STATEMENT OF MARK ROSMAN

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

THURSDAY, NOVEMBER 14, 2013

Good afternoon Chairman Klobuchar, Senator Lee, and members of the Subcommittee. My name is Mark Rosman, and I am a partner at Wilson Sonsini Goodrich & Rosati P.C. here in Washington, D.C. Before joining Wilson Sonsini Goodrich & Rosati, I was a trial attorney and prosecutor with the Antitrust Division of the U.S. Department of Justice ("Division" or "DOJ") for two decades and served in both a field office and the headquarters. In that time I had was responsible for investigating and trying various cartels, including at the regional, national, and international level. My last position with the Division was as the Assistant Chief of the National Criminal Enforcement Section ("NCES"). It was my distinct honor and privilege to work for the Division and it is an honor and privilege to be here testifying with you today.

The Division's criminal cartel enforcement program is one of the more successful government enforcement programs in the world. It consistently nets record fines, detects and prosecutes cartels presenting extremely complex facts, and navigates through some of the most difficult procedural challenges. And, in my opinion, its prosecutors are some of the finest anywhere. Yet, as with any institution, there are opportunities for improvement. My remarks today, while not critical of the Division, are meant to suggest areas for improving antitrust cartel enforcement in the United States.

These four areas of improvement are: (I) refocusing enforcement efforts to detect and prosecute domestic (regional and national) cartels, i.e., avoid tunnel-vision on the "blockbuster" international cartels; (II) reconsidering the application of certain sentencing guidelines, particularly with respect to the Division's use (or non-use) of the "mitigation role adjustment"; (III) reconsidering the use of a "bump" within the Guidelines Fine Range to account for (arguably) indirect commerce; and, finally, (IV) rethinking the ratcheting of fines and jail sentences as a means of deterrence. My testimony today will cover each of these four areas in turn.

I. Enforcement Focus: Should DOJ Rebalance Its Focus on "Blockbuster" Cartels?

A. Overview of Recent Focus in Criminal Enforcement at DOJ

Recent Antitrust Division enforcement has been national, and international, in scope. The Division's efforts have included large, multi-national, cartel enforcement investigations relating to municipal bonds ("muni-bonds"), liquid crystal display ("LCD") panels, coastal freight, automotive parts ("auto parts"), airline cargo ("air cargo"), and the London Interbank Offer Rate ("LIBOR"), among other products and services. These investigations have all taken place against the backdrop of the Division's closure of four out of seven of its regional field offices, which were primarily focused on criminal antitrust enforcement.

The Division's field offices in Cleveland, Dallas, Atlanta, and Philadelphia officially closed earlier this year, while the three remaining regional offices in Chicago, New York, and San Francisco have remained open for business. Many believe this measure officially ushered in a new era – with the primary focus being on large scale cartel investigations – at the Division. 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."[1] This statement recognizes the shift that has taken place at the Division.

While I agree with the Attorney General that some consolidation may have been warranted, the wholesale closure of four regional offices may prove to be too aggressive of a step. The field offices played beneficial roles. The offices not only played a part in large national and international investigations, they also handled important smaller, regional and local, criminal cartel cases. They further 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 investigations provide a good example.

Despite the benefits of the four field offices, DOJ decided to close them in an attempt to focus on prosecuting large, multi-national, multi-party cartels. For instance, the recent investigations in auto parts, muni-bonds, LIBOR, air cargo, and LCDs were all international in scope. The majority of the criminal fines now come from investigations that are international in scope, and this trend does not appear to be slowing anytime soon. But while lucrative, DOJ's overwhelming focus on the international cartel presents a number of unique challenges.

B. Challenge 1: Pursuing Domestic Cartels

In the last year the DOJ prosecuted only two U.S. companies for their roles in antitrust cartels, focusing instead on non-U.S. companies involved in international cartels, particularly those in the auto parts and LIBOR investigations. (Indeed, some may say that the DOJ has focused an inordinate amount of time/resources prosecuting Japanese companies and executives for their roles in the auto part conspiracies.) 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,"[2] most of these fines come from only two industries, auto parts and financial services. The DOJ may be (inadvertently) giving potential cartels in countless other industries a free pass.

The closing of four regional offices contributes to this, as these offices had responsibility for detecting and prosecuting regional or local cases. While smaller, these types of cases arguably may have a more direct impact on consumers, such as bid-rigging involving public construction contracts. The closing further has the effect (perhaps obviously) of constraining resources that could be detecting cartels in other industries. But the problems of closing these offices are only compounded by the shift in focus to international cartels. These international cartels are more complex, requiring additional resources to prosecute and thus further draining an already depleted supply of prosecutors. 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

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1 *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).

2 *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.

leniency applicants.[3] This creates a passive (wait-and-see) approach to detection, which just further leaves DOJ vulnerable to domestic cartels going unnoticed. 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.[4]

C. Challenge 2: Avoiding Slippage

As Attorney General Holder noted, international cartel enforcement is complex. 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.[5] For example, the auto-parts investigation has involved a range of parts, including "safety systems such as seatbelts, airbags, steering wheels, and antilock brake systems and critical parts such as instrument panel clusters and wire harnesses."[6] Indeed, DOJ recently announced the plea agreements of nine Japan-based companies and two executives in the auto parts investigation, which involved "conspiracies to fix the prices of more than 30 different products sold."[7]

The complexities of international cartel prosecution are numerous and varied. In addition to procedural issues of dealing with multiple authorities, there are fact development issues of dealing with companies outside the United States, and there are legal challenges that 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.) The result is that some prosecutions may slip. The complexities may drain too many resources, create too many litigation risks, or prove too burdensome to gather the evidence; thus leaving prosecutors no choice but to take a pass (or worse

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3 Scott 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 as Prepared for the 24th Annual National Institute on White Collar Crime (Fed. 25, 2010), *available at* http://www.justice.gov/atr/public/speeches/255515.htm

4 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).

5 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.

6 *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.

7 *See* Press Release, Dep't of Justice, Nine Automobile Parts Manufacturers and Two Executives Agree to Plead Guilty to Fixing Prices on Automobile Parts Sold to U.S. Car Manufacturers and Installed in U.S. Cars (Sept. 3, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/300969.htm.

miss something completely). This raises serious questions of fairness for companies and executives that agree to plead guilty and cooperate earlier in an investigation.

D. Challenge 3: Maintaining Transparency

A third challenge for the DOJ is maintaining its hallmark level of transparency as to its practices and policies. The DOJ has always prided itself in, and indeed much of its success is attributable to, its transparency. However, recent uses of non-prosecuting agreements (NPAs) and deferred prosecuting agreements (DPAs) in financial services industry have created questions about when and under what circumstances companies will be entitled to such resolutions.[8] The DOJ has provided some clarity as to the standard for using these means of resolution, stating that it used NPAs/DPAs primarily to avoid disproportionate collateral consequences.[9] But it is still not entirely clear how that standard has been applied or will be applied in future investigations.

II. "What Goes Up, Doesn't Come Down": Should DOJ Employ the "Mitigating Role Adjustment" of the Sentencing Guidelines to Prosecute Individuals?[10]

Another consequence of focusing on large, international cartels is that there tends to be more individuals to prosecute. This may be considered a positive consequence by some measure, but it nonetheless tests DOJ's prosecution skills and resources. This is partly because individuals in these larger, international cartels tend to have varied roles in the conduct and varied degrees of involvement. It is not a "one-size-fits-all" type of prosecution. As a result, the DOJ may be challenged more at trial, particularly by those who had a less significant (or relatively minor) role in the conduct. In fact, this is what several executives of AU Optronics recently decided, and juries acquitted these defendants. One could question whether DOJ has been overly aggressive in this regard, and it may therefore be an appropriate time to consider what other enforcement tools may be available to DOJ for convincing individuals "farther removed" from the conspiracy to enter into plea agreements, rather than go to trial. (Indeed, it requires the same amount of resources (if not more) to prosecute an individual who played a minor role than an individual who played a major role.)

One such tool may be in the United States Sentencing Guidelines ("Guidelines"): the "Aggravating and Mitigating Role Adjustments" of the Guidelines.[11] The "role adjustments" are

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[8] For example, in the muni-bonds investigation, the Division entered into NPAs with several companies—including UBS A.G., JPMorgan Chase & Co., Wachovia Bank N.A., and GE Funding Capital Markets Services Inc. *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.

[9] Scott Hammond's comments at the 2012 International Cartel Workshop and John Terzaken's comments at this year's International Bar Association's annual conference highlight this point. *See* Panel Discussion at The International Cartel Workshop in Vancouver, *The GCR Cartel Roundtable*, Global Competition Rev. (Feb. 2012); Ron Knox, *Ex-official sees slight policy shifts in US criminal enforcement*, Global Competition Rev. (Oct. 9, 2013).

[10] I co-authored a more detailed article on this topic with my colleague, Jeff VanHooreweghe, in August 2012. "What Goes Up, Doesn't Come Down: The Absence of the Mitigating-Role Adjustment in Antitrust Sentencing," THE ANTITRUST SOURCE, August 2012, available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug12_rosman_7_31f.authcheckdam.pdf.

intended to "serve the guideline's objective of ensuring that sentences appropriately reflect the defendant's culpability and specific offense conduct."[12] The "role" adjustments do this by increasing or decreasing the Guidelines' "Base Offense Level" based on the size and scope of the crime and the defendant's particular role in committing it; the "aggravating role" increases the Base Offense Level; conversely, the "mitigating role" adjustment decreases it. The Base Offense Level is then used to calculate a recommended sentencing range (i.e., jail sentence range) for the individual defendant.

Notably, the DOJ has routinely sought to increase an individual defendant's jail sentence based on the individual's role in the conspiracy by using the "aggravating role" adjustment, yet it has never used the "mitigating role" adjustment to decrease an individual defendant's jail sentence. A recent review of DOJ prosecutions revealed that the "aggravating role" provision has increased the Guidelines' sentencing range by as much as 80 percent for some individuals. The review also revealed that the DOJ has likely been presented with opportunities to use the "mitigating role" adjustment when an individual played a relatively lesser role in the conduct, but has chosen not to.

There are several reasons why the DOJ may consider using the "mitigating role" adjustment. First, it is the law. While courts recognize that it is not mandatory to sentence an individual defendant per the Guidelines' recommended sentence, courts must still consider the Guidelines when determining the sentence and, in doing so, all provisions of the Guidelines should be applied.[13] Second, applying both "role" provisions may help eliminate sentence disparities. Under current practice, the recommended sentencing ranges go up, but cannot go down for an individual's role. When considering the various roles defendants' can (and do) play in complex antitrust cartel cases, this one-sided approach can lead to equal treatment for unequal conduct.

Third, and perhaps most importantly for this hearing, using the "mitigating role" adjustment is good enforcement policy. The DOJ (in my view) handicaps itself by ignoring the "mitigating role" adjustment. The DOJ has had less success prosecuting individuals considered "farther removed" from the conduct, i.e., those playing a lesser role.[14] If the DOJ employed the "mitigating role" adjustment it would have an additional tool for persuading such individuals to plead guilty instead of

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[11] U.S. Sentencing Guidelines Manual §§ 3B1.1, 3B1.2.

[12] Office of the General Counsel, U.S. Sentencing Commission, Aggravating and Mitigating Role Adjustments Primer §§ 3B1.1, 3B1.2, March 2013, at 1.

[13] U.S. SENTENCING GUIDELINES MANUAL §§ 1B1.11(b)(2) ("The Guidelines Manual in effect on a particular date shall be applied in its entirety.") and 1B1.1(a) (providing the order in which a court must apply the Guidelines); *United States v. Stephenson*, 921 F.2d 438 (2d Cir. 1990) (explaining that prosecutors must apply the Guidelines as a "cohesive and integrated whole," not piecemeal.).

[14] For instance, while the Division was successful in prosecuting more senior-level AU Optronics executives, it failed to convict three lower-level employees of the company. Former Deputy Assistant Attorney General Scott Hammond also acknowledged that prosecuting "farther removed" executives becomes more difficult, noting: "As you try to hold more individuals accountable, you [bring] cases against people farther removed. . . . The tougher cases go to trial." Leah Nylen, *Antitrust Complexities Provide Hurdle to Trials*, MLEX, Dec. 28, 2011 (quoting Scott Hammond).

fighting the allegations. This is not to say that the DOJ should employ the "mitigating role" adjustment to prosecute more individuals than it already prosecutes; instead, it could be used as a tool for prosecuting those it has already targeted.

III. "Dump the Bump": Should DOJ Apply the Sentencing Guidelines To Conduct (Arguably) Outside The Reach of the Sherman Act?

A third area of improvement that the DOJ may consider is its application of a "bump" in calculating the Guidelines' recommended fine range for corporations when the conduct (arguably) affected U.S. commerce indirectly. As suggested above in Section I, the DOJ's focus on international cartels invites a host of factual and legal challenges to prosecution. One of these challenges is determining whether conduct that occurred outside the United States somehow affected commerce in the United States.[15] When a company enters into a plea agreement with DOJ, the DOJ has often resolved this challenge by calculating a Guidelines' fine range based on affected sales in the United States (or clearly affecting U.S. commerce directly) and then "bumping" up the fine within that range to account for affected sales outside the United States if (arguably) there is some connection to the United States.

This was the case for at least several companies entering into pleas in the recent air cargo and auto parts investigations. In air cargo, for example, the DOJ investigated whether airlines fixed certain surcharges and base rates for shipping cargo in to and out of the United States. One of the prosecuting challenges was whether the coordination on inbound shipments had the requisite "direct, substantial, and reasonably foreseeable" effect on domestic or import commerce. The DOJ took the position (consistently) that the conduct did have the requisite effect on shipments in both directions, but recognized that it was arguable with respect to shipments in to the United States (inbound). The DOJ therefore decided in its sentencing recommendation (for companies that entered plea agreements) that it would use revenues for shipments out of the United States as the basis for the calculation, but it would "bump" the fine range up by a certain percentage to account for the effect on shipments in to the United States. While not identifying the "bump" explicitly, the DOJ would rationalize the imposition of the increased fine in its plea agreements by stating:

> "The volume of affected commerce calculation in paragraph 8(b) above does not include commerce related to defendants' cargo shipments on trans-Atlantic routes into the United States. The defendants take the position that any agreements reached with competitors with respect to cargo shipments on routes into the United States should not be included in the defendants' volume of affected commerce calculation pursuant to U.S.S.G. §2R1.1(d)(1). The United States disputes the defendants' position and contends that the defendants' cargo shipments on routes into the United States during the charged conspiracy period violated the U.S. antitrust laws. Moreover, the United States asserts that a

[15] The question of the Sherman Act's extraterritorial reach is certainly one that has attracted considerable (and necessary) discussion; and I do not attempt to participate at length here today. For our purposes, it is enough to remember that the Sherman Act applies only to conduct that, *inter alia*, had a "direct" effect on domestic or U.S.-import commerce. Sherman Act, 15 U.S.C. § 6a (2006).

> Guidelines fine calculation that fails to account for cargo shipments into the United States would understate the seriousness of, and the harm caused to U.S. victims by, the offense and would not provide just punishment. . . . The parties recognize the complexity of litigating the issues set forth in [this paragraph] and the resulting burden on judicial and party resources, and agree that the appropriate resolution of this issue is to impose a fine in the lower end of the Guidelines sentencing range . . . ."[16]

The DOJ continues to use the approach applied in air cargo; it has been applied in several other enforcement actions, including in the ongoing auto parts investigation. For example, DOJ took this approach in the plea agreement with one of the early pleas in the auto parts case, Furukawa Electric Company, Inc., (wire harnesses). At the plea hearing, DOJ explained that it considered three categories of commerce: (1) wire harnesses and related products that are manufactured in the U.S., sold to automakers in the U.S. who are installing these parts into their cars, (2) wire harnesses and related products that were manufactured abroad, that were then sold into the U.S. and installed in cars in the U.S, and (3) wire harnesses and related products that are manufactured abroad, sold to automakers abroad, installed in cars abroad that are ultimately destined for the U.S. and U.S. consumers. In calculating the Guidelines' fine range the DOJ started with the revenues derived from categories (1) and (2), but ultimately "bumped" up the recommended fine within that range by accounting for the revenues derived from category (3). The DOJ stated at the plea hearing:

> "Although we could have included this [category (3)] commerce arguably, we did not include it in our overall volume of commerce analysis or our calculation overall. . . . Essentially what we did is we took the categories one and two and we started the defendant at the bottom of the guidelines range. We then adjusted upwards within the range because we felt that the guidelines fine was understating the seriousness of the offense because of this third category of commerce that we were not including."[17]

As the Subcommittee may know, the air cargo and auto parts investigations have netted some of the largest fines in the history of antitrust enforcement. These record fines are due, in part, to this "bump."

While the "bump" may be effective at netting significant fines, it is not necessarily right. Some may even argue that the application is unprincipled. Whether or not that is true, applying the "bump" raises at least a few significant issues that may require further consideration. First, is applying the "bump" consistent with the United States Sentencing Guidelines? Nowhere in the Guidelines is there a provision for the "bump." Further, nowhere in the Guidelines is it contemplated that the fine range should account for potential or debatable violations of law. Rather,

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[16] Plea Agreement, *United States v. Société Air France*, et al, 1:08-cr-00181, at ¶¶ 8(c), 8(d) (D.D.C.) (filed July 22, 2008), *available at* http://www.justice.gov/atr/cases/f235500/235548.htm.

[17] Transcript of Plea & Sentencing Hearing, United States v. Furukawa Electric Co., 2:11-cr-20612, at 18-21 (E.D. Mich.) (November 14, 2011).

the Guidelines advise that the fine calculation should be based on the "volume of commerce attributable to an individual participant in a conspiracy," which is considered the revenues "done by him or his principal in goods or service that were affected by the violation." U.S.S.G. §2R1.1. The Guidelines presume, therefore, that the relevant conduct indeed violated the law, not potentially or arguably violated the law. The Guidelines later allow for some discretion in determining the recommended sentence (*e.g.*, indeed the Guidelines provide a fine range), and indeed allow a court to consider "the seriousness of the offense" in making the determination. U.S.S.G. §2B1.1, Application Note 20. But again, the Guidelines contemplate that an offense occurred (not arguably occurred).

Second, but related, is the DOJ over-reaching its authority by applying the bump? Asked differently, should the DOJ prosecute conduct that falls outside the extra-territorial reach of the Sherman Act (at least arguably, as the DOJ recognizes)? If the conduct does not have the requisite "direct, substantial, and reasonably foreseeable effect" on U.S. commerce, the FTAIA instructs that the Sherman Act "shall not apply." If the Sherman Act does not apply, the defendant has not violated the law, and thus a plea agreement should not be entered. Indeed, a court may only enter a plea if it has jurisdiction to do so.[18] And third, is the DOJ contributing to a "double-counting" of fines? The "bump" applies to conduct that presumably a foreign authority may be interested in prosecuting; by accounting for this conduct it ignores the comity principles underlying the restrictions to the extra-territorial reach of the Sherman Act.[19]

While there are a number of legal, factual, and policy questions at the core of these issue, many of which are reasonably debatable, it may be more prudent enforcement policy to not account for effects from conduct that is not certain to violate the Sherman Act, at least not until the debates are resolved.

IV. Alternative Sentencing Considerations: Does the Punishment Fit The Crime (or Deter Future Conduct)?

Finally, as noted above, the DOJ has significantly increased the level of fines and jail sentences in recent years. The following graphic, as noted above, shows that the Division netted the most fines in its history in 2012.[20]

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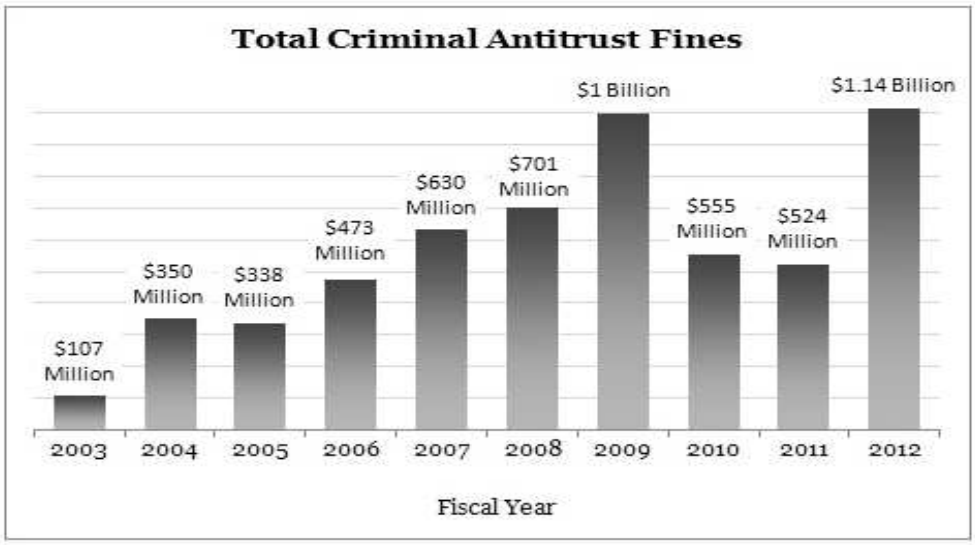
[18] But we recognize that certain cases have held that the FTAIA does not impose a jurisdictional bar; rather it defines the scope of the antitrust violation. *See, e.g., Animal Science Products, Inc. v. China National Metals & Minerals Import & Export Corp.*, 654 F.3d 462 (3d Cir. 2011) (holding that the "FTAIA imposes a substantive merits limitation rather than a jurisdictional bar.).

[19] One indication that the DOJ may be overly aggressive in the use of the "bump" is the increasing number of inability to pay applications made by companies.

[20] *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.



With respect to jail sentences, the Division noted: "During FY 2012, 78 percent of the individuals sentenced in Division cases were sentenced to prison time. The Division is now sending approximately twice as many defendants to prison as it did in the 1990s. And the defendants sentenced to prison are serving longer terms."[21] It is clear that the DOJ does not appear to be letting up, as evidenced by the fact that it recently sought a $1 billion fine against AUO and the maximum 10-year sentences against AUO executives.[22] Further, within the last month alone, the DOJ has secured $740 million and $325 million in criminal fines from nine auto-parts manufacturers for their role in the auto-parts investigation[23] and Rabobank for its role in the LIBOR investigation, respectively[24].

However, while jail time and fines may be key ingredients of deterrence, is DOJ's relentless push to increase jail time and fines the only means to achieve greater deterrence? The DOJ does not rely on any study that has linked jail and fines to deterring antitrust cartels. Several in the defense bar have written that at some point DOJ's aggressive pursuit of penalties could actually have an adverse effect on enforcement, as less companies and individuals will want to cooperate.[25] Thus, it

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21 *Id*.

22 *See* Sentencing Memorandum, *U.S. v. AU Optronics Co. et al.*, No. CR-09-0110 SI, at 56 (N.D. Cal.) (Sept. 20, 2012), http://www.justice.gov/atr/cases/f286900/286934_1.pdf.

23 *See* Press Release, Dep't of Justice, Nine Automobile Parts Manufacturers and Two Executives Agree to Plead Guilty to Fixing Prices on Automobile Parts Sold to U.S. Car Manufacturers and Installed in U.S. Cars (Sept. 3, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/300969.htm.

24 *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.

25 Donald Klawiter, *Enhancing International Cartel Enforcement: Some Modest Suggestions*, COMPETITION POLICY INTERNATIONAL (Sept. 28, 2011); Donald C. Klawiter & Jennifer M. Driscoll, "Sentencing Individuals in Antitrust Cases: The Proper Balance," ANTITRUST MAGAZINE, Spring 2009; Megan Dixon, "A Tension in the US Approach to International Cartel Enforcement: At What Point Does Aggressive Pursuit of Individuals Undercut the Corporate

may be time to rethink how the punishment fits the crime. There are several alternatives that could be considered, including bans for employees from serving as Board members or practicing in certain professional capacities (e.g., in Australia the ACCC can impose a civil order disqualifying an individual from managing a corporation), bans for companies from doing business in particular markets, or requirements to hire compliance monitors and increase compliance efforts.

The DOJ has taken some steps to "think outside the box" when it comes to penalties and resolving its investigations. Indeed, the Assistant Attorney General recently highlighted the Division's efforts to seek compliance monitors as part of the remedy as a way the Division is "open to new ideas that remedy anticompetitive conduct and guard against any recurrence."[26] With respect to the Division's successful prosecution of AU Optronics Corporation ("AUO"), the AAG noted: "Last year, for the first time, the division recommended that a criminal antitrust defendant be required, as a condition of its probation, to retain an independent corporate monitor to develop and implement an effective antitrust compliance program."[27] The AAG also highlighted the Division's recent victory over Apple in the e-books litigation, where an external monitor and full-time internal antitrust compliance officer will work together to ensure compliance with the Judge's final order as well as antitrust laws in general.[28] The DOJ has also increased use of non-prosecution ("NPAs") or deferred prosecution agreements ("DPAs") to resolve certain matters, as described above.

Conclusion

I am proud to have been a part of one of the most successful criminal enforcement programs in the world for 20 years. The DOJ has largely taken a very considered, prudent approach to cartel enforcement, and it should be commended. I raise these four "areas" today only because (as with most institutions) there is room for improvement. The areas of improvement that I identify reflect some of the more significant legal and policy challenges that the DOJ faces today, as I see it now from the perspective as a defense counsel representing companies and individuals under investigation. Thank you again for the opportunity to provide this testimony.

Leniency Policy," COMPETITION LAW INTERNATIONAL, Jan. 2012. AUO, however, was sentenced to pay a $500 million fine, which still matched the largest fine imposed on a company for violation of the U.S. antitrust laws. Further, the executives' sentences were nowhere close to the Division's 10-year request. *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.

[26] Bill Baer, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, "Remedies Matter: The Importance of Achieving Effective Antitrust Outcomes," Remarks as Prepared for the Georgetown Law 7th Annual Global Antitrust Enforcement Symposium (Sept. 25, 2013), at 12, *available at* http://www.justice.gov/atr/public/speeches/300930.pdf.

[27] *Id*. at 11.

[28] *Id*. at 7; *see also* Final Judgment, United States v. Apple, Inc. et al., No. 12-cv-2826 (S.D.N.Y 2012) (Sept. 5, 2013), http://www.justice.gov/atr/cases/f300500/300510.pdf.