines. An important factor in the divestiture, as stated in the Competitive Impact Statement, is to "impede the industry's evolution toward a tighter oligopoly." This approach follows the Antitrust Division's Policy Guide to Merger Remedies (2011). That document contains the following language with respect to the sale of divestiture assets in markets where our investigation reveals evidence of oligopolistic conduct:

> First, divestiture of the assets to the proposed purchaser must not itself cause competitive harm. … If the concern is one of coordinated effects among a small set of post-merger competitors, divestiture to any firm in that set would itself raise competitive issues. In that situation, the Division likely would approve divestiture only to a firm outside that set. (p.28)

The Department of Justice has said it will listen to arguments any carriers make as to why they should be considered acceptable acquirers for any of the divestiture assets. Indeed, the department has invited any interested carrier to approach the department and discuss any reasons why it may be an acceptable purchaser for any of the assets to be divested. We are actively engaged with potential purchasers at this time.