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JUSTICE NEWS

Assistant Attorney General Jonathan Kanter Delivers Opening Remarks at 2022 Spring Enforcers Summit

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I am thrilled to participate in the first-annual spring gathering of antitrust enforcers. It is a privilege to be among this incredibly esteemed, talented and dedicated group of speakers and attendees. Admittedly, I was excited – maybe too excited – to learn that people are calling this “Antitrust Day.” May today be the first of many. And maybe next year, this occasion will be reflected in the greeting card aisle.

I look forward to learning from each other so that we can be more effective advocates on behalf of the public at this critical moment in the history of antitrust enforcement. I am confident it will be an engaging program.

I would like to open by highlighting some changes we have made at the Antitrust division, and announcing some new ones. As I have discussed before, the Division has a preference for remedies over settlements. Over the last few months, the division has taken important steps to reject risky settlements and challenge illegal mergers in court. In fact, we have sued to block or obtained abandonments in four merger matters in as many months. Just last week, we rejected a settlement proposal from Cargotec and Konecranes, which abandoned their proposed \$5 billion transaction in the face of opposition from the Antitrust Division and the UK’s CMA.

Bourgeoning scholarship demonstrates that flimsy settlements often fail. For example, at the Food and Agriculture listening session that we held last week with the FTC, we heard concerns from a milk producer about a 2017 dairy industry merger that failed to preserve competition. Stories like this reaffirm our policy view that the public cannot bear the risk of a divestiture that flops.

In order to protect the public, the division must be able to go to court to block a deal. We will bring tough cases — cases where charging is consistent with the facts and the law, and in criminal cases with the Principles of Federal Prosecution. We have six active civil cases, including the monopolization case against Google and merger challenges against American Airlines, Penguin-Random House, United Health Group, U.S. Sugar, and Verzatec. In the criminal program, we have 21 indicted cases against 42 individuals, including 9 CEOs and corporate presidents under indictment. We ended FY 2021 with 146 pending grand jury investigations, which is the most in 30 years. We will aggressively pursue enforcement of the criminal antitrust laws to protect consumers, workers and businesses harmed by unlawful collusion and monopolization.

We are more committed than ever to litigating when we believe a violation has taken place. I have designated two acting DAAGs to oversee our litigation docket: Carol Sipperly and Hetal Doshi. It’s the first time I’m aware of that the Antitrust Division has had not one but two litigation deputies—a reflection of our intense focus on trying cases. Both Carol and Hetal are longtime department prosecutors with a wealth of experience, including supporting Antitrust Division trials.

Carol has first chaired and co-led over 30 jury trials. Her career with the Justice Department began as an Assistant U.S. Attorney in the Southern District of New York, where she investigated and prosecuted cases involving organized crime as well as complex white-collar violations, including cases against John Gotti Jr. and Darryl Strawberry. She is also a veteran of the Division’s LIBOR cases. For the last two years, Carol has championed vigorous antitrust enforcement leading the Division’s criminal litigation program as Senior Litigation Counsel and (Acting) Co-Director of Criminal Litigation. In this role, she supervised and supported trial teams in *U.S. v. Penn*, *U.S. v. Aiyer*, and *U.S. v. Lischewski*.

Hetal is a highly accomplished trial attorney who has experience both in private practice and in the U.S. Attorney's office in Denver. Hetal supervised civil and criminal trial teams and trained and mentored AUSAs. She served on the Financial Fraud Enforcement Task Force and led investigations of global international banks for their conduct in causing the 2008 global financial crisis, resulting in historic, multi-billion-dollar penalties. She also established a cryptocurrency fraud investigations and prosecution practice. Hetal has supported Antitrust prosecution trial teams in Denver and through the Procurement Collusion Strike Force.

Of course, the division has also had talented litigation directors and veteran trial lawyers on staff whose insights and experience support our civil and criminal trial teams. Their expertise will be deployed to help train junior litigators, supervise trial teams, provide support for special matters like motions to compel or help litigate especially complex matters and unique issues. We are in the process of hiring additional trial lawyers from outside the department to grow our bench and complement our internal talent.

Our goal is simple: we must be prepared to try cases to a verdict when we think a violation has taken place. And that means that our capacity for litigation must grow with the demands of modern antitrust enforcement. In other words, the division must have the scale to litigate multiples of our current docket. To do so, we are institutionalizing shared resources to support trial teams, recognizing the complexity of modern litigation. At bottom, we will work toward a steady state where the division is not constrained by the costs of litigation. Accordingly, the President's FY 2023 budget request for the division incorporates an increase of over \$80 million. We intend to put the money to good use.

This is especially true because the investment in antitrust enforcement pays enormous dividends. In addition to the massive benefits to the economy from competition, the fines that result from our criminal enforcement more than surpass our annual expenditures. Over the most recent ten fiscal years, the Antitrust Division is responsible for depositing more than \$8.7 billion in criminal antitrust fines and penalties to the Crime Victims Fund – 42% of the \$20.8 billion deposited overall. The division is also responsible for nearly \$2 billion in additional contributions to the general treasury fund over that time period.

I want to say clearly that we are committed to litigating cases using the whole legislative toolbox that Congress has given us to promote competition. One tool that I think we can use more is Section 8 of the Clayton Act. Section 8 helps prevent collusion before it can occur by imposing a bright-line rule against interlocking directorates.

For too long, our Section 8 enforcement has essentially been limited to our merger review process. We are ramping up efforts to identify violations across the broader economy, and we will not hesitate to bring Section 8 cases to break up interlocking directorates.

We are also acting in real time to intervene wherever needed to protect competition, including filing statements of interest in state and federal courts and before federal agencies.

On criminal enforcement, I am excited to announce that as of today, the division is making important updates to its leniency program. Leniency is one of the division's most important enforcement tools for rooting out cartels because it incentivizes corporations involved in wrongdoing to do the right thing by self-reporting.

While these core incentives have not changed, the updates to the leniency policy will further promote accountability. First, under the revised leniency policy, to qualify for leniency, a company must promptly self-report after discovering its wrongful conduct. A company that discovers it committed a crime and then sits on its hands hoping it goes unnoticed does not deserve leniency.

Second, to qualify for leniency, a company must now undertake remedial measures to redress the harm it caused and improve its compliance program.

Just as important as the changes to the policy is the division's commitment to making that policy transparent, predictable, and accessible to the public. As of today, the division's leniency policy lives in the antitrust chapter of the Justice Manual, which is easy to find on the DOJ website and is the definitive go-to source for internal policy and guidance across the department.

Today we are also issuing an updated version of the Frequently Asked Questions about our leniency policy. Front and center in our minds when updating that document was the need to simplify and demystify our practices. The FAQs are written in plain language. And we have added nearly 50 FAQs to ensure they address all the recurring questions we've received — and then some. This document will make it even easier for the public to learn about leniency and understand what benefits it provides and what the division requires in return.

When I say the public, I want to emphasize that we are focused on making our policies intelligible to all: outside counsel, in-house counsel, and businesspeople in all sectors of the economy and at all levels of sophistication. There are no unwritten rules to enforcement at the Antitrust Division. We make our enforcement decisions based on transparent and predictable criteria.

And we need to change the language of antitrust more broadly to make laws more accessible to the public that they protect. By facilitating equal access to justice and making our processes transparent, we guarantee just outcomes for all. When it comes to leniency, the easier we make it for the public to understand the program, the more applications we receive, and the stronger the program's incentive structure is — which ultimately improves our enforcement capabilities.

As I said earlier, the division is considering all of the tools at our disposal. That's true across the board, when it comes to both civil and criminal enforcement. We take our mandate to enforce the antitrust laws seriously — especially when it comes to making sure we are deterring, detecting, and where warranted prosecuting the most flagrant, pernicious offenses.

Robust antitrust enforcement is particularly critical right now. As we've seen time and time again, collusion thrives in consolidated industries. And when Congress passed the Sherman Act in 1890, it made Section 2 a crime as it did with Section 1. Since the 1970s, Section 2 has been a felony, just like Section 1. In 2004, Congress increased Section 2's criminal penalties in lockstep with the increased penalties for Section 1 crimes. So if the facts and the law, and a careful analysis of Department policies guiding our use of prosecutorial discretion, warrant a criminal Section 2 charge, the Division will not hesitate to enforce the law.

Another area where I am determined to improve is in the language of antitrust — we have launched an Access to Antitrust Justice Initiative, which we are calling AT2J, to change the language of antitrust law to make enforcement more accessible and responsive. Antitrust should be accessible to all citizens, consumers, workers, and small businesses — not just large corporations that can afford expensive counsel. This will impact the language in our public statements and investigations, the participants in our public fora. We are already seeing this play out in our review of the merger guidelines alongside our colleagues at the FTC. We are following a rigorous, inclusive process in reviewing the merger guidelines, providing transparency throughout, and seeking input from a wide array of stakeholders in merger policy, not just attorneys and economists, but also business owners, workers, farmers, and consumers who have been impacted by corporate consolidation. We submitted a public Request for Information posing several questions regarding merger analysis, and have already received over 275 comments, far outpacing the 51 comments received in the first round of the 2010 Guidelines review. Last week we partnered with the FTC to hold the first of four Listening Forums to hear directly from those affected by consolidation. And, of course, we are here today with our international and state counterparts to hear and learn from your experiences.

Indeed, this summit, which is being live streamed for free to enhance access and share our policies and direction with the public at large, is also a celebration of cooperation and collaboration as well as a reminder that partnerships among competition enforcers are transformative. At a case level, cooperation enables us to cover more ground at a deeper level. Exchanges between teams sharpen our analysis and refine our thinking, and can give us access to evidence and information to which we would not otherwise have access. At a macro level, our partnerships are a force multiplier. Individually, each of us has our own "superpower;" and is a force for good, but when we act together, we are the Avengers. And the world today, the global economy around us, needs powerful voices ensuring competitive markets and fair competition. When we work together, that is the competition enforcement community.

One of the challenges I have given to my team is to make collaboration among DOJ's competition partners even better. On the international side, we are taking a close look at tools like second generation agreements in the

international space and continue to work with our partners bilaterally, inside multilateral organizations, and in a variety of dialogues. We also are expanding our programs to provide technical assistance and litigation resources to partners in order to help them meet the competition challenges of the modern economy.

On the domestic front, we are focused on implementing the Executive Order on Promoting Competition in the American Economy. We launched a new initiative to support antitrust enforcement throughout the U.S. government, including through new partnerships with the USDA and Federal Maritime Commission to provide litigation support for their statutory competition authorities. We also have greatly expanded partnerships in support of competition with numerous other agencies, including DOL, DOD, DOT and the CFPB. We are training interagency partners throughout the federal government on the antitrust laws. As federal infrastructure spending increases, we also are continuing our efforts to seek out and prosecute procurement collusion through the Procurement Collusion Strike Force.

My first step to getting all this done has been to make sure the people are in place to build and support our partnerships. For this, I have looked to a strong career staff with a few additions. I created the position of Policy Director to oversee the division's policy development work in a cross-functional way, including overseeing its International, Competition Policy, and Appellate sections. Career attorney Dave Lawrence has ably stepped into the post. Patty Brink took on the role of senior counsel for International and Intergovernmental Affairs. Lynda Marshall continues on as our International Chief and Karina Lubell is now chief of our policy group. Both lead strong staff teams. And Sarah Allen has joined us as a counsel in the Front Office to focus on our collaboration with state attorneys general, which is vital to effective enforcement. I have asked all of them to do a deep dive on our resources and present a long-term plan for growing in our partnerships. We are working through projections of where we want to be not just tomorrow, but in three years and beyond.

These are exciting times for the antitrust and competition law enforcement community. Thank you for joining this summit and happy Antitrust Day. I look forward to today's discussions.

Speaker:
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Component(s):
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