

**STATEMENT OF**  
**CHRISTOPHER B. HOCKETT**  
**ON BEHALF OF THE**  
**AMERICAN BAR ASSOCIATION**  
**SECTION OF ANTITRUST LAW**  
**before the**  
**SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND**  
**CONSUMER RIGHTS**  
**of the**  
**COMMITTEE ON THE JUDICIARY**  
**of the**  
**UNITED STATES SENATE**  
**concerning**  
**U.S. CARTEL ENFORCEMENT**

**November 14, 2013**

Good afternoon Chairman Klobuchar, Senator Lee, and members of the Subcommittee. My name is Christopher Hockett, and I am a partner at Davis Polk & Wardwell LLP in Menlo Park, California. I am also the current Chair of the Section of Antitrust Law of the American Bar Association (“Antitrust Section”) and, as such, I have been duly authorized to testify on behalf of the Antitrust Section. The views expressed in the Section’s comments and in this testimony were approved by the Council of the Section of Antitrust Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

Thank you for inviting me to testify before you today concerning U.S. cartel enforcement. Today I will focus on several key aspects of cartel enforcement:

- The Antitrust Division’s consistent and successful efforts to investigate and prosecute cartels, and the need for adequate resources to support those efforts going forward;
- The importance of international outreach and cooperation to promote enforcement and encourage fair treatment and due process across jurisdictions;
- The use of investigative techniques to complement the Division’s successful Corporate Leniency Policy; and
- The merit of the Division’s new policy concerning the identification of employees who are carved out of corporate plea agreements.

**I. THE ANTITRUST SECTION SUPPORTS THE DIVISION’S CONSISTENT APPROACH TO VIGOROUS CARTEL ENFORCEMENT**

Over the past thirty or more years, the U.S. Department of Justice, Antitrust Division (the “Division”) has devoted considerable resources to cartel enforcement. In the early years of the Clinton administration, the Division meaningfully strengthened its Corporate Leniency Program, which led to increased detection of cartels, and enhanced enforcement efforts against international cartels, which have the potential for substantial harm to U.S. consumers in light of an increasingly global economy. Despite many changes in the Division leadership, including through the Clinton, Bush and Obama administrations, the Division has consistently targeted

cartel behavior with highly successful results. There has been little dispute across the political spectrum that cartel enforcement is a top enforcement priority and that it benefits consumers and the U.S. economy. The Antitrust Section therefore supports the continued efforts of the Division in actively investigating and prosecuting cartel conspiracies that injure U.S. consumers.

In the 1990s, then-Assistant Attorney General Anne K. Bingaman explained that the enactment and progressive strengthening of the Sherman Act's criminal provisions "has been a bipartisan objective of the United States Congress."<sup>1</sup> She noted further that the "Division's criminal enforcement program is fundamentally nonpartisan and bipartisan," fostering "great continuity from one Administration to another."<sup>2</sup> Over a span of decades, no President, Attorney General, or Assistant Attorney General has expressed the slightest doubt or hesitation about strong anti-cartel enforcement as a good policy that should be maintained.

The Division's cartel enforcement efforts received a substantial boost in effectiveness from three key developments in the early 1990s. First, the Division substantially strengthened its Corporate Leniency Program. That program was originally implemented in 1978 but was little used until 1993, when the Antitrust Division made it more transparent and increased the opportunities and raised the incentives for companies to report criminal activity and cooperate with the government.<sup>3</sup> Second, in 1993, the Division reallocated resources to concentrate enforcement efforts on national and international cartels "that involve large amounts of

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<sup>1</sup> Anne K. Bingaman, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, The Clinton Administration: Trends in Criminal Antitrust Enforcement, Remarks Presented Before the Corporate Counsel Institute 5 (Nov. 30, 1995), available at <http://www.justice.gov/atr/public/speeches/0471.htm>.

<sup>2</sup> *Id.*

<sup>3</sup> Scott D. Hammond, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades, Remarks Presented at the 24th Annual National Institute on White Collar Crime 2 (Feb. 25, 2010), available at <http://www.justice.gov/atr/public/speeches/255515.htm> (characterizing the program between 1978 and 1993 as "rarely utilized," yielding "on average only about one leniency application per year," and involving "[n]o leniency application . . . [that] resulted in the detection of an international or large domestic cartel").

commerce and affect great numbers of businesses and customers.”<sup>4</sup> Ms. Bingaman remarked in 1995 that “[c]riminal enforcement against the most serious antitrust offenses has been, and remains, [the Division’s] core mission.”<sup>5</sup> This focus has been consistently maintained from the administration of President Clinton, under which Ms. Bingaman served, to those of Presidents Bush<sup>6</sup> and Obama.<sup>7</sup>

Third, the Division secured significantly higher fines both through legislative initiatives, which increased the maximum corporate fine from \$1 million to \$10 million to \$100 million, and the use of the Alternative Fining statute that permits “double-the-gain” or “double-the-loss” fines, which has enabled fines as high as \$500 million. Similarly, Congress increased the maximum prison term for criminal antitrust violations from three to ten years. These higher fines and prison terms have increased incentives for cooperation under the Leniency Program.

Under the revised Leniency Program, the Clinton, Bush and Obama administrations have each seen substantial increases in the number of leniency applicants and “a steady trend toward higher corporate fines for cartel offenses and longer jail sentences for individuals.”<sup>8</sup> Along the way, notable developments in cartel enforcement have included the implementation of the “Amnesty Plus” policy, pursuant to which a party already subject to investigation with respect to

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<sup>4</sup> Bingaman, *The Clinton Administration: Trends in Criminal Antitrust Enforcement*, at 1.

<sup>5</sup> *Id.* at 4.

<sup>6</sup> See R. Hewitt Pate, Acting Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, *Anti-Cartel Enforcement: The Core Antitrust Mission*, Remarks Before the British Institute of International and Comparative Law 1 (May 16, 2003), available at <http://www.justice.gov/atr/public/speeches/201199.htm> (noting his belief that the “most important . . . work of the Antitrust Division” is “[o]ur sustained law enforcement effort against cartels, domestic and international”); Scott D. Hammond, Acting Deputy Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, *An Overview of Recent Developments in the Antitrust Division’s Criminal Enforcement Program*, Remarks Before the American Bar Association Midwinter Leadership Meeting 1 (Jan. 10, 2005), available at <http://www.justice.gov/atr/public/speeches/207226.htm> (“The detection, prosecution, and deterrence of cartel offenses is the highest priority of the Antitrust Division.”).

<sup>7</sup> See Hammond, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, at 5 (“The Antitrust Division’s sentencing statistics over the last two decades show a steady trend toward higher corporate fines for cartel offenses and longer jail sentences for individuals.”).

<sup>8</sup> See *id.* at 4-5.

Product A may receive leniency regarding Product B and a discount on the fine paid under a plea on Product A. Congress also passed the Antitrust Criminal Penalty Enhancement and Reform Act (“ACPERA”), which increased incentives for cartelists to come forward by eliminating treble damages and joint and several liability from civil damage claims for parties that receive leniency.<sup>9</sup>

The Leniency Program in its current form is integral to the Division’s enforcement efforts. Over 90% of the more than \$5 billion in fines imposed for antitrust crimes from the mid-1990s to early 2010 resulted from investigations involving leniency applicants.<sup>10</sup> For FY 2012, the Division broke new records in the amount of total fines, and number and length of prison sentences in criminal antitrust prosecutions, and for FY 2013 it almost matched those record levels, again exceeding a billion dollars in fines.<sup>11</sup> Included in these figures was a cartel investigation that went to trial and resulted in a \$500 million corporate fine that “matches the largest fine ever imposed against a company for violating the U.S. antitrust laws.”<sup>12</sup> Additionally, prison sentences imposed on individuals for antitrust violations increased by more than three times the average and were imposed on roughly twice the number of defendants, compared to those in the 1990s.<sup>13</sup> These figures demonstrate that cartel enforcement has remained vigorous and nonpartisan across administrations, and there is no reason to doubt that the Division will continue its vigilant enforcement against cartels in the years to come.

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<sup>9</sup> Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, Title 2, § 215(a), 118 Stat. 661.

<sup>10</sup> See Hammond, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, at 3.

<sup>11</sup> William J. Baer, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, *Division Update Spring 2013: Criminal Program*, available at <http://www.justice.gov/atr/public/division-update/2013/criminal-program.html>.

<sup>12</sup> *Id.* (reporting on the prosecution of AU Optronics Corporation in the Northern District of California in 2012).

<sup>13</sup> *Id.*

However, the ability of the Antitrust Division to build upon its successes in rooting out cartels and protecting consumers is naturally constrained by the resources that are available to it. At a time when cartel enforcement is growing in complexity and scope, domestically and internationally, the Division's need for resources is similarly expanding. Yet, in the midst of the auto parts investigation (the largest the Division has ever undertaken) and other major ongoing investigations, the number of cartel enforcers at the Division has dropped by one-third after closure of four field offices and imposition of a hiring freeze. Effective continued enforcement requires significant resources, especially given the fact-intensive and global nature of many of these investigations. Therefore, the Antitrust Section encourages the Government to carefully evaluate and consider increased funding and staffing for the Division's cartel enforcement efforts.

**II. THE ANTITRUST SECTION SUPPORTS CONTINUED U.S.-LED EFFORTS IN INTERNATIONAL OUTREACH AND COOPERATION TO ENSURE THAT PARTIES ARE AFFORDED FAIR TREATMENT AND DUE PROCESS GLOBALLY**

The Antitrust Section strongly supports the efforts of the Division to cooperate with other international enforcement agencies on cartel enforcement, and in particular to encourage the consistent application of fair and reasonable investigative, administrative and judicial procedures related to cartel enforcement. Moreover, it is critical that the Division continue to lead by example by ensuring that foreign corporations and foreign nationals prosecuted in the U.S. receive full due process and fair treatment.

The Division states that its international initiatives "aim to bring greater cooperation and convergence to international antitrust enforcement . . . by facilitating international discussion of important issues, building bilateral and multilateral relationships, and learning how best to

coordinate investigations and remedies.”<sup>14</sup> To this end, the U.S. has entered into antitrust cooperation agreements with several jurisdictions, including Australia, Brazil, Canada, China, the EU, and, most recently, with India in 2012, in recognition that effective enforcement of the U.S. antitrust laws requires cooperation and coordination with international agencies.<sup>15</sup> The Division actively participates in multilateral organizations, such as the International Competition Network (“ICN”) (where it co-leads a subgroup of the Cartel Working Group), the Competition Committee of the OECD, and the United Nations Conference on Trade and Development (“UNCTAD”). The Division also has intensified its outreach recently through the Visiting International Enforcers Program.<sup>16</sup>

The U.S. has been a leader in international outreach and cooperation to ensure that parties are afforded fair treatment and due process globally. Three areas in which due process and fair treatment are especially relevant are the coordination of investigations, the transparency for parties involved in competition proceedings, and the determination of penalties.

Because cartels often affect many markets worldwide, it is routine for the Division to cooperate with other jurisdictions in investigating global cartels. For example, the Division recently announced that nine Japan-based companies and two executives agreed to plead guilty and to pay a total of more than \$740 million in criminal fines for their roles in separate conspiracies to fix the prices of more than thirty different products sold to U.S. car manufacturers and installed in cars sold in the United States and elsewhere. This plea agreement

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<sup>14</sup> U.S. Dep’t of Justice, Antitrust Div., International Program, *available at* <http://www.justice.gov/atr/public/international/index.html>.

<sup>15</sup> U.S. Dep’t of Justice, Antitrust Div., Antitrust Cooperation Agreements, *available at* <http://www.justice.gov/atr/public/international/int-arrangements.html>.

<sup>16</sup> Rachel Brandenburger, Special Advisor, Int’l, Antitrust Div., U.S. Dep’t of Justice, Intensification of International Cooperation: The Antitrust Division’s Recent Efforts, Remarks as Prepared for the American Chamber of Commerce (Feb. 17, 2012), *available at* <http://www.justice.gov/atr/public/speeches/281609.pdf>.

involved coordination with the Japanese Fair Trade Commission, the European Commission, Canadian Competition Bureau, Korean Fair Trade Commission, Mexican Federal Competition Commission and Australian Competition and Consumer Commission.

Enforcement agencies can coordinate in a variety of ways, including by: (1) sharing information about investigations; (2) obtaining appropriate waivers and sharing business information; (3) sharing substantive theories of harm; (4) coordinating dawn raids, searches, interviews, document demands and remedies; and (5) coordinating the timing of investigations or decisions.<sup>17</sup> International coordination of investigations may contribute to ensuring procedural fairness for parties through, for instance, protecting the parties' rights to determine when and which information and documents can be transferred between agencies of different countries and reducing the likelihood of arbitrary enforcement decision-making. Such coordination may also help avoid unnecessary burdens and expenses for both the enforcers and the parties.

The Division has also previously recognized the importance of procedural fairness and transparency in investigative, administrative and judicial procedures, a dialogue that has taken place in the OECD.<sup>18</sup> Without such cooperation, the potential for conflicting outcomes and material differences in procedure will be greater. Transparency is also important for multinational corporations to understand the various antitrust and competition laws that apply to them and how their conduct should be shaped to comply with these laws.

The Antitrust Section applauds the efforts of the Division and other enforcement agencies to continue a dialogue on the appropriate remedies in international cartel cases. At present, the fines and other sanctions for cartel violations vary substantially across the world. The United

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<sup>17</sup> See OECD, Competition Committee, Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation (2013), at 72.

<sup>18</sup> Christine A. Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, International Cooperation: Preparing for the Future, Remarks as Prepared for the Fourth Annual Georgetown Law Global Antitrust Enforcement Symposium (Sept. 21, 2010), *available at* <http://www.justice.gov/atr/public/speeches/262606.htm>.



States, with criminal sanctions, including the prosecution of individuals, and the European Union, with its high corporate fines, are typically recognized as having the most robust penalties for cartel behavior. However, other jurisdictions are seeking to pursue cartels with increased vigor, and accordingly to impose harsher penalties than before. The Antitrust Section encourages the Division and agencies in other jurisdictions to consider the extent to which penalties imposed on the same behavior by multiple authorities may result in “double counting” or excessive and unreasonable fines, especially when considered in light of follow-on civil damages actions. Moreover, to the extent that enhanced cartel penalties and criminal enforcement regimes further expand internationally, there is increased risk that U.S. businesses operating abroad could face severe sanctions without the benefit of due process protections that are well-established under U.S. law. The Antitrust Section strongly supports any effort by the Division to encourage other jurisdictions to increase transparency and due process in the administration of sanctions for cartel behavior, and encourages the Government to monitor and ensure appropriate funding for this important international engagement and dialogue.

### **III. THE ANTITRUST SECTION SUPPORTS THE CONTINUED USE OF A VARIETY OF INVESTIGATIVE TECHNIQUES TO COMPLEMENT THE SUCCESS OF THE DIVISION'S CORPORATE LENIENCY PROGRAM**

Leniency is now the most important tool that the Division and many other competition agencies use to detect cartels.<sup>19</sup> Despite the considerable success of leniency programs such as the Division's, however, there exist other tools for detecting cartels. Leniency is a "reactive detection" tool in that it relies on those who have committed cartel violations to come forward and admit their crimes. Alternatively, competition agencies may use certain "proactive detection" efforts by which the agencies may investigate markets to uncover suspected cartels. The use of these tools, if viewed as effective for detecting cartels, can also complement leniency programs. As the Division has noted, a "prerequisite to building an effective amnesty program is instilling a genuine fear of detection."<sup>20</sup>

The Division has long encouraged the public to bring complaints and leads regarding suspected cartel activities to its attention. In addition, it has also conducted outreach and training for procurement organizations to assist them in identifying and reporting "red flag" bidding behaviors indicative of potential cartels. Another potential tool is a "screen," defined as a "statistical test based on an econometric model and a theory of the alleged illegal behavior, designed to identify whether collusion, manipulation or any other type of cheating may exist in a particular market, who may be involved, and how long it may have lasted."<sup>21</sup> In short, a screen is a data-driven methodology that in theory could assist competition agencies in determining in

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<sup>19</sup> OECD, Directorate for Financial and Enterprise Affairs, Competition Committee, Background Note by the Secretariat: Roundtable on Ex Officio Cartel Investigations and the Use of Screens to Detect Cartels (Oct. 23, 2013), at 4.

<sup>20</sup> Scott D. Hammond, Director of Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, Cornerstones of an Effective Leniency Program, presented before the ICN Workshop on Leniency Programs 9 (Nov. 22-23, 2004), available at <http://www.justice.gov/atr/public/speeches/206611.pdf>.

<sup>21</sup> OECD, Directorate for Financial and Enterprise Affairs, Competition Committee, Paper by Rosa Abrantes-Metz: Roundtable on Ex Officio Cartel Investigations and the Use of Screens to Detect Cartels (Oct. 23, 2013).

which industries cartels are more likely to arise and in detecting possible cartel conduct. However, screens should be approached with caution because they often yield false positives.<sup>22</sup> A screen may be unable to distinguish between illegal cartel conduct and perfectly legal oligopoly behavior or tacit collusion, or it may be faulty due to the inability to capture relevant variables.<sup>23</sup> Based on a screen's false positive, a competition agency may then decide to seek further information about the possible cartel conduct through an in-depth investigation in the relevant industry. The resulting investigation would waste scarce agency resources and divert them away from what could be more effective investments, such as the Division's Leniency Program.<sup>24</sup> Investigations of false positives would also burden companies and employees required to cooperate with the Division's investigation and produce documents, data and other information, as well as incurring substantial legal and other costs from the investigation.

The Division's efforts in the late 1970s to reorient its enforcement policy to rely on market structure screens to detect cartels resulted in expensive investigations that ultimately did not lead to any cartel prosecutions.<sup>25</sup> Although it is possible that the Division may now be able

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<sup>22</sup> See OECD, Background Note by the Secretariat: Roundtable on Ex Officio Cartel Investigations and the Use of Screens to Detect Cartels at 5.

<sup>23</sup> There may be instances where a screen can distinguish between cartel conduct and tacit collusion, but the issue is again, whether such methods are ultimately reliable. See Rosa M. Abrantes-Metz & Albert D. Metz, How Far Can Screens Go in Distinguishing Explicit from Tacit Collusion? New Evidence from the Libor Setting, *CPI Antitrust Chronicle*, Vol. 1 (Mar. 2012) (the authors attempted to distinguish between such behavior by applying screens to evidence from Libor).

<sup>24</sup> See OECD, Directorate for Financial and Enterprise Affairs, Competition Committee, Paper by William E. Kovacic: Roundtable on Ex Officio Cartel Investigations and the Use of Screens to Detect Cartels (Oct. 24, 2013) at 5 (noting that "a reallocation of resources to proactive screens can seem to be an inferior investment of enforcement agency effort").

<sup>25</sup> See OECD, Directorate for Financial and Enterprise Affairs, Competition Committee, Note by the United States: Roundtable on Ex Officio Cartel Investigations and the Use of Screens to Detect Cartels (Sept. 27, 2013) at 7 (discussing the Division's prior experience with use of screens and noting "those methods did not produce solid leads for cartel investigations"); see also OECD, Paper by William E. Kovacic: Roundtable on Ex Officio Cartel Investigations and the Use of Screens to Detect Cartels at 6 (citing Marc Allen Eisner, *ANTITRUST AND THE TRIUMPH OF ECONOMICS* 148-149 (1991)).

to use screens more effectively, it bears repeating that caution is warranted in light of the potential costs for the Division and the downsides of false positives.

The Antitrust Section thus supports the continued use of a variety of techniques to develop investigative leads for cartel enforcement, but cautions against techniques that would unnecessarily burden companies or drain scarce enforcement resources.

#### **IV. THE ANTITRUST SECTION APPLAUDS THE CHANGE IN THE PUBLIC CARVE-OUT POLICY ANNOUNCED BY ASSISTANT ATTORNEY GENERAL BILL BAER**

A company may, through a plea agreement with the Division, negotiate immunity for current and former employees. However, the Division may insist that certain employees be excluded, or “carved out,” from these agreements. Prior examples of such employees were (1) those who refused to cooperate with the Division’s investigation, (2) employees whom the Division was still investigating, and (3) employees who could not be found but were believed to have information that could be relevant to the investigation. Until recently, the Division’s corporate plea agreements, which are publicly filed in federal court, included the names of these carved-out employees.<sup>26</sup>

On April 12, 2013, Assistant Attorney General Bill Baer announced that the Division would be implementing two changes to its carve-out policy.<sup>27</sup> First, the Division will continue to carve out employees who it has reason to believe were involved in criminal wrongdoing and who are potential targets of the Division’s investigation. However, the Division will no longer carve out employees for reasons unrelated to culpability. Second, the Division will no longer include the names of carved-out employees in the plea agreements filed with the court. Instead, the

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<sup>26</sup> U.S. Dep’t of Justice, Press Release, Statement of Assistant Attorney General Bill Baer on Changes to Antitrust Division’s Carve-out Practice Regarding Corporate Plea Agreements, (Apr. 12, 2013), *available at* [http://www.justice.gov/atr/public/press\\_releases/2013/295747.htm](http://www.justice.gov/atr/public/press_releases/2013/295747.htm).

<sup>27</sup> *Id.*

names will appear in an appendix, which the Division will ask the court for leave to file under seal. The Division has now implemented this policy, and courts have granted the motions to file the carved-out names under seal.

The Antitrust Section strongly supports this change in the public carve-out policy, and agrees with the statement by Assistant Attorney General Bill Baer that “[a]bsent some significant justification, it is ordinarily not appropriate to publicly identify uncharged third-party wrongdoers.”<sup>28</sup>

## V. CONCLUSION

In sum, the Antitrust Section strongly supports the position that cartels are anticompetitive and harm consumers, and that the Division should continue its policy of prioritizing cartel detection, prosecution and deterrence. The Antitrust Section recognizes that cartel enforcement has remained consistent across administrations, and applauds the success of the Division’s Leniency Program, and the Division’s continued efforts to engage in outreach and cooperation with cartel enforcers around the world. The Government should closely monitor performance in this area to ensure that the Division is given adequate resources to maintain its leadership position in the fight against cartels. The Antitrust Section appreciates the opportunity to appear before the Subcommittee to discuss this important issue of U.S. antitrust law, and I look forward to your questions.

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<sup>28</sup> *Id.*