

“Cartel Prosecution: Stopping Price Fixers and Protecting Consumers”
Senator Klobuchar’s QFRs for Mark Rosman

You were formerly with the Antitrust Division both in Washington and in the now-closed Dallas Field Office. How does the closure of field offices impact the mission to fight international, domestic and local level cartels? Can local and domestic cartels be adequately discovered and pursued by the Washington office or remaining three field offices in San Francisco, New York and Chicago?

Thank you for the opportunity to testify in front of you and the subcommittee, Chairman Klobuchar, and for the opportunity to respond to these questions. As a former Trial Attorney in the Antitrust Division’s Dallas Field Office, as well as Assistant Chief of the National Criminal Enforcement Section, I have direct experience prosecuting local and domestic cartels as well as cartels that are international in scope, and I am uniquely positioned to respond to these questions.

I. While the Division’s Ability to Fight International Cartels Remains Intact, Its Ability to Fight Local and Regional Cartels is Weakened by the Field Office Closures

As I noted during my testimony, recent Antitrust Division (“Division”) enforcement has focused in particular on large-scale, international cartels. The Division’s recent efforts in the financial services (e.g., London Interbank Offered Rate (“LIBOR”) investigation) and automotive parts (e.g., automotive parts (“auto parts”) investigation) industries are examples of the Division’s recent large-scale, international cartel investigations. These investigations have all taken place against the backdrop of the Division’s closure of four (Dallas, Atlanta, Cleveland, and Philadelphia) out of seven of its regional field offices, which were primarily focused on criminal antitrust enforcement.

a. The Local and Regional Investigation vs. The Blockbuster (International) Investigation

There is many times a clear distinction between the local or regional domestic cartel investigation and the “blockbuster” cartel investigation, such as the multi-country and multi-product auto-parts investigation. The local or regional cartel typically has only one product or service at issue and, of course, is confined to a region or locality within the United States. With respect to these investigations, the Division’s prosecutors typically only deal with FBI agents and Inspector Generals’ offices, among other United States-based law enforcement officials. For example, the Division’s San Francisco Field Office has been very successful in prosecuting thirty-eight individuals in its ongoing investigation of bid rigging at public real estate foreclosure auctions in Northern California.¹ While the Division may highlight this investigation as a prime example of its continued domestic focus, this type of investigation would have been considered quite ordinary by earlier standards when domestic cases were more of the focus.

The international, or blockbuster, cartel is often times more complex and significantly more resource intensive than the local or regional cartel investigation. The international cartel being prosecuted today often involves multiple companies, multiple countries, and multiple products (potentially), and the cartel is being investigated by multiple jurisdictions.² In addition to the procedural complexities inherent in these multi-faceted investigations, there are fact development challenges in investigating conduct and companies outside the United States (such as document collection and witness interviewing issues). Further, there are legal challenges that

¹ See DOJ Press Release, Northern California Real Estate Investor Agrees to Plead Guilty to Bid Rigging at Public Foreclosure Auctions (Nov. 7, 2013), available at http://www.justice.gov/atr/public/press_releases/2013/301569.htm.

² In DOJ’s recent deferred prosecution agreement with Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A. (“Rabobank”), entered into on October 29, 2013, DOJ worked with numerous agencies. Rabobank agreed to pay over \$1 billion in criminal and regulatory penalties – stemming from investigations by the DOJ, United States Commodities and Futures Trading Commission (“CFTC”), United Kingdom Financial Conduct Authority (“FCA”), and the Dutch Public Prosecution Service. The DOJ also cooperated with the Securities and Exchange Commission and United Kingdom’s Serious Fraud Office See Press Release, Dep’t of Justice, Rabobank Admits Wrongdoing in Libor Investigation, Agrees to Pay \$325 Million Criminal Penalty (Oct. 29, 2013), available at http://www.justice.gov/atr/public/press_releases/2013/301368.htm.

may not arise in a smaller, more straightforward domestic cartel (such as extra-territorial reach of the Sherman Act or the privacy laws of other countries.)

b. The Division's Recent Focus Is on the "Blockbuster" Cartel (at the Expense of the Local or Regional Cartel)

It is clear that the Division's recent efforts have focused on prosecuting large, multi-national, multi-party cartels. Indeed, this focus is one of the reasons for the regional field office closures. As Attorney General Holder stated regarding the closures: "We have seen that these . . . antitrust cases become more complex, more complicated, and it is our view that they can best be handled by the reduced number of offices that we have with larger teams."³ This statement recognizes the shift that has taken place at the Division with respect to its investigational focus.

As I noted in my testimony, I agree with the Attorney General that some consolidation may have been warranted, but the wholesale closure of four regional offices may prove to be too aggressive of a step. In other words, the decision to close the field offices is akin to using machete when a scalpel was more appropriate. The closure of the field offices may not have impacted the Division's ability to prosecute international cartels significantly (although it may have strengthened it in some respects and weakened it in others, as noted below), it certainly *weakened* the Division's ability to prosecute local and regional cartels.

i. *The Regional Field Offices Played an Important Role*

Before identifying how the closures may have weakened prosecution efforts, it is important to note how the regional field offices benefitted the Division. Perhaps the most significant benefit is that the offices handled very important smaller, regional and local, criminal cartel cases. Indeed, the field offices were central hubs for detecting and prosecuting local cases

³ *Oversight of The U.S. Department Of Justice: Hearing Before the Senate Comm. on the Judiciary*, 112 Cong. 13 (2012) (testimony of Eric Holder, Attorney General of the United States), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112shrg81674/pdf/CHRG-112shrg81674.pdf>.

in their region. As such, they created efficiencies in presenting facts before a grand jury and trying cases in jurisdictions in which the field offices resided.

The Division's recent real estate public foreclosure auction investigation in Northern California, as mentioned above, provides a good example. While smaller, these types of cases arguably may have a more direct impact on consumers, such as bid-rigging involving public construction contracts, and also arguably a more direct deterrent effect. At the same time, these regional offices also assisted in the larger national, and international, investigations when Division resources were tight.

ii. *The Impact on Enforcement at All Levels (Local, National, and International) Will Be Significant*

The closings will have a significant effect on enforcement on all types of cartel prosecutions (local/regional, national, and international). First, the closures further constrain resources that could be *currently* prosecuting or detecting cartels at the local or regional level, particularly in the localities and regions around Dallas, Atlanta, Cleveland, and Philadelphia. Second, the closures strip the Division of the efficiencies from having local, experienced prosecutors handle cases in their respective region. Third, the closures strip the Division of resources that were once focused and had experience in detecting cartels. Unlike local/regional cartels, international cartels also often stem from leniency applications; indeed, it has been reported that over 90% of fines imposed from the mid-1990s to early-2010 resulted from investigations involving leniency applicants. This promotes a passive (wait-and-see) approach to detection, which just further leaves DOJ vulnerable to domestic cartels going unnoticed.

Finally, and perhaps most significantly, the closures confirm the Division's focus on international cartel enforcement. This only exacerbates the challenges of slimming down the resources at the Antitrust Division, i.e., the focus on international calls for more resources (like

those that were once available in these offices), not the elimination of them. The focus (or the blatant shift in focus) also may cause companies operating on the local/regional and national level to be less focused on compliance (perhaps not intentionally).

II. For Local and Regional Cartels to be Adequately Discovered and Pursued by the Washington Office or Remaining Field Offices, Significant Efforts Must be Made Outside the Leniency Program

As the above comments indicate, the Division is currently facing an uphill battle with respect to discovering local and regional cartels. Although I do not question the intent of the Division to investigate and prosecute domestic cases, myself and many others do have doubts about the ability to do so given resource constraints and the office closures. And while the Division netted \$1.14 billion in fines in 2012, i.e., “the highest ever obtained by the Division in a single year,” most of these fines come from only two industries, auto parts and financial services.⁴ Thus, the DOJ may be (inadvertently) giving potential cartels, particularly local and regional cartels, in many other industries a free pass.

Despite the amnesty program’s overwhelming success, the DOJ should work diligently to detect cartels in other ways, as it did before the amnesty program arose. For example, the DOJ used to employ screens and conduct significant public outreach to identify cases.⁵ Before the amnesty program arose, the field offices were particularly successful with respect to detecting local and regional cartels. It is possible with expanded resources that the remaining Washington office and the remaining field offices could adequately pursue these types of cases; however, it would require more time on the road working with local law enforcement and perhaps even

⁴ See U.S. Dep’t of Justice, Antitrust Div., Division Update Spring 2013, *available at* <http://www.justice.gov/atr/public/division-update/2013/criminal-program.html>.

⁵ See Daniel Sokol and Rosa Abrantes recently wrote an interesting paper on this subject. Rosa M. Abrantes-Metz & D. Daniel Sokol, *The Lessons from LIBOR for Detection and Deterrence of Cartel Wrongdoing*, 3 HARV. BUS. L. REV. 10 (2012), *available at* <http://www.hblr.org/2012/10/the-lessons-from-libor-for-detection-and-deterrence-of-cartel-wrongdoing/>.

specifically dedicated resources, such as a domestic enforcement squad or sub-group within a Section.

The Division's prosecutors (some of the best in the world in my opinion) are very adept at using practices other than the amnesty program to discover cartels, but the Division needs to retain and develop the resources in order to do so.