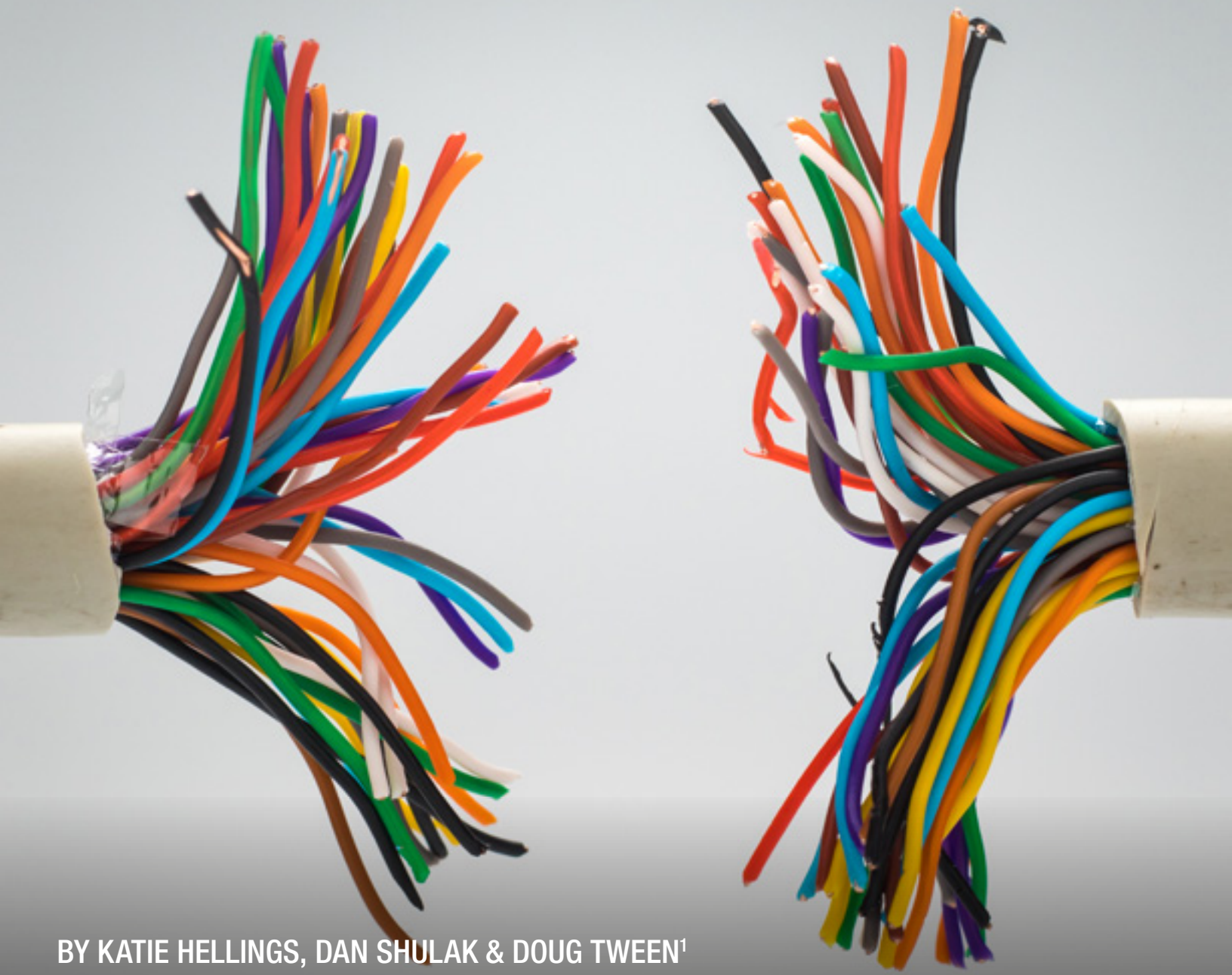
DISCONNECT BETWEEN DOJ ANTITRUST DIVISION PROSECUTORS AND CRIMINAL ANTITRUST BAR RESULTS IN UNCLEAR POLICY AND LACK OF TRUST



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CPI ANTITRUST CHRONICLE FEBRUARY 2023

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By Katie Hellings, Dan Shulak & Doug Tween

Experienced criminal antitrust lawyers in the last few years have observed major changes in policies and procedures at the U.S. Department of Justice Antitrust Division. These changes have led to uncertainty and shaken the trust between defense attorneys and prosecutors, affecting the advice defense attorneys provide to their clients in Division investigations and prosecutions. Specifically, among other things, the Division has largely abandoned its long-standing practice of providing targets of investigations with notice and an opportunity to be heard by Division management in the front office; burdened leniency applicants with an obligation to "promptly" report and to make consensual recordings; made clear that current employees of Type B leniency applicants will no longer presumptively be included in the company's leniency; criminalized conduct that for decades had been treated civilly; and in at least two cases indicted individuals who believed their cooperation was going to result in an agreement from DOJ not to prosecute them. The significant uncertainty perceived by the antitrust bar as to the Division's intentions does a disservice to potential targets who face life-altering consequences as a result of the Division's enforcement decisions, and makes the Division's investigations and prosecutions less effective and ultimately less successful.

Experienced criminal antitrust lawyers in the last few years have observed major changes in policies and procedures at the U.S. Department of Justice Antitrust Division (the "Division" or "DOJ"). These changes have led to uncertainty and shaken the trust between defense attorneys and prosecutors, affecting the advice defense attorneys provide to their clients in Division investigations and prosecutions.

Specifically, among other things, the Division has largely abandoned its long-standing practice of providing targets of investigations with notice and an opportunity to be heard by Division management in the front office; burdened leniency applicants with an obligation to "promptly" report and to make consensual recordings; made clear that current employees of Type B leniency applicants will no longer presumptively be included in the company's leniency; criminalized conduct that for decades had been treated civilly; and in at least two cases indicted individuals who believed their cooperation was going to result in an agreement from DOJ not to prosecute them.

There is growing evidence that these changes in policy and practice are negatively impacting the Division's cases. In 2022 the Division failed to secure a guilty verdict in its highly publicized investigation into alleged price fixing in the poultry industry. Following two mistrials, DOJ pursued an unprecedented third trial after having to explain to the district court why a third trial was likely to yield a different result. Following that third trial, and DOJ's altered trial strategy, a Denver jury acquitted all five defendants — all current and former executives in the chicken industry. In September 2022, in other cases resulting from the same investigation, the Division moved to dismiss the charges against the two remaining corporate defendants, Claxton Poultry and Koch Foods. Shortly thereafter, in October, the Division dismissed charges against the two remaining individual defendants — two former executives from Pilgrim's Pride[2] — after the court's order excluding all of the government's exhibits of co-conspirator statement evidence. Notably, one of the defendants in this case was indicted by the government despite having cooperated extensively in the investigation.

In April 2022, the Division also lost its first two criminal labor market trials: a jury in Texas acquitted the owner of a physical therapy staffing company alleged to have conspired with competitors to lower workers' pay, and a jury in Colorado found dialysis service provider DaVita and its former CEO not guilty of engaging in criminal "no-poach" agreements with competitors. Less than six months later, in September 2022, a Florida jury advised the court that it was deadlocked in its deliberations in a criminal trial involving allegations that the founder of an oncology group engaged in a conspiracy to split the market for cancer treatments with a competitor.[3] That case resulted in a mistrial.

DOJ had better success in 2022 securing guilty verdicts in its more traditional bread-and-butter bid-rigging and price-fixing cases.[4] However, these cases were much smaller, with relatively fewer defendants and smaller penalties, than the broad international investigations that were common in years past. The fines secured by DOJ for criminal antitrust cases in 2021 and 2022 dipped significantly from the prior two years. According to DOJ, as of November 8, 2022, the agency had secured only $2 million in criminal antitrust fines and penalties.[5] In 2021, the total was $151 million. This is compared to $365 million in 2019 and $529 million in 2020 — a drop of more than $520 million in fines in just two years.

DOJ's poor trial record and decreasing fine totals are a product, at least in part, of policy changes that have diluted the efficacy of the leniency program. Leniency applications are down. Without leniency applicants, the Division has fewer cooperating witnesses to rely upon in investigating and prosecuting cases. As a result, DOJ has filed fewer cases and has consistently lost at trial.

There is a considerable disconnect between the Division's public statements about transparency and its opaque practices, causing confusion in the defense bar and resulting in a general reluctance to cooperate. In a series of recent public remarks, Division leadership has emphasized transparency and consistency in criminal antitrust enforcement. For example, Assistant Attorney General Jonathan Kanter has stressed that a foundational goal for the Division is the promotion of transparency and "access to justice"[6] and that the agency is committed to making

2 Pilgrim's Pride was the lone conviction in the broiler chicken cases, having pled guilty in in February 2021.

3 The court received a note from the jury during deliberations stating that it was essentially "deadlocked." The judge indicated that she had intended to have the jurors keep deliberating, however she ultimately declared a mistrial because of Hurricane Ian's impact on the court proceedings.

4 See Press Release, U.S. Dep't of Justice Antitrust Division, Two Kentucky Real Estate Professionals Plead Guilty to Bid Rigging Farmland Auction (Nov. 30, 2022); Press Release, U.S. Dep't of Justice Antitrust Division, Construction Company Owner Pleads Guilty to Bid Rigging and Bribery (Nov. 14, 2022); Press Release, U.S. Dep't of Justice Antitrust Division, Two Companies Plead Guilty in Bid Rigging Scheme for Insulation Contracts (Aug. 4, 2022); Press Release, U.S. Dep't of Justice Antitrust Division, Military Contractor Pleads Guilty to Rigging Bids for Public Contracts in Texas and Michigan (July 14, 2022); Press Release, U.S. Dep't of Justice Antitrust Division, Commercial Flooring Contractor and Its Former President Plead Guilty to Antitrust Charges (June 9, 2022).

5 Department of Justice Antitrust Division, Total Criminal Fines & Penalties (updated 8 November 2022), https://www.justice.gov/atr/total-criminal-fines.

6 American Bar Association 70th Antitrust Law Spring Meeting (2022 ABA Spring Meeting), Enforcers Roundtable (April 8, 2022), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/events/2022-spring-meeting/2022-at-spring-brochure.pdf.

criminal charging decisions on the basis of "transparent and predictable criteria"[7] readily available to the public. Touting a focus on enforcement policies written in "plain language" for broad accessibility, Kanter has publicly stated his intention for there to be "no unwritten rules" for how the Division carries out its enforcement mandate.[8]

Echoing these sentiments, former Deputy Assistant Attorney General Richard Powers[9] also said publicly that the Division is focused on promoting transparency and accessibility,[10] stating in July 2021 that "when we consistently apply written, publicly available policies and guidance to the facts of each case, and when we make our decision-making principled and transparent, that increases confidence in our justice system."[11]

Despite these public statements, however, recent policy changes have eroded the critical trust with the defense bar. Historically, trust between the Division and criminal antitrust defense lawyers has been essential to the Division's effectiveness in securing necessary cooperation from individuals and companies. The Division's recent break from historical practices, changes in policy, and unpredictability has resulted in less cooperation, reducing the Division's ability to obtain the results it has experienced in the past.

I. RECENT BREAKS IN PAST PRACTICE

There have been recent reports of unpredictable interactions and breaks from past practice between investigation subjects and Division prosecutors that have left the defense bar with concerns about the Division's commitment to transparency and consistency. Although it is obviously impossible to get a full picture of closed-door negotiations with Division prosecutors, recent public court filings have shed some light on alleged misunderstandings, inconsistencies, and breakdowns in communication between Division staff and cooperating subjects that threaten to enhance a culture of distrust and may further stymie the defense bar's ability to advise clients to cooperate in Division investigations.

A. Unpredictable Consequences of Cooperation

One such situation involved an individual defendant in *U.S. v. McGuire et al.*, one of the broiler chicken cases.[12] On February 7, 2022, a defendant filed a Motion to Dismiss, arguing that the indictment against him was untimely and outlining his experience providing the Division "extensive cooperation" for more than a year.[13] The defendant stated that he "voluntarily assisted the government's investigation, including by explaining documents and offering background knowledge of the industry that was crucial for the government's understanding of its own case." According to the defendant, this assistance included sitting for three interviews (totaling approximately 13 hours), providing four attorney proffers, and responding to four substantive follow-up requests.[14]

However, instead of telling the defendant that a non-prosecution agreement was unavailable to him, the Division instead allegedly continued to take his assistance and then indicted him in July 2021 — eight months after indicting his alleged co-conspirators. Even when no promise is made by the Division regarding cooperation, for DOJ to continue to plumb the knowledge of a cooperating subject when it intends to indict him is generally inconsistent with past practice and arguably in bad faith. If experienced defense counsel can be misled and cooperating witnesses are indicted after multiple interviews, other defense counsel will be hesitant to engage with the Division and provide cooperation. If nothing else, it makes it significantly more difficult to advise clients to proceed with proffer interviews when there is an increased risk that the interview will simply be used by prosecutors to support an indictment of the interviewee. The likeliest result is that defense counsel will err on the side of caution and advise clients to assert their Fifth Amendment privilege against self-incrimination and refuse to speak with prosecutors without immunity and outside of the grand jury. At a minimum, this will significantly slow down investigations, as prosecutors will need to schedule scarce grand jury time. More likely is that prosecutors will be denied potentially significant evidence.

7 DOJ and FTC Spring Enforcers Summit (April 4, 2022) transcript, https://www.justice.gov/atr/page/file/1494606/download.

8 *Id.*

9 Richard Powers left DOJ in September 2022 for private practice. Marvin N. Price, Jr. is currently serving as Acting Deputy Assistant Attorney General for Criminal Enforcement until the position is filled permanently.

10 2022 ABA Spring Meeting, Agency Update with the U.S. Department of Justice (April 6, 2022).

11 Press Release, U.S. Dep't of Justice Antitrust Division, Acting Assistant Attorney General Richard A. Powers Delivers Remarks at the Symposium on Corporate Enforcement and Individual Accountability Hosted by the University of Southern California Gould School of Law (July 21, 2021).

12 *U.S. v. McGuire et al.*, 21-cr-00246 (D. Co.) Indictment, https://www.justice.gov/atr/case-document/file/1420911/download.

13 Def. Mot. To Dismiss the Indictment or for Severance, 3, *U.S. v. McGuire et al.*, ECF No. 79.

14 *Id.*

Similar allegations were made by a defendant in the Texas wage-fixing case. In his Motion to Dismiss the Indictment, the defendant alleged that the Division "breached [its] oral agreement not to prosecute" him.[15] The defendant claimed that the Division reneged on an oral non-prosecution agreement without providing "any evidence to show that [the defendant] materially breached the terms" of the agreement.[16] The court rejected the defendant's Motion to Dismiss on the basis that the oral agreement was not legally enforceable. Yet this apparent miscommunication and misunderstanding between prosecutors and defense counsel will only make other defense lawyers more cautious and hesitant in future dealings with the Division.

B. Additional Burdens and Decreased Benefits for Leniency Applicants

The Division has recently increased the burdens and decreased the benefits of leniency. As Powers acknowledged in early 2020, "[w]e recognize that it generally takes longer now to receive a conditional letter than it did 20 years ago; attorney proffers and hot documents are no longer sufficient and multiple witness interviews are almost always requested by staff."[17] Powers also stated that the Division can require a corporate leniency applicant to compel employees to do consensual recording.[18] Put simply, these requirements make seeking leniency more expensive and less attractive.

In addition, the Division has shifted its practices regarding current employees. Historically, current employees of corporate leniency applicants were typically included in both Type A and Type B corporate leniency agreements, assuming they cooperated in the Division's investigation and prosecution. However, the Division now says that for Type B leniency, even current employees will be subject to individual assessments as to whether they will be included in the corporate leniency agreement. This uncertainty regarding individual exposure makes counselling companies and individuals very challenging.

The changes in the leniency program now require counsel to tell a client considering applying for leniency that it is entirely possible that the Division will look to exclude and ultimately prosecute its entire senior management — making leniency an unattractive option in all but the direst circumstances. Current DOJ policy has created additional hurdles in the leniency process and removed benefits for applicants, which in turn disincentivizes companies from applying for leniency, especially Type B leniency. A recent instance involving a current employee of Tyson Foods, which is understood to be the leniency applicant in the broiler chicken investigation, illustrates the issues with DOJ's recent policy changes.The employee was excluded from the corporate leniency agreement and compelled to enter into a separate non-prosecution agreement. While the specifics of that employee's case and the leniency discussions are obviously not public, excluding a current employee from a corporate leniency agreement does not inspire confidence in the leniency program among both the defense bar and individual defendants, and creates uncertainty around the anticipated benefits of pursuing leniency. Nor does it inure apparent benefits to DOJ prosecutors who have to engage in additional lengthy non-prosecution agreement negotiations only to present a less appealing cooperating witness to a jury.

The potential individual exposure for employees of the leniency applicant, coupled with the Division's requirement that companies make current employees available for interviews to substantiate the reported conduct, significantly complicates a company's leniency calculus. How does a company make employees available for DOJ interviews if those employees are not going to be afforded the protections of the company's leniency agreement? When must a company retain separate counsel for individuals? Separate individual counsel for employees might be required at the earliest stages of a leniency application if individual exposure is unknown, making cooperation with DOJ slower and more difficult. The recent changes to DOJ's leniency program discourage companies from seeking leniency by making it more difficult and more expensive to qualify.

Finally, the recent revisions to the Division's Leniency Policy announced on April 4, 2022[19] add a "promptness" requirement, directing applicants to "promptly report[]" illegal activity upon its discovery.[20] Prior to these recent revisions the directive in the leniency policy was for applicants to engage in "prompt and effective termination." However, in early 2022, Powers said that the amendments make "prompt reporting"

15 Def. Mot. To Dismiss the Superseding Indictment, *U.S. v. Neeraj Jindal and John Rodgers*, ECF No. 45, https://www.law360.com/articles/1395949/attachments/0.

16 *Id.* at 9.

17 Richard A. Powers, Deputy Assistant Attorney General, U.S. Dep't of Justice Antitrust Division, A Matter of Trust: Enduring Leniency Lessons for the Future of Cartel Enforcement, Remarks at the 13th International Cartel Workshop, (February 19, 2020).

18 *Id.* ("We may also require covered employees to assist with proactive investigative techniques, where appropriate.").

19 Press Release, U.S. Dep't of Justice Antitrust Division, Antitrust Division Updates its Leniency Policy and Issues Revised Plain Language Answers to Frequently Asked Questions (April 4, 2022).

20 The revisions to the Leniency Policy also add a directive for an applicant to make efforts to "remediate the harm caused by the illegal activity, and to improve its compliance program to mitigate the risk of engaging in future illegal activity." This supplements the existing requirement that the company pay restitution to victims "when possible."

rather than "termination" the key.[21] While the Revised Leniency Policy FAQs explain that "an organization may still be eligible for leniency if it conducts a preliminary internal investigation in a timely fashion to confirm that it committed a violation *before* self-reporting,"[22] the FAQs provide little clarity on what the Division will consider to be "in a timely fashion" in this context (aside from noting that an organization that confirms its involvement in illegal activity but does not report until after learning that the Division has opened an investigation will not be eligible for leniency.) While stating that it is the "applicant's burden to prove that its self-reporting is prompt," the FAQs do not make clear under what circumstances applicants will be considered to have met this burden. Practitioners are left with minimal guidance on how to effectively advise potential leniency applicants on what timing will meet the government's standard of "prompt" reporting.

In addition, the revised FAQs add compliance officers to the list of authoritative representatives for the purpose of determining when an organization has "discovered" illegal activity.[23] Practically speaking, it can take considerable time for a compliance employee to discover potentially problematic conduct, investigate it appropriately, and report it to in-house counsel. Companies now face the risk that self-reporting will no longer be considered prompt because it took time for the internal compliance process to play out.

C. Front Office Access

For at least the last 50 years, front office pre-indictment meetings were a standard part of the charging decision process — not as a matter of right, but certainly a longstanding practice — and one that benefitted all sides. If, after a thorough investigation and hearing arguments from defense counsel, Division staff recommended bringing criminal charges, targets had traditionally been granted an opportunity to be heard at the front office level. This layer of prosecutorial oversight benefited all parties and resulted in fairer outcomes. Staff may spend many years sifting through large amounts of evidence potentially implicating an array of companies and individuals believed to be part of sometimes vast conspiracies. Understandably, certain biases — including confirmation bias — can develop, and front office meetings provided defense counsel with an opportunity to point out to Division leadership deficiencies in the government's case that may have been overlooked or undervalued by staff that is living in the weeds of an investigation. At the same time, even unsuccessful pre-indictment front office meetings provided defense lawyers with the opportunity to communicate to their clients that they had done everything possible to prevent an indictment but that the prosecution was still bent on moving forward. This final "moment of truth" situation often led clients to conclude that they were better served by pleading guilty rather than being indicted.

But recently, front office meetings have become the exception rather than the rule. As Powers stated:

the Justice Manual [] provides, '[i]n investigations handled by the Antitrust Division, a target's counsel is usually afforded an opportunity to meet with staff and the office or section chief regarding the recommendation being considered.' But that is far from absolute. If the target and counsel have declined to engage throughout the investigation, or made apparent to staff that further engagement will not be productive, then the Division will not continue to spend its valuable time and resources on pointless meetings — and if we have decided not to notify the target of its status, of course there will not be an opportunity for a meeting.[24]

Recently, we have seen no-notice or minimal-notice indictments in the broiler chicken cases, which resulted in two hung juries followed by an acquittal. By refusing meetings with counsel that would provide prosecutors with an informed, big-picture understanding of the facts of the case and give targets the opportunity to negotiate pleas with cooperation, the Division is doing its own investigations a great disservice. And at what cost? These front-office meetings are not resource-intensive for the Division. The costs of such meetings are quite low compared to the benefits of meaningful review and overall fairness.

II. SCOPE OF CRIMINAL CONDUCT INCREASINGLY UNCLEAR

In addition to recent breaks in practice, the Division has created additional uncertainty around the actual conduct it intends to investigate and prosecute criminally. For example, on February 25, 2022, DOJ surprised many when, in a Statement of Interest it filed in a Nevada State court

21 2022 ABA Spring Meeting, Agency Update with the U.S. Department of Justice.

22 U.S. Department of Justice Antitrust Division, Frequently Asked Questions about the Antitrust Division's Leniency Program, at 8 (Update published April 4, 2022.

23 *Id.*

24 Press Release, U.S. Dep't of Justice Antitrust Division, Acting Assistant Attorney General Richard A. Powers Delivers Remarks at the Symposium on Corporate Enforcement and Individual Accountability Hosted by the University of Southern California Gould School of Law (July 21, 2021).

lawsuit,[25] it argued that non-compete restrictions could be considered *per se* violations of Section 1 of the Sherman Act.[26] While DOJ does not make reference to criminal liability or prosecutions in its Statement of Interest, DOJ's position that in certain situations non-compete agreements can be per se unlawful could be a first-step towards criminal scrutiny of non-competes, which would be a significant expansion of criminal liability related to a common business arrangement. Without more explicit guidance from the Division, defense lawyers are left wondering whether a few sentences in a Statement of Interest should be interpreted as the Division announcing a major shift towards targeting non-compete agreements as per se violations of the antitrust laws.

The Division has also made good on its commitment to pursue criminally violations of Section 2 of the Sherman Act, having brought the first two criminal Section 2 cases in over 40 years. In October 2022, DOJ announced that the president of a Montana paving and asphalt contractor pled guilty to one count of violating Section 2 for attempting to monopolize the market for highway crack-sealing services in Montana and Wyoming. Because of the structure of the market in this case, the Division was able to use Section 2 to allege that if the defendant's efforts to secure a market allocation agreement with his competitor had been successful, the two companies would have been monopolists in their alleged regional markets. And in December 2022, the DOJ brought criminal charges pursuant to Section 2 against 12 individuals in Los Indios, Texas, alleging that they conspired to monopolize the industry for transporting used vehicles and other goods from the U.S. through Mexico for resale in Central America.[27]

These cases followed public commitments in early 2022 by Kanter and Powers that the agency was prepared to bring criminal charges against individuals who violate the prohibition against market monopolization in Section 2.[28] However, these commitments by agency officials did not come with any practical guidance for practitioners as to how to effectively advise clients about their potential exposure to criminal Section 2 charges. Despite his pledge for there to be "no unwritten rules to enforcement"[29] at the Division, Kanter advised lawyers seeking concrete guidance on criminal monopolization enforcement to review the century of case law related to criminal antitrust enforcement of Sections 1 and 2.[30] Powers also encouraged practitioners to look at what's on the books — noting that courts have issued opinions supporting the Division's Section 2 cases over the years, and promising that the Division will be guided by the facts and law in front of it.[31]

DOJ's recent application of antitrust law, without guidance or engagement with interested parties, is neither transparent nor predictable. It is impractical and unrealistic for companies and individuals to make critical business decisions on the basis of vague and underdefined policy pronouncements made by Division leaders that, if taken at face value, would lead to a major shift in the criminal antitrust enforcement landscape. Antitrust policy should be accompanied by concrete guidance stemming from a robust and open dialogue between the government and defense counsel who are attempting to counsel clients, the vast majority of whom want to do the right thing. Confidence in the justice system — a stated goal of Division leadership[32] — would be significantly diminished if the Division moves ahead with prosecuting more Section 2 cases and criminalizing noncompete agreements without first publishing written guidance outlining the basis for and detailing the intended execution of this shift in policy. As of today, the scope of conduct the Division considers criminal in these two areas is entirely unclear.

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25 In *Beck v. Pickert Medical Group et al.*, CV21-02092, plaintiffs provided anesthesiology services to Renown Regional Medical Center pursuant to an exclusive Professional Services Agreement (PSA) that allegedly contained a provision prohibiting plaintiffs from providing anesthesiology services for two years at any facility within 25 miles of Renown's facilities or any other facility where the anesthesiologist worked before terminating of their employment (the non-compete provision). Plaintiffs alleged that the PSA violated a Nevada state law limiting noncompetition covenants. In its statement of interest, DOJ first argued that the non-compete provision qualified as a horizontal restraint between competitors because the individual board-certified and licensed anesthesiologists were "actual or potential competitors of Pickert when they agreed to the non-competes." Viewed in that light, per DOJ, the non-compete provisions "could be characterized" as agreements "to allocate to Pickert the area within 25 miles of Renown or at any other facility where the anesthesiologists employed by Pickert worked. Thus, they would constitute horizontal agreements to allocate territories subject to the per se rule unless the ancillary-restraints defense applies."

26 Statement of Interest of the United States, *Beck v. Pickert Medical Group, et al.*, CV21-02092, Second Judicial District Court of the State of Nevada in and for the County of Washoe (Feb. 25, 2022).

27 Press Release, U.S. Dep't of Justice Antitrust Division, Criminal Charges Unsealed Against 12 Individuals in Wide-Ranging Scheme to Monopolize Transmigrante Industry and Extort Competitors Near U.S.-Mexico Border" (Dec. 6, 2022).

28 At the Federal Trade Commission (FTC) and DOJ Spring Enforcers Summit on April 4, 2022, Kanter warned that the Division will "not hesitate to enforce the law" if it determined that a Section 2 criminal charge was warranted.

29 *Id.*

30 2022 ABA Spring Meeting, Enforcers Roundtable.

31 2022 ABA Spring Meeting, Agency Update with the U.S. Department of Justice.

32 2022 ABA Spring Meeting, Agency Update with the U.S. Department of Justice.

III. LACK OF CLARITY ON HOW TO INTERPRET THE DIVISION'S OWN STATEMENTS

Finally, it is also currently unclear exactly how to interpret Division leadership's public statements about the agency's policy priorities. Kanter has said that the Division is talking about its views in "real time" and advises the antitrust bar to "look at what [the Division is] saying and writing" for guidance as to the agency's enforcement objectives.[33]

As examples of such guidance, Kanter cites to "important amicus briefs"[34] filed by the Division and open conversations with the public and stakeholders about its enforcement objectives. However, in contrast, Powers told an audience at the 2022 ABA Antitrust Spring Meeting that the Division does not "make or change policy via speech."[35] This leads stakeholders to wonder what weight to give recent statements by agency leadership that, if taken at face value, indicate a significant shift in criminal antitrust enforcement priorities and procedures.

Heeding Kanter's suggestion that the criminal antitrust bar "look at what [the Division] is saying and writing" to deduce the agency's enforcement agenda leads to more questions than answers. Through short public statements and briefing, the Division is merely providing vague suggestions — instead of clear, unambiguous written guidance — about what type of conduct will trigger criminal antitrust scrutiny.

Criminal antitrust cases are not like criminal fraud cases — jurors do not always intuitively know that the charged conduct is wrongful. As a result, criminal antitrust trials are usually much more complex, nuanced, and difficult for the Division to prove beyond a reasonable doubt, and prosecutors' tactics that are successful in fraud prosecutions don't always translate to antitrust prosecutions. The significant uncertainty perceived by the antitrust bar as to the Division's intentions does a disservice to potential targets who face life-altering consequences as a result of the Division's enforcement decisions, and makes the Division's investigations and prosecutions less effective and ultimately less successful.

33 2022 ABA Spring Meeting, Enforcers Roundtable.

34 See Brief of the United States as Amicus Curiae Supporting Plaintiffs-Appellants, *State of New York v. Facebook, Inc.* (D.C. Cir. Jan. 28, 2022) https://www.justice.gov/atr/case-document/file/1467321/download; Brief of the United States Department of Justice as Amicus Curiae in Support of Neither Party, *The Atlanta Opera, Inc. and Make-Up Artists & Hair Stylists Union*, 10-RC-276262; 371 NLRB No. 45 (Feb. 10, 2022) https://www.justice.gov/atr/case-document/file/1470846/download; and Brief of Amicus United States of America in Support of Neither Party, *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.* (9th Cir. Nov. 19, 2020) https://www.justice.gov/atr/case-document/file/1338731/download.

35 2022 ABA Spring Meeting, Agency Update with the U.S. Department of Justice.

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