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CONFIRMATION HEARING ON THE NOMINATION OF R. HEWITT PATE TO BE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

MAY 21, 2003

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NOMINATION OF R. HEWITT PATE, OF VIRGINIA, TO BE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

WEDNESDAY, MAY 21, 2003

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:19 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch, Specter, DeWine, Craig, Leahy, and Kohl.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. We're happy to welcome you all out here to this nomination hearing this morning. We are honored to have Senator Allen here. It is our pleasure to consider the nomination of Hugh Pate to be Assistant Attorney General for the Antitrust Division at the United States Department of Justice.

I would like to start by welcoming Mr. Pate to the Committee and congratulating him for being nominated by President Bush. Your impressive background and past government service make me very confident that you will be a great asset to the Department of Justice, this Committee, and, of course, the people of our country.

Over the last decade, the position of the Assistant Attorney General for the Antitrust Division has grown in very great importance. The rapid transformation of our country's economy, particularly in new technologies and international markets, has raised public attention and policy focus on a variety of important antitrust issues. The Assistant Attorney General in charge of the Antitrust Division plays a crucial role in formulating competition policy and enforcing the existing antitrust laws to make sure that our free market economy survives efficiently and serves the public.

Now, I think I will reserve the rest of my remarks until later, and if could—can you reserve yours until we let Senator Allen say his remarks? And let me just mention, Senator Warner is managing the DOD authorization bill on the floor, and he particularly caught me and said, Mr. Pate, he wanted to be here and asked me if I would put his very complimentary statement into the record because he fully supports you and believes that you will make a great Antitrust Division chief.

So if we can do that without objection, and if you will forgive Senator Warner, there is not much he can do. He has to be there. So we are going to count on Senator Allen doing the job here, and we will turn to him at this time.

PRESENTATION OF R. HEWITT PATE, NOMINEE TO BE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE, BY HON. GEORGE ALLEN, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator ALLEN. Thank you, Mr. Chairman. And I have Senator Warner's statement here that I would like to have put in the record for my colleague.

Chairman HATCH. Without objection.

Senator ALLEN. Mr. Chairman, Senator Kohl, members of the Committee, thank you for this hearing on Hugh Pate. I should say Mr. R. Hewitt Pate, a fellow Virginian, to be Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice. He is joined here by his wife, Lindsey, and his daughters, Lizzie and Ellen. And I know they are very proud of their father, and we are proud to have you all here with us for this—

Chairman HATCH. We are happy to have you here, too, and, Lizzie and Ellen, you are beautiful young women. And you blush beautifully, too.

[Laughter.]

Senator ALLEN. As you said, Mr. Chairman, the enforcement of the antitrust laws is very important and essential for the protection of competition in our free market economy, and I have known Mr. Pate for many years, and I can confidently say without any reservation whatsoever that he is very well qualified, and I am confident that he will be effective, he will handle the job and leadership positions and decisions with dignity and impartiality in enforcing the law.

I, when I was Governor of Virginia, appointed Mr. Pate to the Virginia Commission on Higher Education and to the Governor's Commission on Self–Determination and Federalism. You may see from his record that he did get his undergraduate degree from the University of North Carolina. I got to know Hew—that is what we call him, "Hew" Pate—when he was at law school at the University of Virginia in Charlottesville and I was a member of the House of Delegates at that time representing the Charlottesville area. And Mr. Pate at the University of Virginia at the law school graduated first in his class in 1987 and then went on to clerk for Fourth Circuit Judge J. Harvie Wilkinson. In addition, Mr. Pate clerked for Justice Lewis Powell and Justice Anthony Kennedy on the Supreme Court of the United States.

After these impressive clerkships, Mr. Pate went on to practice antitrust law for 10 years at Hunton and Williams, which is a highly respected and one of the largest law firms in the Commonwealth of Virginia. It is an international firm, actually.

He also taught competition law at the University of Virginia Law School, and since 2001, Mr. Pate has worked in the Department of Justice's Antitrust Division and has been the Acting Assistant Attorney General for Antitrust since November of 2002.

In fact, there was one case that Senator Warner and I had one position and the Justice Department and Antitrust had another position. And Mr. Pate came and briefed us on it. Applying the law and the facts of that situation, he said, "Here's why we come down this way," contrary to the way that Senator Warner and I were advocating. After that meeting, we felt that that issue had been given fair consideration. He applied the law logically and understandably, and there was no more grousing appeals for reconsideration and all the rest.

So when you have a friend who has to tell two other friends that applying the law in the question of a judgment call contrary to what you desire, it is not an easy task to do. And that is why I am confident that he will impartially adhere to the laws, provide for proper competition in our economy, and I ask you, Mr. Chairman and members of the Committee, to move as swiftly as possible for the confirmation of R. Hewitt Pate, because I know he is a man of integrity, of capability, and with the qualifications we would want to be heading up this important Division.

And I thank you, Mr. Chairman and members of the Committee, for having this hearing.

Chairman HATCH. Well, thank you, Senator Allen. I worry about a nominee, though, that doesn't hew the line for two powerful Senators from Virginia like the two of you.

[Laughter.]

Senator ALLEN. Well, I am still for him, and I respected that he argued the case very well and in a logical way in applying the law.

Chairman HATCH. I appreciate that, and that is what we want. We want people who are going to do what is right.

Senator ALLEN. And I will present to you, to the clerk, Senator Warner's testimony or his introduction, unless you—do you already have it, Mr. Chairman?

Chairman HATCH. We do, and thank you.

Senator ALLEN. You do? Good.

Chairman HATCH. You can leave it there, and we will make sure it is in the record.

Senator ALLEN. I will leave it here.

Chairman HATCH. Thanks, Senator Allen. We know you are busy, and we will excuse you. We know how busy you really are.

Senator ALLEN. We know how busy you are as well, Mr. Chairman, and thank you.

Chairman HATCH. Thank you so much. We appreciate it.

Well, I will finish my opening remarks, and I will turn to the Ranking Member of the Antitrust Subcommittee, Senator Kohl.

STATEMENT OF HON. HERB KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KOHL. Thank you so much, Mr. Chairman. We meet today to consider the nomination of Hew Pate to be Assistant Attorney General for Antitrust. The mission of the Justice Department's Antitrust Division has never been more important. In our challenging economic times, we depend on the dynamism and competition to provide the economic growth and jobs necessary to propel our economy forward. Only aggressive enforcement of our Nation's antitrust laws will ensure that competition flourishes and

consumers obtain the highest quality products and services at the lowest possible prices.

If confirmed, Mr. Pate will assume the leadership of the Antitrust Division at a very crucial time. One example is the ferment in the media sector. In the next few weeks, the Federal Communications Commission is expected to adopt new rules that will fundamentally relax the limits on media ownership that have existed for decades. This ruling is likely to unleash a wave of media consolidation and media acquisitions that have the potential to reshape the way Americans receive their news, information, and entertainment programming. Only by maintaining diversity in media ownership can we ensure the diverse marketplace of ideas so essential to our democracy. The Antitrust Division will stand as our last line of defense against excessive media concentration.

Our work in the last year has also uncovered serious allegations of anti-competitive practices in the ways hospitals buy the medical devices essential to delivering quality health care to millions of Americans. Group purchasing organizations have been accused of adopting exclusionary contract practices which benefit dominant suppliers to the detriment of innovation and patients.

While the Federal Trade Commission has taken the lead in investigating this industry, the Antitrust Division's cooperation in revising the joint FTC–DOJ health care guidelines will be essential to restoring competition to this vital sector.

Mr. Pate, the performance of the Antitrust Division over the last 2 years under your predecessor's leadership does concern me. From the defects in the Microsoft settlement, which many believe was unnecessarily weak and riddled with loopholes, to the general decline in the Division's enforcement activities, we are left to wonder if the Division was truly committed to its crucial mission of protecting competition.

It is essential that the next head of the Antitrust Division be committed to restoring the proud tradition of vigorous antitrust enforcement to the Justice Department. Your impressive record of achievement and your fine reputation demonstrate that you are well qualified to restore our confidence and lead the Antitrust Division. I have been impressed with your dedication since you have been the acting head of this Division.

Mr. Pate, the position of Assistant Attorney General for Antitrust carries with it a special burden and a special responsibility. The companies over whom the Antitrust Division has jurisdiction have ample resources to hire skilled and talented counsel to represent their best interests. But no one represents the interest of the American consumer other than the Antitrust Division. Millions of consumers will depend on your efforts and your judgment. It is my sincere hope and full expectation that you will meet this challenge when you are confirmed.

Thank you very much, Mr. Chairman.

Chairman HATCH. Well, thank you, Senator Kohl.

Mr. Pate, we will just swear you in at this point, if we can. Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Mr. PATE. I do.

Chairman HATCH. Thank you, sir. We would be happy to take any statement you would care to give at this time.

STATEMENT OF R. HEWITT PATE, NOMINEE TO BE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. PATE. Thank you, Senator. I do have a brief opening statement.

It is a great honor to me to have been nominated by the President to serve in the Justice Department as Assistant Attorney General for Antitrust, and I thank you, Mr. Chairman, and the Committee for the opportunity to appear today. I would like to thank Senator Allen and also Senator Warner for their support and for the warm introductions that they've given.

Senator Allen mentioned my family. I would like to recognize the support that my wife, Lindsey, and my daughters, Ellen and Lizzie, provide me, which is valuable beyond measure, and I thank them for that.

Chairman HATCH. We are happy to have them with you here today.

Mr. PATE. I have with me today also my mentor as a young lawyer, Tom Slater, from my former firm, who taught me a great deal about antitrust litigation. And the Committee may be interested to know that John Shenefield, whose presence I really appreciate here today, was the head of that firm's antitrust practice when he left in the late 1970's to become the AAG for Antitrust during the Carter administration. Tom Slater then succeeded him as head of the firm's antitrust practice. I went to work for Slater, and now here some 13 years later, if confirmed, I have the opportunity to succeed Mr. Shenefield to be—

Chairman HATCH. That sounds like nepotism to me.

[Laughter.]

Chairman HATCH. We have one law firm controlling all the antitrust rules in this country.

Mr. PATE. Well, in fairness, Mr. Shenefield moved on and has had an illustrious career elsewhere, but I do appreciate being associated with that lineage.

Chairman HATCH. We are happy to have both of you here, and, Mr. Shenefield, we remember your term. I was here when you served, and you did a very good job, and we just appreciate having both of you. Both of you have done good jobs, and we are grateful to have you in this position as well.

I am going to have to turn this over to Senator DeWine—it looks like we have another vote—because I am in the middle of the tax conference. I hate to leave, but I am totally in support of your nomination. I think it is one of the best nominations we could possibly have. But Senator DeWine, who himself has been an Attorney General, and Senator Kohl do an excellent job on our Antitrust Subcommittee, and I am going to turn it over to Senator DeWine. It looks like we have a vote, and I will tell them to hold it for you.

Mr. PATE. Well, thank you, Senator. I appreciate your being here to open the hearing.

Chairman HATCH. Thank you so much. We are honored to have you accept this position, and we appreciate your wife and family,

because we know the long hours that you have to put in, and it is very, very difficult for you. So we appreciate the service that you give as well.

Go ahead. I am sorry to interrupt you.

Senator DEWINE. [Presiding.] I think what we are going to do, since we just started a vote, I think that we will stop at this point so we don't break the questioning.

Mr. PATE. Okay. And should I complete my brief statement at that time when you resume?

Senator DEWINE. We are going to do that. We are going to have to just break it right now. We are going to go vote. Senator Kohl and I will vote, and we will be back.

Thank you very much.

Mr. PATE. Thank you, Senator.

[Recess 10:33 to 10:59 a.m.]

Senator DEWINE. The hearing will come to order. We apologize for the interruption. We didn't count on—at least, I didn't count on a second vote.

Mr. Pate, will you please continue your opening statement?

Mr. PATE. I will. Thank you, Senator. Having introduced my family and Mr. Slater and Mr. Shenefield earlier, let me just continue by saying this, Mr. Chairman:

The antitrust laws are truly a cornerstone of our market economy. We in the United States rely to a great extent on competition to ensure that citizens get the benefit of higher quality and lower prices in the goods and services that they need, and sound enforcement of our antitrust laws protects this competition.

The Antitrust Division's Criminal Enforcement Program detects, punishes, and deters price fixing and other illegal conduct by those who conspire to cheat consumers rather than compete to win their business. Our Merger Review Program prevents anti-competitive combinations that can lead to higher prices or can lead to greater opportunities for collusive behavior. And our Civil Non–Merger Program prevents the unlawful creation or abuse of monopoly power.

This year marks the 100th anniversary of the appointment under President Roosevelt of the first Assistant to the Attorney General responsible for antitrust. This organizational step laid the foundation for the current Antitrust Division, and the Division has a great history of vigorous enforcement of our antitrust laws. My work at the Division for just about 2 years now has made me appreciate that it is the extraordinary public service of our dedicated career attorneys and career economists who make the Division's enforcement record possible. And I am very humbled to think that, if confirmed by the Senate, I will have the opportunity to do all that I can to help the Division carry forward its important work.

I'd like to thank you again, Mr. Chairman, for the opportunity to appear before the Committee, and I would be happy to answer any questions that Senators may have.

[The biographical information follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Full name (include any former names used).**

R. Hewitt Pate

2. **Address: List current place of residence and office address(es.)**

Office	Residence
U.S. Department of Justice Antitrust Division, Room 3109 950 Pennsylvania Avenue, N.W. Washington, DC 20530	Richmond, VA Washington, DC

3. **Date and place of birth.**

Born June 14, 1962; Ft. Sill, OK.

4. **Marital Status: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).**

Married to Lindsey Haines Pate, who is not presently employed.

5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**

University of North Carolina, Chapel Hill, NC, 1980-84; B.A. 1984.
University of Virginia School of Law, Charlottesville, VA, 1984-87; J.D. 1987.

6. **Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.**

The Grupe Company (real estate firm), Stockton, CA, summer intern, 1984.

Jones, Day, Reavis & Pogue, Washington, DC, summer law clerk, 1985.

Sullivan & Cromwell, New York, NY, summer law clerk, 1986.

Hon. J. Harvie Wilkinson III, U.S. Court of Appeals for the Fourth Circuit, law clerk, 1987- 88.

Hon. Lewis F. Powell, Jr. (Ret.), U.S. Supreme Court, law clerk, 1988-89.

Hon. Anthony M. Kennedy, U.S. Supreme Court, law clerk, 1989-90.

Hunton & Williams, Richmond, VA, summer law clerk, 1987; associate 1990-95; partner 1995-2001.

Adjunct Professor, University of Richmond T.C. Williams School of Law, 1992-93.

Adjunct Professor, University of Virginia School of Law, 1995-97.

Ewald Distinguished Visiting Professor of Law, University of Virginia School of Law, Fall 1999.

Children's Museum of Richmond, Richmond, Virginia (Member, Board of Trustees 1996-2001; General Counsel 1999-2001)

The Carver Promise, Richmond, VA (Board Member, 1995-2000)

U.S. Department of Justice, Antitrust Division, Washington, DC, Deputy Assistant Attorney General, 2001-2002.

U.S. Department of Justice, Antitrust Division, Washington, DC, Acting Assistant Attorney General, 2002 to Present.

7. **Military Service: Have you had any military service: If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.**

No military service.

8. **Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.**

Alumni Award for Academic Excellence; CJS Award (for graduating first in law school class), University of Virginia.

Order of the Coif.

Roger & Madeline Traynor Prize (best written work in law school class).

Executive Editor, Virginia Law Review.

Raven Society (University of Virginia honorary organization).

Omicron Delta Kappa.

Martindale-Hubble "AV" Rating.

Listed in "Best Lawyers in America" 2001.

"Top Forty Under Forty," Richmond, VA Business and Civic Leaders 1999.

9. **Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.**

Virginia State Bar (Member, 1989-present; Chairman, Antitrust Section 2000-01).

District of Columbia Bar (Member, 2001-present).

American Bar Association (Member, approximately 1987-present).

Virginia Bar Association (Member, 1990-present).

Richmond Bar Association (Member, 1990-present).

Fourth Circuit Judicial Conference (Permanent Member 1999-present).

Federalist Society (Member, approximately late 1980's-present; Litigation Section Vice-Chair 1997-2000).

American Judicature Society (Member, approximately 1987-1996).

Supreme Court Historical Society (Member, approximately 1990-2000; Virginia Membership Chair, 1993-94).

10. **Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.**

Grace & Holy Trinity Episcopal Church, Richmond, Virginia (Member 1994-present; usher, lay reader, etc. at various times).

Country Club of Virginia, Richmond, Virginia (Member 1995-present).

Farmington Country Club, Charlottesville, Virginia (Member 1998-present).

Children's Museum of Richmond (Member 1996-present).

Friends of the National Zoo (Member 2001-present).

11. **Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.**

Virginia Supreme Court (1989).

D.C. Court of Appeals (2001).

United States Supreme Court (1992).

U.S. Courts of Appeals for the 2nd (1997), 4th (1990), 6th (1996), 9th (1992), 10th (1991), and D.C. (1991) Circuits.

U.S. District Courts for the Eastern and Western District of Virginia (1990).

12. **Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.**

Current Trends and Initiatives in Antitrust Enforcement Efforts, Virginia State Bar, Vienna, VA, March 21, 2003.

Department of Justice Enforcement Initiatives, The Conference Board, New York, NY, March 18, 2003.

Introductory Remarks, Joint Department of Justice/Federal Trade Commission Hearings on Health Care and Competition Law and Policy, Washington, DC, February 26, 2003.

Department of Justice Enforcement Overview, American Bar Association, Corporate Counseling Dinner, Washington, DC, February 11, 2003.

The Department of Justice's International Antitrust Program – Maintaining Momentum, American Bar Association, Forum on International Competition Law, New York, NY, February 6, 2003.

Antitrust and Intellectual Property, American Intellectual Property Law Association, Winter Institute, Marco Island, FL, January 24, 2003.

Upcoming Hearings on Antitrust and Healthcare and Current Enforcement Efforts, American Bar Association, Midwinter Leadership Meeting, Puerto Rico, January 20, 2003.

Antitrust Enforcement at the United States Department of Justice: Issues in Merger Investigations and Litigation, Milton Handler Antitrust Review, City Bar of New York, New York, NY, December 10, 2002.

Licensing Antitrust: A View from the Antitrust Enforcement Agencies, Practising Law Institute Intellectual Property Issues, San Francisco, CA, November 16, 2002.

Antitrust Federalism, Federalist Society Convention, Washington, DC, November 15, 2002.

Antitrust Division Enforcement Initiatives: Antitrust and Intellectual Property, American Bar Association, Fall Forum, Washington, DC, November 7, 2002.

Antitrust Issues in Intellectual Enforcement, Practising Law Institute, 8th Annual Intellectual Property Law Institute, New York, NY, September 26, 2002.

Competition and Intellectual Property Policy Implications of International Standard-Setting, American Bar Association International Brown Bag Roundtable "RAND," Washington, DC, June 18, 2002.

Acquisitions, Management and Enforcement of Intellectual Property in a Global Antitrust Environment, Crowell & Moring Roundtable, Washington, DC, June 14 2002.

The Intellectual Property Defense: Refusing to License in the U.S. and Abroad, American Bar Association Section of Antitrust Law, San Francisco, CA, June 6, 2002.

Communications and Competition, American Bar Association-International Bar Association, Washington, DC, May 20, 2002.

Antitrust and Intellectual Property, University of Chicago/Federalist Society, Chicago, IL, May 2, 2002.

Industries in Transition: New Competition, Quasi-Regulation and National Security, American Bar Association Section of Public Utility, Communications and Transportation Law, Washington, DC, April 29, 2002.

American Bar Association, "Corporate Counsel Roundtable," Washington, DC April 23, 2002.

Antitrust and Refusals to License Intellectual Property, George Mason University Symposium on Patent and Related Issues in Standard Setting, April 19, 2002 (article forthcoming in George Mason Law Review).

Regulatory Matters – U.S. Department of Justice, American Bar Association Forum on Air and Space Law, Washington, DC, March 28, 2002.

Merger Review, The Conference Board 2002 Antitrust Conference: Antitrust Issues in Today's Economy, New York, NY, March 7, 2002.

Upcoming M&A: Antitrust and Regulatory Issues, Credit Suisse/First Boston Global Telecommunications CEO Conference, Orlando, FL, March 4-6, 2002.

U.S. Department of Justice, Antitrust Division: State of Civil Non-Merger Enforcement, American Bar Association Fall Forum: New Administration and New Technologies, Washington, DC, November 15, 2001.

U.S. and EU Merger Review, Corporate Counsel Roundtable, Washington, DC, November 13, 2001.

Antitrust Issues, State Bar of California 9th Annual Golden State Antitrust and Unfair Competition Law Institute, October 18, 2001.

Antitrust Enforcement at the Department of Justice, The Federalist Society/University of Virginia Law School, Charlottesville, VA, October 9, 2001.

Developing and Trying a Multi-state Case, National Association of Attorneys General 2001 Antitrust Seminar, Minneapolis, MN, October 3, 2001.

Interlocutory Appeals, Litigation, Vol. 25, No. 2, 1999.

Destabilizing Democracy, 1 Green Bag 2d. 331, 1998.

No Statehood for DC — Unless We Amend the Constitution (Two similar pieces published in 1993, one in the Wall Street Journal, and one as a Heritage Foundation Lecture).

Evans v. Jeff D and the Proper Scope of State Ethics Decisions, 73 Va. L. Rev. (1987).

Payment of Attorneys' Fees with Potentially Forfeitable Assets, 22 Crim. L. Bull. 326 (1986).

13. **Health: What is the present state of your health? List the date of your last physical examination.**

I believe my health is excellent. Last physical examination April 2001.

14. <u>Public Office</u>: **State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.**

Acting Assistant Attorney General (Antitrust), Appointed, 11/02 to Present.

Deputy Assistant Attorney General (Antitrust), Appointed, 06/01 to 11/02.

Governor's Commission on Higher Education in Virginia, Member, Appointed, 1994-95.

(Virginia) Governor's Commission on Self-Determination and Federalism, Member, Appointed, 1994-96.

15. <u>Legal Career</u>:

a. **Describe chronologically your law practice and experience after graduation from law school including:**

1. **whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;**

Judicial Clerkships

Hon. J. Harvie Wilkinson III, U.S. Court of Appeals for the Fourth Circuit, 1987-88.

Hon. Lewis F. Powell, Jr. (Ret.), U.S. Supreme Court, 1988-89.

Hon. Anthony M. Kennedy, U.S. Supreme Court, 1989-90.

2. **whether you practiced alone, and if so, the addresses and dates;**

None.

3. **the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;**

Law Firm

Hunton & Williams, Riverfront Plaza, East Tower, 951 East Byrd Street, Richmond, VA 23209. Associate (1990-95); Partner (1995-2001).

Government Agency

U.S. Department of Justice, Antitrust Division, 950 Pennsylvania Avenue, NW, Washington, DC 20530. Deputy Assistant Attorney General (2001-2002); Acting Assistant Attorney General (2002-Present).

Academic Positions

Adjunct Professor, University of Richmond T.C. Williams School of Law (1992-93).

Adjunct Professor, University of Virginia School of Law (1995-97).

Ewald Distinguished Visiting Professor of Law, University of Virginia School of Law (Fall 1999).

b. 1. **What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?**

2. **Describe your typical former clients, and mention the areas, if any, in which you have specialized.**

My law practice from 1990 to 2001 primarily involved the representation of business clients in litigation and counseling in the fields of antitrust, unfair competition, intellectual property, business torts, and other matters relating to the regulation of the competitive process. My competition litigation practice involved the representation of both plaintiffs and defendants, and both my litigation and counseling activities involved clients in a wide variety of businesses. At various times I also handled appellate matters

involving a variety of legal issues. As noted above, I also taught law school courses at various times during my practice, including a period of full time law teaching in 1999.

In June, 2001, I joined the Department of Justice Antitrust Division as the Deputy Assistant Attorney General for Regulatory Matters. In that position, I was responsible for supervision of the Transportation, Energy, and Agricultural Section, the Networks and Technology Section, and the Telecommunications Section. I was involved in all aspects of those sections' merger and non-merger enforcement activities, including cases such as the proposed merger of United Airlines and U.S. Airways, and the Department's predatory conduct case against American Airlines on appeal in the 10th Circuit (in these airline matters I was Acting AAG by virtue of Charles James' recusal); the proposed merger of DirecTV and Echostar; the Department's Telecommunications Act § 271 reviews; and other significant matters.

c. 1. **Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.**

My practice tended to involve at any one time a small number of relatively large matters or cases, so it would be most accurate to say that I appeared in court "occasionally."

2. **What percentage of these appearances was in:**
   (a) **federal court;**
   (90%)
   (b) **state courts of record;**
   (10%)
   (c) **other courts.**

3. **What percentage of your litigation was:**
   (a) **civil;**
   (100%)
   (b) **criminal.**
   (0%)

4. **State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.**

   The majority of cases in which I participated were settled at some point during the litigation. I estimate that I tried (or won on summary judgment or other dispositive proceeding or represented on appeal to a final judgment) approximately 24 cases, in 14 of which I was chief counsel and in 10 of which I was associate counsel.

5. **What percentage of these trials was:**
   (a) jury;
   (5%)
   (b) non-jury.
   (95%)

16. **Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:**

    (a) the date of representation;
    (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
    (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

    1. ***United States v. DirecTV and Echostar***, No. 1:02CV02138 (D.D.C. Oct. 31, 2002) (Hon. Ellen Segal Huvelle). Primary Antitrust Division official in charge of the Division's challenge to the proposed Echostar/DirecTV merger. Direct involvement in and supervision of all aspects of the Division's investigation of and ultimate lawsuit challenging the transaction. Appeared on behalf of the Government in district court for argument of various scheduling and other motions prior to the parties' eventual decision to abandon the transaction.

Co-counsel:
The Attorneys General of 23 states, the District of Columbia and the Commonwealth of Puerto Rico joined the Department of Justice in its lawsuit. Serving as primary counsel for the states were:

Jeremiah H. (Jay) Nixon
Attorney General of the State of Missouri
Anne E. Schneider
Assistant Attorney General
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Eliot Spitzer
Attorney General of the State of New York
Jay L. Himes
Bureau Chief, Antitrust Bureau
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Opposing Counsel:
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Helene D. Jaffe
Weil, Gotshal & Manges
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2. ***Columbia Union College v. Clarke***, 988 F. Supp. 897 (D. Md. 1997) (Hon. Marvin J. Garbis), 159 F.3d 151 (4th Cir. 1998) (Hons. J. Harvie Wilkinson, Diana Gribbon Motz, John D. Butzner, Jr.), *cert. denied*, 527 U.S. 1013 (1999), No. 96-1831, 2000 U.S. Dist. Lexis 13644 (Aug. 17, 2000) (Hon. Marvin J. Garbis), 254 F.3d 496 (4th Cir. 2001) (Hons. J. Harvie Wilkinson, Diana Gribbon Motz, Karen J. Williams). Pro bono representation from 1995-2001 of a Seventh-day Adventist college in a civil rights case challenging the college's exclusion from a Maryland higher education grant program. The representation involved proceedings before the Maryland Higher Education Commission, the U.S. District Court for the District of Maryland, and appellate courts. After an initial summary judgment decision against the College, I obtained reversal and remand from the Fourth Circuit and (following denial of certiorari by the Supreme Court) prevailed at trial and on subsequent appeal to the Fourth Circuit. The same district judge who had initially ruled against the College ultimately awarded substantial enhanced civil rights attorneys' fees, specifically commending the quality of the representation.

Opposing Counsel
Mark J. Davis
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3. ***Michael Moecker, as Assignee for the Benefit of Creditors for Vehicle Safety Systems, Inc. v. Honeywell International, Inc., et al***, 144 F.Supp.2d 1291 (2001 M.D. Fla) (Hon. William Terrell Hodges). Representation from 1999-2001 of defendant Honeywell International in a Sherman Act and Robinson-Patman Act suit involving automotive safety restraints. I was lead counsel for the later phases of discovery, throughout the briefing and oral argument of summary judgment motions (which were partly granted and partly denied) and during pretrial. It is my understanding that the litigation was settled after I left my former law firm and joined Department of Justice.

Co-defense counsel
William S. Dufoe
Holland & Knight
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Counsel for plaintiff Michael Moecker, as Assignee
Ladd H. Fassett
Fassett, Anthony & Taylor, PA
1325 West Colonial Drive
Orlando, FL 32804
Tel: 407-872-0200

4. ***Taylor Publishing Company v. Jostens, Inc.***, 36 F. Supp. 2d 360 (1999 E.D. Tex) (Hon Paul Brown), 216 F.3d 465 (5th Cir. 2000) (Hons. E. Grady Jolly, Emilio M. Garza, Fortunato P. Benavides). Representation of plaintiff Taylor Publishing Company in a Sherman Act Section 2 suit against dominant yearbook publisher, Jostens, Inc. I was brought in as trial co-counsel during the trial preparation, pretrial briefing, and jury trial. The trial resulted in a $24 million verdict for Taylor. The district court later granted JNOV and this was upheld by the Fifth Circuit.

Co-Plaintiff's Counsel
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Counsel for Defendant Jostens, Inc.
Jeffery J. Keyes
James J. Long
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5. ***Bragg v. Roberston***, 248 F.3d 275 (4th Cir. 2001), (Hons. Paul V. Niemeyer, J. Michael Luttig, Karen J. Williams), *cert. denied*, 534 U.S. 1113 (2002). Appellate representation during 2000-01 of the West Virginia Coal Association in SMCRA and Clean Water Act litigation. Obtained reversal of district court order. This litigation continued with further district court and appellate proceedings after I left my former law firm and joined the Department of Justice.

Co-Defense Counsel
Robert G. McLusky
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Opposing Counsel
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Suite 525
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6. ***Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.***, 1993 U.S. Dist. LEXIS 18482 (E.D. Va. Nov. 18, 1993) (Hon. Richard B. Kellam), 56 F.3d 556 (4th Cir. 1995) (Hons. Donald S. Russell, H. Emory Widener, Jr., Kenneth K. Hall), *cert. denied*, 516 U.S. 938 (1995), *cert. denied*, 516 U.S. 990 (1995), 203 F.3d 291 (4th Cir. 2000) (Hons. H. Emory Widener, Jr., Karen J. Williams, M. Blane Michael), 2000 U.S. App. LEXIS 3489 (4th Cir. Mar. 7, 2000) (Hons. H. Emory Widener, Jr., Karen J. Williams, M. Blane Michael), *cert. denied*, 531 U.S. 918 (2000), *reh'g denied*, 531 U.S. 1030 (2000). Appellate counsel during approximately 1994-2000 for finders of the largest sunken treasure ever recovered in litigation with insurance underwriters who claimed to have insured the sunken gold at the time of the shipwreck in 1857. During the course of several separate appeals over many years, the finders obtained an award of 90% of the antique gold. The appellate representation also involved

obtaining the reversal of the district court's alteration of settlement agreement and a district court order unsealing a confidential inventory of the antique gold.

Co-Counsel for Columbus America
Robert W. Trafford
Porter Wright Morris & Arthur
41 South High Street
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Counsel for Underwriters
Guilford Ware
Crenshaw, Ware & Martin
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Norfolk, VA 23510
Tel: 757-623-3000

George Robert Daly
Bigham, Englar, Jones & Houston
40 Wall Street
New York, NY 1005
Tel: 212-269-5500

7. ***Omega World Travel, Inc. v. TWA***, 1996 U.S. Dist. LEXIS 21432 (E.D. Va. Aug. 2, 1996) (Hon. Claude M. Hilton), 1996 U.S. Dist. LEXIS 21431 (E.D. Va. Sept. 6, 1996) (Hon. Claude M. Hilton), 1996 U.S. Dist. LEXIS 21434 (E.D. Va. Oct. 23, 1996) (Hon. James C. Cacheris), 111 F.3d 14 (4th Cir. 1997) (Hons. Kenneth K. Hall, J. Michael Luttig, John D. Butzner, Jr.), 172 F.3d 863 (4th Cir. 1999) (Hons. J. Michael Luttig, John D. Butzner, Lacy H. Thornburg). Representation during 1995-98 of antitrust defendant TWA in suit brought by national travel agency arising from a discount airline ticket program. The representation included obtaining an emergency appellate stay and reversal of a preliminary injunction barring a termination of the agency and summary judgment in favor of TWA on all claims.

Counsel for Co-defendant Airlines Reporting Corp.
Kathryn M. Fenton
Kevin D. McDonald
Edwin L. Fountain
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Counsel for Plaintiff Omega World Travel
Barry Roberts, Esq.
Roberts & Hundertmark
35 Wisconsin Circle
Chevy Chase, MD 20815
Tel: 301-656-3395

8. ***Forest Ambulance Service, Inc. v. Mercy Ambulance of Richmond, Inc.***, 952 F. Supp. 296 (E.D. Va. 1997) (Hon. Richard L. Williams). Representation in 1997 of defendant Multi Hospital High Tech Services in a suit alleging violations of the Sherman Act and Sections 1983 and 1988 in connection with the provision of ambulance services in the City of Richmond. I served as lead counsel throughout discovery, briefing of motions to dismiss, and oral argument on State Action doctrine and Noerr-Pennington issues. The litigation resulted in the court granting the defendants' motion to dismiss.

Co-Counsel:
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Opposing Counsel:
Vernon Eugene Inge, Jr.
LeClair Ryan
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9. ***Marshall v. Meadows***, 921 F. Supp. 1490 (E.D. Va. 1996) (Hon. Richard L. Williams), 105 F.3d 903 (4th Cir. 1997) (Hons. Clyde H. Hamilton, J. Michael Luttig, Karen J. Williams). Representation of Senator John Warner of Virginia during 1995-97 in an election law and First Amendment controversy. The Republican Party of Virginia sought to deny Senator Warner renomination by primary as provided by Virginia law. I was lead counsel in obtaining an official opinion from the Virginia Attorney General and in Eastern District of Virginia and Fourth Circuit litigation upholding Senator Warner's right to primary renomination prior to his successful 1996 reelection campaign.

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Counsel for Defendant
James Walter Hopper
Office of the Attorney General of Virginia
900 East Main Street
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Tel: 804-786-2071

10. ***Dillard's Virginia, Inc. v. Crown American Financing Partnership and The May Department Stores Company***, U.S. District Court for the Eastern District of Virginia, CA No. 4:97cv96 (Hon. Harry C. Morgan, Jr.). Representation during 1997 and 1998 of plaintiff Dillard's in a Sherman Act Section 1 case brought against defendants Crown American and the May Department Stores Company. I served as lead counsel through a successful argument against the defendants' motions for summary judgment. The case was ultimately settled prior to trial.

Counsel for Defendant Crown American
Stephen S. Zubrow
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Joseph R. Lassiter
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Norfolk, VA 23514
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Counsel for May Department Stores
Richard J. Cromwell
McGuire Woods Battle & Boothe
101 West Main Street
Norfolk, VA 23510
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17. **Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).**

My non-litigation or pre-litigation practice involved all aspects of client counseling, development of evidence, preparation of legal memoranda and briefs, and similar activities for a wide variety of business clients. As discussed above, the focus of this practice was on antitrust and other trade regulation matters.

During the period while I was an adjunct professor at the University of Virginia and University of Richmond law schools, I gained substantial experience as a law

teacher. This continued when I was appointed Ewald Distinguished Visiting Professor by the University of Virginia law school.

At the Department of Justice, I had significant management and policy responsibilities, in addition to the supervision of antitrust enforcement matters described in the responses above.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

   None.

2. **Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.**

   Because of the steps I took to avoid conflicts of interest and recusals upon becoming a Deputy Assistant Attorney General in 2001, such as the sale of any individual stocks, I do not anticipate any significant conflicts of interests. Although this may not technically be required in all cases, I expect to recuse myself from any matters involving my former law firm, Hunton & Williams. I will also rely on the Department's ethics official to counsel me on any potential conflict issues as well as follow the extensive rules and regulations of the Department of Justice.

3. **Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service in the position to which you have been nominated? If so, explain.**

   None.

4. **List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more. (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)**

   See attached.

5. **Please complete the attached financial net worth statement in detail (add schedules as called for).**

   See attached.

6. **Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.**

   Even though I have not played a role in a campaign, I represented Senator John Warner in an election law and First Amendment controversy described in answer 16 above.

III. GENERAL (PUBLIC)

1. **An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.**

During my private law practice I devoted a substantial part of my time to pro bono activities every year. Among the most significant of these activities:

- George Mason Elementary School Mentoring Program (1990-92). After school tutoring and mentoring program for at-risk 4th and 5th grade children.

- Hunton & Williams Church Hill Office (1992-93). Volunteer counsel in special law office providing legal assistance to low income citizens.

- Minority Youth Assistance Society, Inc. (early to mid 1990's). Provided legal assistance on a variety of matters for an at-risk youth tutoring program, most notably a purchase of a new facility for the Society through a complicated escheat process. Received special certificate of recognition from the Society.

- Children's Museum of Richmond, Richmond, Virginia (Member, Board of Trustees 1996-2001; General Counsel 1999-2001)

- The Carver Promise (educational mentoring program for at-risk minority youth), Richmond, Virginia (Board Member, 1995-2000)

- Pro bono constitutional litigation. I devoted substantial time to litigating two major public interest constitutional cases. The *Columbia Union College* litigation is described in the response to question 16 above. In *Kessler v. Grand Central District Management Ass'n*, during the mid to late 1990's, I represented pro bono the Business Improvement District that beautifies and provides homeless outreach in the area in which my former firm's New York office is located in a constitutional challenge to the District's governance structure, prevailing in both the Southern District of New York and Second Circuit.

For each year, 1996 to 2000, I received my former firm's "E. Randolph Williams Award for Outstanding Pro Bono Service," given to lawyers who devoted over 100 hours per year pro bono work.

2. **Do you currently belong, or have you belonged, to any organization which discriminates on the basis of race, sex, or religion - through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies.**

From 1994 to 2002, I was a member of The Commonwealth Club, Richmond VA, an all-male athletic and dining club.

I resigned from the Club in November, 2002.

Senator DEWINE. Let me turn to my colleague, Senator Leahy, for any opening statement he would like to make.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman. I am glad to be here with you and with Senator Kohl. Both of you, as I have said before, do such a superb job in handling this Subcommittee, and I will put most of my statement in the record. But I do worry about the geographic boundaries of our marketplace being pushed further and further out, and many of the competitive issues that were once only local have become regional, national, or even global in their nature. And when the economy is suffering and in down times, then you have a temptation to act anti-competitively. We are in a world dominated by high-tech information industries. Technological change is coming at a dizzying speed. And so we have to have fair and efficient enforcement of our antitrust laws. We think of mergers of competitors, but more and more vertical arrangements are entered into, and we have to look at those. It doesn't mean they are all bad by any means, and in some cases they can give consumers a greater range of choice. In others, they can very much limit it. And we have to make sure in the digital age that consumers are covered.

I have raised concern about the recent proposal by H.P. Hood and National Dairy Holdings to join, which would have had one entity, Dairy Farmers of America, in control of 90 percent of the milk market in my part of the country, at a time when milk prices are at an all-time low.

I might conclude with this, Mr. Chairman. On the question of media concentration, I have talked before this hearing with Mr. Pate. I sent a letter, along with Senator Jeffords, to Chairman Powell at the FCC expressing our concerns about media concentration. And I will arrange to give Mr. Pate a copy of that letter because, as he has pointed out to me, there are different rules that involve the Department of Justice and the FCC on that, and they have different concerns, expressing it as you do.

And the last thing I would say: it is so nice to see your family here, and as I told you earlier, you are blessed with a wonderful family, and I hope these two lovely 8-year-olds gain something from this. This is not what they would normally be doing in school, so we are delighted to have you here.

Mr. PATE. Thank you, Senator.

Senator LEAHY. Thank you, Mr. Chairman.

Senator DEWINE. Senator Specter.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Well, just a word or two. Welcome, Mr. Pate. You are taking on a very major assignment here. The modern trends on mergers and acquisitions and concentrations really pose a very, very different economic picture for America today than when Jefferson raised a question about whether big was bad and Brandeis raised about the same issue. So it is a very, very important matter.

One of the subjects that has been of continuing concern to me has been the monopoly practices of OPEC oil, and when we have a chance to talk about it, I would like to get your views on what might be done on an aggressive policy, because I think that OPEC does not qualify for any of the exclusions from the antitrust laws under sovereign immunity, et cetera. But I will save most of my comments for the Q and A.

Thank you, Mr. Chairman.

Senator DEWINE. Senator Craig?

STATEMENT OF HON. LARRY E. CRAIG, A U.S. SENATOR FROM THE STATE OF IDAHO

Senator CRAIG. Welcome before the Committee.

Mr. PATE. Thank you, Senator.

Senator CRAIG. Your reputation tells me that you are going to be confirmed, and we will look forward to working with you. I do say that I reflect some of the concerns expressed by my colleagues here. Dominant in them is the consolidation of the segments of the agricultural economy that have offered great frustration to the producers in the last decade or two. And while that frustration doesn't go away, there is ongoing study as to whether, in fact, it affects market price and whether all of this activity fits within the antitrust laws of our country or does not.

My guess is that during your tenure some of those issues will be visited, and we will look forward to working with you on them.

Thank you.

Mr. PATE. Thank you, Senator.

Senator DEWINE. Since I am presiding today on behalf of Chairman Hatch, and since I am going to be here throughout the hearing, I know some of my colleagues do have to leave because they have other hearings going on. I am going to hold my opening statement and I am going to hold my questions until the end.

So we will start with Senator Leahy for the first round of questions.

Senator LEAHY. I would just as soon go to Senator Kohl.

Senator DEWINE. That is fine. Senator Kohl? Senator Kohl is the ranking member, as you know, of the Antitrust Subcommittee, and Senator Kohl and I have exchanged gavels back and forth a number of times. And I suspect we may at some time in the future do that again, although I hope that doesn't occur too soon.

[Laughter.]

Senator LEAHY. I hope it does.

Senator DEWINE. Well, we understand.

Senator Kohl?

Senator KOHL. Thank you very much, Senator DeWine.

Mr. Pate, as you know, over the last year, our Subcommittee has investigated disturbing allegations of anti-competitive practices among the large buying organizations that purchase medical equipment and devices for hospitals, what are known as group purchasing organizations or GPOs. We held a hearing last year and received evidence of GPO contracting practices and conflicts of interest that can effectively prevent competitive medical device manufacturers from gaining access to hospitals for their devices, innova-

tive products like retractable needles, for example, or advanced pacemakers.

As a result, it appeared that in many cases hospitals were not getting the best products at the best prices for their patients. The situation is quite disturbing. We cannot tolerate, as you know, a situation in which patients and physicians could be well denied the best medical devices because of anti-competitive practices by these GPOs.

We are pleased that in response to our concerns, several of the largest GPOs, including the industry leader Premier, have now committed to voluntarily change many of their contracting practices and end conflicts of interest. We commend Premier and the other GPOs that have worked with us over the last year to reform their practices. However, we also believe that vigorous antitrust enforcement is required of this industry and that the joint FTC–DOJ health care guidelines covering the activities of GPOs need to be reviewed and updated in light of the industry practice we uncovered and the consolidation that has taken place in this industry. I have a question for you regarding this issue and then a follow-up.

First, do you share our concern, Mr. Pate, regarding the possibility of anti-competitive practices by GPOs which could well result in device manufacturers' being denied access to the hospital marketplace?

Mr. PATE. Senator, the issue you raise is one of great importance. The ways in which hospitals can purchase medical supplies affects not just the price of medical care but also access to new and innovative products, as you mention. This is an issue of concern and attention at the Division.

As you know, the Federal Trade Commission has an open investigation in this area. It would be inappropriate for me to make comments directly about that, but I will say that the Division works cooperatively with the Federal Trade Commission in this area. We have joint health care hearings, open, with the Federal Trade Commission in which this a subject on which we're going to be seeking evidence. And if as a result of that we find that there is a need for changes to the health care guidelines as they relate to GPOs particularly, then we have pledged to work with the Federal Trade Commission on that. So this is an area in which you can expect us to be active.

Senator KOHL. So what you are saying is that, if and when you are confirmed, we can expect your very prompt re-examination of the health care guidelines to begin and would expect it to be finished in a fairly quick and effective way?

Mr. PATE. You can expect we'll be very active in this area. I think that it would be most likely that we would try to conclude the joint health care hearings and the collection of evidence on health care issues before, frankly, there would be a revision of the guidelines. But what I'm talking about there is a period of several weeks during which those hearings are going to continue. And after that, if there is a need to move forward, we'll be doing that together with our colleagues at the Federal Trade Commission.

Senator KOHL. Okay. One more question on this round. Mr. Pate, the Federal Communications Commission is about to conclude per-

haps the most fundamental revision to its media ownership rules that we have ever seen and expects to issue its new rules in the next few weeks.

It has been reported in the press that the new rules will be a major relaxation of current media ownership limits, even though we have recently seen a great amount of consolidation in the media. And these reports trouble many of us.

Mr. Pate, if these ownership limits are lifted, then we can imagine an even greater wave of media mergers and acquisitions. Indeed, the investment firm of Merrill Lynch has just released a report predicting just such a merger and acquisition binge. The antitrust enforcement agencies will then be our last line of defense against excessive media concentration.

Some believe that there is nothing special about mergers and acquisitions in the media marketplace and that they should be treated just like any other merger. For example, when I discussed this issue with your predecessor, Charles James, last year, he said that the only thing that mattered in reviewing such a media merger was the economic consequences of the transaction.

I respectfully disagree. First, mergers in the media are different because they affect competition in the marketplace of ideas which are so central to our democracy, and diversity in ownership is essential to ensuring that such competing views are heard. Therefore, I believe that we must give media mergers special and more exacting scrutiny than when we review mergers in other industries which do not affect the free flow of information. Former FTC Chairman Robert Pitofsky agrees with this view.

What is your view, Mr. Pate? Is the conventional view of antitrust review of media mergers focused solely on, for example, ad rates, correct? Or do you agree with me that the Justice Department should consider a media merger's impact on diversity of views and information and not limit your analysis to a merger's likely effect on economic interests such as advertising rates?

Mr. PATE. Well, Senator, this is an important issue, one on which I know members of the Committee have been very active. There are different predictions as to what may follow from the FCC's rulemaking. I recall the report you mentioned. I know that an analyst group, I believe called the Precursor Group, issued a report a couple of days ago, suggesting that there would not be consolidation following the rulemaking.

We're not in the business of predicting what will happen but dealing with transactions that do come before us. What I would say on that front is that—I know you characterize us as the last line of defense, but I can certainly assure you that we will be in place, and if there are transactions that present anti-competitive consequences, we will stop them. We have been active in the media area in whatever size case, including big cases such as DirecTV–EchoStar.

As to the specific diversity issue that you mentioned, it is the case that we have a different statutory mandate than the Federal Communications Commission, which, for example, right now is looking at a diversity index that would look directly at diversity of voices, to some extent at local production. Our statute, the Sherman Act, is different and is directed specifically at competition. But

I would say that when we step in to stop an anti-competitive transaction, that may as a by-product also preserve diversity of voices. And that's all to the good.

Senator KOHL. I appreciate that. And, finally, I would like you to offer me some response that is somewhat specific to my suggestion that media activities, because they relate to something so central to democracy, deserve more than just an economic review, that there is another level of review that is proper and necessary when it comes to media diversity.

Mr. PATE. Well, certainly as a statutory mandate, the FCC directly looks at those things. And in terms just of the general interest in citizens, no one can deny that there is a great interest in diversity of access to views in the media.

When we go to court, which is what we need to do to challenge an anti-competitive transaction, we have to proceed under the standards of the Sherman Act. And those are specifically directed toward competition. But as I say, the work that we try to do in protecting competition may also from time to time help preserve diversity in the marketplace in terms of the output of views that are accessible to consumers.

Senator KOHL. Thank you, Mr. Pate.

Thank you, Mr. Chairman.

Senator DEWINE. Senator Specter?

Senator SPECTER. Thank you, Mr. Chairman.

Mr. Pate, at the outset, I thank you for your timely intervention with the Department on a matter of significance in Pennsylvania where we had a bankruptcy sale involving a company called Carbide Graphite, and you had the matter under study and intervened in a very timely way to forestall an antitrust potential violation which resulted in the continuation of the plant and the employment of some 120 people in a small town, St. Mary's in Pennsylvania. That was, I thought, unusual, very prompt action, and we thank you for that.

Mr. PATE. Well, thank you, Senator. That was an important situation, one in which the Division had to act quickly. The Division's Principal Deputy, Debbie Majoras, was in charge of that and did a good job. We also had tremendous help from the U.S. Attorney's Office in Pennsylvania in that case as well. So I appreciate your comments on that.

Senator SPECTER. Mr. Pate, back on October 11th, I wrote to President Clinton and, similarly—in 2000, and on April 25, 2001, wrote to President Bush concerning the energy crisis and the high prices of OPEC oil. And, Mr. Chairman, I would like both of these letters to be made a part of the record.

Senator DEWINE. Without objection, they will be made a part of the record.

Senator SPECTER. And these letters outlined the basis for pursuing OPEC, essentially pointing out that the governmental activity exemption did not apply and citing the case law on commercial transactions, and even an alternative suit from the International Court of Justice at The Hague. But the principal idea was to move under the antitrust laws, and we have seen the energy issue become even more complicated, difficulties in finding sufficient fuel, costs of using fossils, coal.

I hope that you will take a very, very serious look at this issue because we now know with certainty that the Saudis are not our friends. And while there may have been some political factors to ease off in the past, I think that has all changed with 9/11 and the revelations of Saudi involvement.

This is too complicated a subject to discuss at any length in the course of the 7 minutes allotted, so perhaps it might just as well be left with your commitment to study it and act if you think you have a case and can get permission from the White House.

Mr. PATE. Well, Senator, I understand that this is a very difficult legal area. I know that FTC Chairman Pitofsky testified on this a few years ago and noted some of the legal hurdles that might be in the way of such a case. I know that it has been a subject of interest to you personally, Senator.

Let me say this: Bringing an enforcement action against OPEC would certainly involve more than just the legal and policy considerations ordinarily involved in an antitrust case that the Division might bring. As the content of your question indicates, there are inherent diplomatic and international relations issues involved in such a case, and the issue would be one that would involve interests broader—not only broader than the Antitrust Division, but broader than the Department of Justice. And I believe that in the past administrations have pursued this issue through diplomatic and other means, but as with any topic, I would pledge to take a look at the antitrust law on this subject and to provide your staff with information on that if you believe our review would be appropriate.

Senator SPECTER. Well, let's leave it this way: Would you make a commitment to within 90 days give a conclusion as to whether you think there is an antitrust violation? And if you do, then I think others in the Congress would weigh in—I certainly would—as a matter of policy in international relations take it up to the Secretary of State and really up to the President. But I think the threshold question is whether the Assistant Attorney General in charge of the Antitrust Division thinks there is a case.

Mr. PATE. Well, Senator, as with any issue in which Senators seek our views, if you were to request those, I commit to you that the Division will get a response back to you promptly. And I certainly think 90 days is a reasonable amount of time to do that.

Senator SPECTER. Okay. I am requesting it.

Let me turn now to a matter of interest to Pennsylvania. There is a travel agency called Travelocity, which I visited recently because they had brought to my attention a very serious situation which appears to me to be an antitrust violation. I had written to you about this just a week ago, on May 13th, but the essential facts for the record at hearing are these: that there is a competitor of Travelocity's—and we are putting all the cards up on the table, it is a question of fair competition, legal competition—a company called Orbitz, which is jointly owned by five major airlines: United, American, Delta, Continental, and Northwest. And those five airlines together account for four of five tickets sold in the United States. And almost all major U.S. airlines, which account for more than 90 percent of domestic bookings, are represented to participate in Orbitz on similar terms with the five identified airlines.

The key concern that Travelocity has is the so-called most-favored-nation agreement between Orbitz and air carriers which guarantees Orbitz access to the airlines' lowest fares to the exclusion of Travelocity.

It sounds to me on its face like a restraint of trade. What do you think?

Mr. PATE. Well, Senator, I appreciate an opportunity to address the Orbitz case, which I know has been one of interest among members. For the reasons you state, the Orbitz matter has been a subject of great concern at the Division. A joint venture involving an MFN among five horizontal competitors with 70 percent or more of the traffic raises obvious antitrust issues.

At the time we opened the investigation, however, the Division determined right about the time I came to the Division, correctly, I believe, that we should look at the market operation of Orbitz and make a determination based on that rather than do as some were suggesting at the time, try to seek an injunction to prevent Orbitz from coming into operation at all, because there were potential consumer benefits from this new venture that were being offered.

At this point, our economists have been involved in trying to review large volumes of market evidence, but one of the problems we face is the post–September 11th environment in which the airline industry has faced a situation unlike any I am aware of. And, frankly, it has been difficult to come to a conclusion that we can be confident about in the case.

But I assure you we are not sitting on it. We are working hard on it, and we want to bring the case to a conclusion to determine whether we need to try to take some action and whether that would be justified. It is a priority matter at the Division.

Senator SPECTER. You might think 90 days is too short to come to a conclusion, unlike OPEC oil?

Mr. PATE. Well, on a non-merger investigation of that importance, I know these things take longer than many would think is necessary. I can assure you we are working hard on it, but I would hesitate to put a timetable on it of that type because it is equally important that we get the answer right as that we act quickly in a case like this. We are working on it.

Senator SPECTER. Orbitz is important, but not more important than OPEC.

Mr. PATE. I wouldn't suggest that it is.

Senator SPECTER. I am just jousting with you a little on time. If not 90 days, perhaps 180, but we would appreciate a close look.

Mr. Chairman, I have just a little more, if I might proceed.

Senator DEWINE. Sure.

Senator SPECTER. I am handed a note by staff reminding me that the investigation has been ongoing since May of 2000. Now, that is not under your watch, but I hope you will keep that factor in mind that we are 3 years into the matter.

I note that the Department of Transportation is going to be issuing regulations here, and I am a little perplexed as to why the Department of Transportation has the lead role when this is really an antitrust issue. Will the Department of Justice and the FTC be

giving the Department of Transportation your inputs as to the potential antitrust issue and the past violation?

Mr. PATE. Senator, I believe what you are addressing there is the CRS rulemaking that's underway at the Department of Transportation, and, yes, we are looking right now at providing record comments to the Department of Transportation about how the CRS rulemaking should go forward.

We had a letter from Senator Kohl and from Senator DeWine jointly asking about that same topic, and it's a matter that our attorneys and economists are working on now.

Senator SPECTER. Why does the Department of Transportation have what is really the lead role on a matter of this sort which is really an antitrust issue?

Mr. PATE. Well, the rulemaking that I believe you're referring to is really a rulemaking that occurs under the Federal Aviation Act, and there are different aspects of aviation competition in which the DOT takes the lead and others, such as merger review, where the Justice Department takes the lead. So the reason for that division as it relates to the CRS rules is the content of the statute that they follow.

Senator SPECTER. Well, I would just like to be sure that the real antitrust experts are at work on it, and I thank you for your assurances.

Mr. Pate, I think you are an impressive nominee. You are an impressive witness. I look forward to supporting you and working with you.

Mr. PATE. Thank you, Senator.

Senator SPECTER. Thank you, Mr. Chairman.

Senator DEWINE. Thank you, Senator Specter.

Senator Kohl?

Senator KOHL. Thank you very much, Mr. Chairman.

Mr. Pate, we were pleased last year when the Justice Department decided to block the merger between DirecTV and EchoStar. Now the media giant News Corporation, owners of the Fox television and cable networks, wants to acquire a controlling interest in DirecTV. While not a direct horizontal merger among competitors like the EchoStar–DirecTV deal, this merger does raise important vertical issues. One of the world's most powerful producers of news and entertainment would be acquiring one of the most important distribution vehicles.

Mr. Pate, we recognize that you cannot comment on the specifics of the News Corporation–DirecTV deal as it will be reviewed by your agency when you are confirmed. But can you tell us generally how you will analyze vertical mergers in the media industry? Do combinations of content producers and distribution channels pose special dangers, especially for competitors who do not own a means of distribution?

Mr. PATE. Well, thank you for that question, Senator. I appreciate your remarks on the DirecTV–EchoStar merger. We were very pleased with the outcome we got there. It was actually an instance where I was able to appear in court myself on that case and was especially pleased at the way it turned out.

As to the transaction you mentioned, the upcoming News Corp. transaction, as you say, it would not be appropriate for me to com-

ment on that. It involves obviously different circumstances from the purchase—or the merger of two direct horizontal competitors as we had in DirecTV–EchoStar. But we'll be looking at it closely.

On the overall question about vertical mergers, as a general approach, vertical mergers, as you know, generally provide lesser concern under the antitrust laws than a merger of horizontal competitors. Nonetheless, there are instances where the vertical consequences of a merger can present a sufficient impediment to competition by one of the horizontal competitors that they do raise significant concerns.

I would mention cases since I have been at the Division: Northrup–Grumman, TRW, we had a case called Prem Door in the door manufacturing area. So we have in recent times looked at vertical aspects of mergers, and we'll do that in any case that it's called for. But beyond that, I think it would be inappropriate to address specifically an upcoming transaction such as the one you mentioned.

Senator KOHL. All right. In the 1996 Telecommunications Act, Congress essentially deregulated radio station ownership, ending national ownership caps and allowing one company to own up to eight radio stations in large markets. As you know, an enormous wave of consolidation followed, resulting in large corporations such as Clear Channel now owning more than a thousand stations across the country.

Many people have decried this gigantic wave of radio consolidation and contend that it has homogenized radio ownership—radio across the country with the same formats and programming offered in every major city by the same owners. Many stations, critics do contend, care little about their local markets and are often programmed at one central and oftentimes one very distant location. Local news coverage has suffered perhaps the most. Radio stations once competed with different city hall or courthouse reporters, for example, and those same groups of eight stations now share one reporter and only one perspective. Many stations have eliminated news coverage altogether. Last Sunday's Washington Post reported, for example, that on 9/11 several of Washington's leading FM radio stations had nowhere to turn but to television, and they merely fed the sound from these television broadcasts.

Does the experience of radio consolidation sound a warning bell for media consolidation in general? Doesn't this experience support examining a media merger's effect on the marketplace of ideas, to which I referred before, rather than just on the economic cost of advertising?

Mr. PATE. Well, as we discussed with your earlier question about media consolidation, Senator, when we intervene to stop an anticompetitive merger, it can have the effect of preserving diversity. The specific treatment of issues such as local content generation, local ownership, and looking directly at the content of broadcasting is something that comes within the Federal Communications Commission's mandate. When we act, as I mentioned earlier, we act under the Sherman Act.

In terms of doing that with respect to your concern about local communities, I will stress that we look at that on a local geographic, market-by-market basis. We don't simply look at a radio

merger in a nationwide context; rather, we look from market to market at what the effects will be on a particular locality.

As to my experience in this field with respect to radio mergers, the one recent transaction we've had was the Univision–HBC transaction, and in that case radio overlaps between HBC and a company called Entrevision, where the specific issue in which we intervened and required a divestiture. So these are issues that we're going to look at closely.

Senator KOHL. Would you say you would tend to be, can we predict more in the mold of a Charles James or a Joel Klein, in terms of your activity? In terms of your activity. I am not talking about your philosophy, but he was perhaps, in my judgment, more energetic just in terms of his activity, not necessarily his political philosophy but—

Mr. PATE. Well, Joel Klein has been, Senator, a friend of mine for a long time, and Charles James is a friend and my former boss, so I may be too close to the situation to comment.

I guess if I were going to try to affiliate myself with two predecessors, I would take my friend, John Shenefield, who is here, and then James Rill, who was in charge of the Division and is also a good friend who served in the previous Bush Administration.

Senator KOHL. Thank you.

Mr. PATE. Thank you.

Senator KOHL. Thank you, Mr. Chairman.

Senator DEWINE. Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman. I would hope you look very carefully at the issues that Senator Kohl and others have raised on this, and as I said, I will give you a copy of the letter that Senator Jeffords and I sent to Chairman Powell on this media concentration. Just from the article that Senator Kohl referred to from the Post over the weekend, plus what many of us who travel around the country see, I mean the homogenization of radio is terrible. When somebody can sit in a room in Maryland and pretend to give the traffic reports for a West Coast radio station, you realize how much they have lost touch. But you also find when the company, Clear Channel—I believe they will deny this, but I believe they have done this—actively censored different artists and others, I mean that is wrong, or even those who have talk shows, who have actively censored them or made sure they cannot compete with each other. I think one of the great things I found growing up was to find my own State having a number of radio stations that are each different. It is bad enough that our newspapers around the country have become very homogenized. Now if radio and television does the same thing, we have a real problem. Plus the public safety aspects. In my State we only have a couple, two or three radio stations left that can do the things when there is a flood, a massive snowstorm—and in Vermont, massive, you have to go about 15 or 20 inches. 15 inches the schools open an hour late. 20 inches it is possible to have some closings, but those are newcomers to the State.

[Laughter.]

Senator LEAHY. And 25 inches I am willing to open the office three hours late, but you need these kinds of things. The best thing about this country is to have diversity of views, diversity of opin-

ions, and it is not real competition if somebody is able to say in one place what is going to be heard all over the country. It does not help any of us. So please look at it carefully.

I also would note that in December I wrote to you about opposing the proposed merger between HP Hood and National Dairy Holdings, a dairy processing company largely owned by Dairy Farmers of America. Now, this is somewhat parochial, I will admit, but it would have allowed them to, as I said in my opening statement, control 90 percent of the fluid milk in New England. The Department of Justice now has launched an investigation of the proposed merger. HP Hood and National Dairy announced that they would restructure their merger, I think that because the Department of Justice was looking at it, that they were more careful. I hope I have your commitment that your Department will continue to look at it. I am not asking you to prejudge it, but would you at least continue to look at it carefully?

Mr. PATE. Thank you, Senator. You do have that commitment, and we do not view agricultural issues as parochial ones or unimportant ones. As you know, at the Division, we have a man named Doug Ross, who is our special counsel full time on agriculture. With respect to milk specifically, we recently brought a case which was not a reported merger, but a transaction that was below the threshold called Southern Belle, which related to school milk markets primarily in Kentucky, in which joint control by DFA presented a concern. We were looking very closely at the NDH–Hood transaction when it was withdrawn, and to the extent that or a similar transaction in that industry comes back, you can rest assured we will be looking at it closely.

Senator LEAHY. I mention this because in 2001 Dean Foods and Suiza Foods merged. I was concerned about that, and expressed concern. They control about 30 percent of the milk nationally, about 70 percent in New England. Since that merger, what has happened is that farmers receive 25 percent less for their milk. The price in the supermarket is virtually the same for a gallon. It may change a cent or two, but most places it is the same. So I hope also that your Department will look and find out whether that merger brought about the severe drop in prices to the producers. It certainly has not made any change for the consumer, but whether that has anything to do with the severe drop to the producers.

Mr. PATE. Well, just as you mentioned, Senator, in the agricultural area, this can be somewhat unlike other areas. We are concerned with issues of so-called monopsony power, an in order for farmers to have a fair market in which to sell their milk, there needs to be a choice of potential purchasers. So I think these are legitimate issues and they're ones that we'll continue to look at. With Respect to Suiza–Dean the Department did insist on some divestitures there, but as with any other case, if information comes to light about what has happened since the merger that can help us do a better job in the future, we would want to consider that as well.

Senator LEAHY. Thank you, Mr. Pate. I will put my other questions in the record. I do have one, if I just might, Mr. Chairman.

Senator DEWINE. Sure.

Senator LEAHY. You gave a speech in February, offering praise for a European Union initiative, whereby either the EU or a member country could investigate an antitrust matter, but not vote. You suggested, as I read it, the U.S. system where many States and Federal agencies launch investigation, is too cumbersome. But I look at things like Microsoft. That case came about because there had been cooperative State and Federal law enforcement officials working. Some of the things that come eventually to the Federal level began because of aggressive action at the State level.

So would you like to speak a little bit to your speech?

Mr. PATE. I would. I appreciate the opportunity to talk about that.

Senator LEAHY. I thought you might.

Mr. PATE. The context in which I was mentioning that is one in which, as you know, we have from time to time been critical of our colleagues at the European Commission. On the other hand, the point I wanted to make there is that we need to be open to ideas in terms of what they are doing there, and Mario Monte, I think very ambitiously, is looking at how in a Federal system they can work together.

With respect to what I have here, I guess I would refer you to my remarks at the ABA antitrust meeting more recently, in which I pointed out that one of the strengths of our antitrust system is the decentralization of that system. The Antitrust Division has a voice in making antitrust law. So do the courts. So do State attorneys general. And we work cooperatively very well with State attorneys general. We're doing that now in terms of enforcing the Microsoft settlement, even working with the so-called non-settling States who took a different view of the case than we did. As long as I'm at the Division, if I'm confirmed, you'll find that we're going to continue to cooperate with the States.

There are situations in which having a very large number of enforcers looking at the same case can make it difficult to enforce in a nonduplicative way, and we want to work together with the States on that problem when it comes up as well.

Senator LEAHY. I will take a look. In fact, if you could have somebody send me over the ABA speech, I will actually read it.

Mr. PATE. I'll make sure you have it.

Senator LEAHY. Not everybody will make that offer, but I will read it. Thank you.

Thank you, Mr. Chairman.

Senator DEWINE. Senator Kohl.

Senator KOHL. Thank you, Mr. Chairman. I have just one more question.

Mr. Pate, the Government's landmark antitrust case against Microsoft was settled before you assumed your current responsibilities. As you may know, I expressed serious concerns regarding the loopholes and limitations in the settlement when it was announced, and I still hold some of these concerns today.

A couple of questions. First, have you been satisfied in the manner with which Microsoft has implemented the settlement thus far? And can you point to any specific ways in which a settlement has improved competition in the computer software market today?

Mr. PATE. Well, Senator, I appreciate your comments on Microsoft. I know there was a wide range of opinions about that case. We at the Division were very pleased about what Judge Kollar–Kotelly had to say about the ways in which the settlement did track very faithfully the findings of the D.C. Circuit Court of Appeals and did provide effective relief for consumers.

Since that time we have worked together with the State attorneys general's offices who have been involved in the case to try to make sure that settlement is effective. I would say that it's an area in which we understand the need to be vigilant in making sure that the settlement is carried out. One recent example in which—that I would point out, where our lawyers who are in charge of enforcing that settlement, obtained some improvements was in the area of the licensing agreements that Microsoft uses. Through our efforts, together with our State colleagues, we obtained an agreement that Microsoft change those licensing terms, and also removed a nondisclosure agreement, so that the terms of the agreement could be available to the public so that we could get comment from interested parties.

We're going to continue to do things like that, and Judge Kollar–Kotelly has set up a procedure that is going to try to make sure that the settlement is effective, and we're committed to doing that.

Senator KOHL. And with respect to Microsoft, last week the International Herald Tribune reported an allegation that Microsoft had engaged in a number of questionable business practices during the last year in order to dissuade governments and large institutions from choosing cheaper alternatives to its dominant Windows operating system. The alleged practices include offering steep discounts for Windows or even offering it for free if necessary. In addition, the newspaper claimed that Microsoft representatives were attending trade fairs under false identities and purporting to be independent computer consultants in order to persuade customers to avoid buying competitive products.

Do these allegations concerns you, Mr. Pate? And if true, do they raise questions regarding Microsoft's pledges to have undertaken reforms and obey the spirit as well as the letter of the settlement? Do you plan, when you are confirmed, to investigate these allegations?

Mr. PATE. Senator, with respect to the reports you mention, our level of concern would depend on the actual facts that we were able to verify.

With respect to discounting and other practices in Europe, I would suggest a caution in that the laws in Europe with respect to what sort of discounting is appropriate may differ from ours, and there may be instances in which things that are actually on-the-merits competition from our point of view, may run afoul of different local rules there.

On the other hand, as to your general question, we have met in the past repeatedly with firms who have concerns about Microsoft. If I am confirmed, we will continue to welcome input from those who think there are matters that need to be addressed, and I can assure you, if we find anticompetitive conduct, we will take appropriate action to stop it.

Senator KOHL. Thank you, Mr. Pate.

Mr. PATE. Thank you, Senator.

Senator KOHL. Thank you, Mr. Chairman. I return the floor to you.

Senator DEWINE. Senator Kohl, thank you very much.

STATEMENT OF HON. MIKE DEWINE, A U.S. SENATOR FROM THE STATE OF OHIO

Senator DEWINE. Mr. Pate, the good news or the bad news is you are down to me, I think, now.

[Laughter.]

Senator DEWINE. Let me welcome you again to the Committee.

Mr. PATE. Thank you, Senator.

Senator DEWINE. I appreciate you being here, and your wife Lindsey, and Ellen and Lizzie are doing pretty well I think there. I am not sure this is an improvement over school though.

[Laughter.]

Senator DEWINE. School has got to be better than this, but I will not ask them to comment. They can tell you later, but school has got to be more exciting than this.

But we do appreciate your leadership at the Department you provided as Acting Assistant Attorney General for Antitrust really during a period of great transition. The transition period has not only included the departure of your predecessor, Charles James, but also that of two different deputy attorney generals, deputy assistant attorney generals, one for international enforcement and one for economics. Really I think you are to be commended for the way that the Antitrust Division has functioned during this transition period, and we thank you for that.

In today's challenging economic climate, vigorous antitrust enforcement we believe remains vitally important to ensuring that our markets function properly, and ultimately that American consumers get the benefit of better goods and services at better prices. The Antitrust Division is of course an integral part of our Nation's antitrust enforcement efforts. In fact, it is likely that the role of Antitrust Division will grow in importance in the near future. I am thinking in particular of the issue of media consolidation. Of course, we have already talked about that a little bit today. It has been widely reported that the FCC is likely to weaken its media ownership rules early next month. Accordingly, consumers will look increasingly to the Antitrust Division to carefully scrutinize potential mergers and acquisitions in the television, the radio, the cable news and the entertainment markets. We must take care to not allow consolidation in these markets to harm consumers' interest.

The pending News Corp–DirecTV deal is an example of the type of media deal that creates the need for thorough review. Although the FCC rule-making may not directly implicate the deal, I think the proposed acquisition is really typical of the type of consolidation that we are seeing throughout the media sector. Because of this, Senator Kohl and I plan to hold an Antitrust Subcommittee hearing next month on the News Corp–DirecTV deal, and we will closely examine the proposal at that time. We have already begun to line up witnesses for that hearing. I think it is going to be a lively and I think a very positive hearing.

For today, however, there are a number of other key areas that I think we need to examine. When your predecessor appeared before the Antitrust Subcommittee last September I stressed the importance of antitrust scrutiny for joint ventures. While joint ventures differ from full-fledged mergers, they often have significant competitive impact and require similar vigorous scrutiny from the antitrust agencies. Joint ventures also differ from mergers because Hart–Scott–Rodino Act does not cover them. As a result, the Antitrust Division is not required to examine joint ventures under the statutory merger timelines. Despite the lack of statutory timelines, however, it is important that the Antitrust Division review these arrangements within reasonable time periods without of course sacrificing careful, thorough, economically sound analysis.

We also must recognize that the Antitrust Division and other American antitrust authorities are not the only important antitrust authorities in the world. As business becomes more global, and commerce flows more freely around the world, companies that do business worldwide face nearly 100 different antitrust enforcement agencies. Ongoing efforts to facilitate cooperation between various antitrust agencies around the world and efforts to coordinate procedural and substantive antitrust standards represent important advances in antitrust enforcement.

I know you have worked a great deal in international coordination, and hope that those efforts continue. I look forward to discussing with you these and other issues today. In just a moment we are going to do that with just a few questions, although some of these areas have been really I think thoroughly examined by my colleagues.

I also want to discuss this along with the successes of the Antitrust Division during your tenure as the Acting Assistant Attorney General and the challenges that still remain. So we do also look forward to working with you in the future, and really again, I want to just say I appreciate your work, look forward to your confirmation. I think you have done a very good job thus far, and I know you are going to continue that work after your confirmation.

[The prepared statement of Senator DeWine appears as a submission for the record.]

Senator DEWINE. Let me just start. I just have a couple questions. First, I have expressed concern in the past about supplier-owned joint ventures. Now, I understand that the Antitrust Division has several ongoing investigations of these joint ventures, and as I have said before how I have some concerns about the length of time that some of these investigations go on, it is certainly important to thoroughly examine these issues, but the Orbitz investigation, for example, does seem to be taking quite a long time. I am particularly worried that the very existence of the investigation is starting to have an impact on the marketplace. I know, of course, that you cannot get into the details of an ongoing investigation, so I am not going to ask you to do that, but perhaps we could discuss the more general question of what if any impact does the existence of ongoing investigations into these joint ventures have in the market? In other words, does the existence of these investigations deter supplier-owned joint ventures from behaving in an anticompetitive manner, or does the existence of these investigation discourage le-

gitimate precompetitive activities? How should the balance be struck, and more importantly, how can the Antitrust Division investigate these issues thoroughly enough to protect consumers but quickly enough to give businesses and the marketplace the certainty and the finality that they really need?

Mr. PATE. Thank you, Senator. Let me address your joint ventures comment directly, but first, thank you for your comments about the Division's operation during the interim period since Charles James left in November. I really do appreciate that, and would like to recognize that that has been the result of a lot of hard work from Debbie Majoris, the principal deputy; Connie Robinson, our Director of Operations who stepped in; Ken Heyer, who served the function of Economics Deputy essentially prior to our filling that slot recently. But I appreciate your comments on that point.

With respect to joint ventures, there were really two aspects of the importance that Charles placed on that that he talked about with you in an earlier hearing. One is the so-called sham joint venture, where two companies may characterize as a joint venture something that is really nothing more than an agreement to eliminate competition. We have been very active in that area and have moved very fast. Our alternative newspapers case and the case involving the Math Works, both were situations where the Division acted quickly to bring assets back into competition.

As to the investigations that have taken a longer time, I am not sure that despite the long pendency of those investigations that they are really average examples. Orbitz, our foreign currency joint venture transaction, the music distribution investigations, all were situations involving the inception of brand new industries and the need on our part to collect and evaluate huge amounts of economic data. As I said earlier, they take a long time, but it is just as important to get the right result as it is to move quickly in a case like that.

As to your very specific question, there are two sides to that coin. Some think—and this has been an opinion that has been expressed in the context of Orbitz—that the pendency of the investigation may have prevented anticompetitive conduct. Others equally, with respect to that very same case, say that the pendency of the investigation is an unfair burden on Orbitz. So we at the Division try not to look at either side of that coin. For an investigation to be open, we do not see ourselves as sitting as regulators with no end in sight. Rather, if an investigation is open, it needs to be driving towards some potential Sherman Act claim. These things can take some time, but we try to do them as expeditiously as possible. So I hope that is responsive.

Senator DEWINE. Good, good. Thank you very much.

Mr. Pate, in passing the Telecommunications Act of 1996, Congress granted a role to the Antitrust Division in examining the applications of the Bell operating companies to provide long distance services in their local service areas, the so-called Section 271 applications. The Antitrust Division has adopted the standard that a regional Bell operating company should be permitted to provide long distance service in its local service area only when those local markets in a State have been fully and irreversibly opened to competi-

tion. In addition to providing a role to the Antitrust Division in examining the Section 271 applications, Congress also expressly included an antitrust savings clause in the 1996 Act to ensure that the antitrust laws continued to apply.

Has the Antitrust Division undertaken any investigations of alleged anticompetitive conduct by the Bell operating companies in their local markets once 271 applications have been granted? Under what circumstances do you foresee the Antitrust Division undertaking such investigations to ensure that competition of local markets remain fully and irreversibly opened to competition?

Mr. PATE. Well, Senator DeWine, as you mentioned, the Congress gave the Division a specific responsibility, a statutory responsibility under Section 271 of the Telecommunications Act in this field. We have been very active in the 271 process, and as you know, the statute requires the Federal Communications Commission to give weight to the comments expressed in our evaluations.

We have in some cases recommended that, or concluded that markets are fully and irreversibly open, and recommended that the FCC grant those applications. In others we've been unable to support the applications, and we think our work in that field has been very important.

You're very correct in what you say with respect to the savings clause, and since I've been at the Division we have filed several briefs reiterating the Department's position that the antitrust laws continue to apply. I don't think it would be appropriate to discuss any particular case, but I would just say generally that we hope that once we conclude that a market is fully and irreversibly open to competition, that means that the operating systems and other necessary attributes are present there, that the market will function and that as a commercial matter there will be access for local competitive firms, but if as you say, there is an allegation of anticompetitive conduct, we certainly believe, under the savings clause, that it's our job to be there to evaluate it, and we'll do that.

Senator DEWINE. Thank you very much. Let me turn to the issue that you have already discussed a little bit, and that is the international antitrust arena, which has so fundamentally changed really in the last decade. International antitrust enforcement has really increased in importance over the past few years as business has become more global and really the number of antitrust enforcement regimes around the world have increased. In fact, there are nearly, I believe there are nearly 100 antitrust enforcement regimes in the world today. This means that business has faced an array of different antitrust standards and procedural requirements. In specific cases this can lead to different jurisdictions reaching different conclusions on the same transactions. This happened, of course, in the GE–Honeywell merger case. In general it can create a great deal of uncertainty for businesses as they operate internationally.

I am pleased to hear about the strides that you have made in facilitating cooperation among the different antitrust authorities, and let me also just congratulate you—we talked about this the other day in the office—but congratulate you on the successes that you have had in this area. You have stated that the U.S.–EU bilateral relationship is a good model for how a bilateral relationship should work. Recently Senator Kohl and I met with Mario Monte, Euro-

pean Commissioner for Competition, and he mentioned the positive working relationship as well.

Let me just ask you how are we progressing with other bilateral relationships? What is the future there, do you think?

Mr. PATE. I think, Senator DeWine, that the future is positive. We do have a particularly good relationship with the EU that's borne fruit in all aspects of our work, particularly on the criminal side, where we just this year for the first time have had joint investigations in terms of drop-in interviews, dawn raids, as they call those in the EC, coordinated with the EC, Japan, Canada, some of the other countries with whom we have a particularly strong bilateral relationship.

On the broader front I would mention the International Competition Network to you, and that is an organization, not an organization composed of a number of private interests, not a bar organization, but an organization of enforcement authorities around the world. As you mentioned, there are about 100 countries now that do have antitrust statutes. The ICN, as it's called, we think is a good forum for us to try to share the view that antitrust enforcement ought to be based on objective economics and objective law enforcement rather than any other considerations. And the best thing we can do is have a forum to try to discuss that. There's a meeting coming up next month in Mexico that's going to involve the jurisdiction, many of the jurisdictions with antitrust laws, and we think that is a good forum that can make improvements in the area that you mention.

Senator DEWINE. Mr. Pate, again, thank you very much. Let me just again say, as I did announce, that Senator Kohl and I do plan on holding an Antitrust Subcommittee hearing next month on the News Corp–DirecTV deal. We think that is a very important hearing. We intend to spend significant time on that hearing to thoroughly examine that issue.

Another issue that Senator Leahy raised with you is the whole media consolidation issue. We also plan on holding a hearing on that issue in June, and we will examine that issue as well. I must say that I share many of the concerns that were expressed by Senator Leahy. I understand, Mr. Pate, that your jurisdiction, under our law, is of a limited jurisdiction. You do have jurisdiction in these areas, but it is somewhat limited, as you and I talked about the other day in my office. But we have an obligation I think in this Subcommittee to have an overview of this issue. I think from a public policy point of view that these consolidations present some very big, big public policy issues that frankly go beyond the economic issues that you are limited to looking at, and some of the antitrust issues that you are limited to looking at, and so we intend to look at the broad issues as well.

Again, Mr. Pate, thank you very much. I think you are off to a great start in your job, and we look forward to moving forward on your confirmation.

Mr. PATE. Thank you very much, Senator DeWine.

Senator DEWINE. Thanks for being with us.

[Whereupon, at 12:04 p.m., the Committee was adjourned.]

[Questions and answers and a submission for the record follow.]

DEPARTMENT OF JUSTICE
Antitrust Division

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JUN - 2 2003

The Honorable Orrin Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed are the written responses to the questions I received following my confirmation hearing.

Sincerely,

R. Hewitt Pate
Acting Assistant Attorney General

Enclosure

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

Answers to Questions for the Record
Confirmation Hearing of R. Hewitt Pate
Before the Senate Judiciary Committee
May 21, 2003

Questions from Senator DeWine

1. Judgment enforcement is a critical part of effective antitrust enforcement. Once the Antitrust Division uses its resources to obtain consent decrees, it is vital that it enforce those consent decrees to ensure that consumers reap the benefits of the Antitrust Division's efforts. Please describe the Antitrust Division's ongoing efforts to detect violations of its consent decrees and, when appropriate, take enforcement actions.

Answer: Effective judgment enforcement is an important part of the Antitrust Division's mission. It would be contrary to our law enforcement responsibilities to obtain a remedy and then not monitor and, if necessary, enforce it. The Antitrust Division takes great care in drafting decrees, requiring that there be sufficient requirements to keep the Division abreast of how the decree is being implemented. This may include periodic reporting obligations, visitation rights, and document inspection rights, as well as other enforcement tools.

I am, and the Division is, committed to decree compliance and enforcement. The responsibility for enforcing the Division's judgments lies with the civil sections to which the judgments are assigned according to commodity or industry allocations among those sections. Typically, the key enforcement personnel are those that worked on the enforcement matter in the first instance. Those individuals have the most knowledge about the industry and have developed industry contacts through the initial investigation that can serve them well in ensuring enforcement.

The Division has an active program to ensure compliance with its decrees. Within the past five years, the Division has filed four contempt petitions to enforce compliance with its decrees: *United States v. Microsoft* (D.D.C. 1997), *United States v. Interstate Bakeries Corp. & Continental Baking Co.* (N.D. Ill. 1999), *United States v. Smith Int'l & Schlumberger Ltd.* (D.D.C. 1999), and *United States v. Earthgrains Baking Cos.* (N.D. Ill. 2002).

2. Part of any judgment enforcement regime is ensuring that the consent decrees in force restore and maintain competition. Consent decrees that are no longer effective or required by competitive conditions in a market can impose unnecessary restrictions on businesses and potentially occupy resources that the Antitrust Division could better deploy in other ways. In response to a written follow-up question on judgment enforcement after the Antitrust Subcommittee's Antitrust Oversight hearing in September of 2002, former

Assistant Attorney General James noted that the monitoring and enforcement of consent decrees "also includes consideration of whether the consent decree is still useful and necessary or should be modified or sunset. The Division also encourages parties who believe a current decree is having an anticompetitive effect to bring that concern to the Division's attention."

Has the Antitrust Division moved to sunset or modify any consent decrees based on the parties' assertions that the consent decrees have become anticompetitive?

Please provide an update on the Antitrust Division's efforts to identify consent decrees that are no longer effective or necessary.

Answer: Due to changed circumstances, a consent decree may no longer be required by competitive conditions and could potentially impose unnecessary restrictions on a business. This is more likely to be the case for very old decrees which did not typically contain a set term for which the decree would be in effect. Virtually all decrees in the past two decades have provided explicitly for sunset after a set number of years. With respect to those decrees, changed circumstances supporting decree modification are much less likely to develop. With respect to older decrees, the Division is happy to work with parties subject to those decrees if a case can be made that the decree is competitively unnecessary due to changed circumstances and is imposing unnecessary restrictions on their business.

Since June 2001, the Division has moved to modify or terminate three decrees.

- In January 2002, the Division moved to modify the Sprint/France Telecom/Deutsche Telekom decree on the grounds that DT and FT had sold their ownership interests in Sprint, and DT and Sprint had withdrawn from the Global One joint venture and sold their interests in Global One to FT. The court modified the decree in May 2002.

- In February 2002, the Division moved to terminate the AT&T/TCI decree after AT&T had spun off both AT&T Wireless and Liberty Media, thereby removing the concern caused by Liberty's part ownership of Sprint PCS. The decree was terminated in May 2002.

- In May 2002, the Division moved to terminate a 1952 decree involving General Electric and others entered as a result of a complaint charging the parties with conspiring to control the street lighting equipment market, after concluding that the decree was no longer necessary. The court terminated the decree in October 2002.

Division attorneys monitor decrees for their continued usefulness as part of monitoring compliance. Under the Division's current organization, each industry is allocated to one of six civil sections. Along with investigating possible violations of the antitrust laws within its assigned industries, each of those civil sections is responsible for monitoring and enforcing each

consent decree that relates to any of those industries.

3. At the time of the Antitrust Oversight hearing last September, the Antitrust Division was reviewing its remedy processes and procedures. What is the status of that review? When will the Antitrust Division complete its review and what final product will result from the review?

Answer: The Antitrust Division's merger remedy project is in its final stages. It is expected to be finalized by the summer of 2003. The final product will be a guide to merger remedies for Antitrust Division attorneys and economists that provides guiding principles of merger remedies as well as guidance on how to fashion a remedy, how to implement the remedy, and how to monitor and enforce compliance. It is currently anticipated that such guidance also will be released publicly, so that businesses and practitioners can use the guidance to work more efficiently and effectively with the Antitrust Division to ensure that a decree will contain acceptable merger remedies that preserve and protect competition.

4. At your confirmation hearing, you stated that the antitrust laws and, by extension, the Antitrust Division are limited to reviewing only the economic consequences of media mergers. One possible economic consequence of media mergers is the potential effect on competition among purchasers of programming. When appropriate, will the Antitrust Division analyze the potential effects of media mergers on national, regional, and local programming markets, for both new programming and syndicated programming (both first run and other syndicated programming)? Briefly and generally outline how the Antitrust Division will analyze effects on programming markets in media mergers, particularly mergers involving television stations.

Answer: The Antitrust Division analyzes mergers as to all markets that may be potentially affected. For a media merger, our analysis would certainly include, as appropriate, any potential effects on competition (horizontal as well as vertical) for the purchase of programming. We would consider whether the merger would increase concentration among purchasers of programming to such an extent as substantially to reduce competitive alternative outlets for programmers, or among programmers to such an extent as substantially to reduce competitive programming choices for purchasers of programming. We would also consider whether, in a market with significant concentration, a merger between a programmer and a purchaser of programming would give the merged firm the ability to favor anticompetitively its own programming or its own distribution outlets and thereby deprive consumers of competitive alternatives. We would consider these potential effects as to new programming and as to all forms of syndicated programming, in relevant national, regional, and local programming markets, as appropriate.

5. Recently, the Department of Justice ("Department") and the Federal Trade Commission ("FTC") filed an *Amicus* brief with Supreme Court asking it to hear an appeal from the Second Circuit in the *Trinko* case. In that case, the plaintiff alleged that the incumbent Bell Operating Company denied plaintiff's local telephone service provider equal access to its local network. Some commentators have suggested that the Department and the FTC are advocating that the Supreme Court adopt a position that would make monopolization claims much harder to prove, by allowing defendants to escape liability by showing that their exclusionary conduct generates any efficiency, however small, even if the same conduct greatly harms competition.

Are the above-mentioned commentators correct in their characterization of the position that the Department and the FTC are advocating? Please explain more fully the position that the Department and the FTC plan to take in their *Amicus* brief in the *Trinko* case.

Does the position that the Department and the FTC plan to take seek to alter or modify existing law?

Will the position, if adopted by the Supreme Court, make it more difficult for plaintiffs – including the Antitrust Division – to prevail in future monopolization cases?

Answer: We have not taken the position that any showing of an efficiency allows defendants to escape liability for exclusionary conduct. The basic position that the Department and the Federal Trade Commission have taken in the Amicus brief in *Verizon v. Trinko* is that in evaluating single-firm conduct – particularly in the context of claims for the imposition of a duty to assist competitors -- an appropriate standard to use is whether the conduct asserted as an antitrust violation would make economic sense for the defendant but for the elimination or lessening of competition. We believe that this test sets forth an objective, transparent, and economically-based framework for assessing single-firm conduct. This test has support in existing case law and is consistent with well-established principles of antitrust jurisprudence, including prior decisions of the Supreme Court. We do not believe this standard is appropriately characterized as either pro-plaintiff or pro-defendant. We would note in that regard that the Department itself has utilized the standard as a plaintiff in two important enforcement matters, the *Microsoft* case and the *American Airlines* case.

Questions from Senator Leahy

1. The problem of media concentration was a central topic at your hearing, and I was pleased to hear you give assurances that if confirmed, you would give media mergers full attention. But I would like a little clarification of your answers: You said that the Antitrust Division's charge was to look at the "anticompetitive effects" of a transaction. Do those effects include only economic effects, or does a reduction in competition among a diversity of voices also merit the Division's intervention?

Answer: Media concentration is an important public policy issue. The First Amendment is a testament to the importance of free speech and press to our society. When assessing media mergers, as in assessing other types of mergers, the Division is obligated to follow the dictates of Section 7 of the Clayton Act, which provides that mergers that may tend substantially to lessen competition violate the statute. I will vigorously enforce the antitrust laws against anticompetitive media mergers. Indeed, I personally appeared in court in the Division's challenge to the DirecTV/Echostar merger as an antitrust law violation.

In assessing whether a merger may tend substantially to lessen competition, the Division first analyzes the product and geographic markets at issue in the merger. With respect to media mergers, markets are typically a type of media (for example, radio or television) and local in nature (for example, a town or city). Once the appropriate markets are defined, the Division then determines the number of competitors in the markets and their market shares. We then analyze whether the competitive effects of the merger lead us to the conclusion that the merger may tend substantially to lessen competition. Typically, there is more likely to be antitrust concern about the competitive effects of a proposed merger in markets with a limited number of competitors. Thus, antitrust enforcement in those markets preserves additional competitors in the market.

More competitors in a market often, but does not necessarily, equate with more diversity in a market, depending on how one defines diversity. If diversity is defined as the number of different owners of assets in a market, then antitrust enforcement promotes diversity. If diversity is defined instead as the number of different points of view heard, even if the stations are controlled by the same corporate entity, antitrust enforcement may not equate with diversity. As an antitrust enforcer, the Division would not want to allow, for example, a merger to monopoly in a media market based on the contention that the different stations in the market, although controlled by the same entity, would, through contractual commitments or otherwise, present different points of view.

For a media merger, our analysis would certainly include, as appropriate, any potential effects on competition (horizontal as well as vertical) for the purchase of programming. We would consider whether the merger would increase concentration among purchasers of programming to such an extent as substantially to reduce competitive alternative outlets for

programmers, or among programmers to such an extent as substantially to reduce competitive programming choices for purchasers of programming. We would also consider whether, in a market with significant concentration, a merger between a programmer and a purchaser of programming would give the merged firm the ability to favor anticompetitively its own programming or its own distribution outlets and thereby deprive consumers of competitive alternatives. We would consider these potential effects as to new programming and as to all forms of syndicated programming, in relevant national, regional, and local programming markets, as appropriate.

As this discussion indicates, it will often be the case that Division enforcement under Section 7 of the Clayton Act to preserve competition will have the effect of preserving a diversity of media viewpoints. This is a beneficial public policy outcome. As more programmers and media outlets compete for advertising and viewers, the likely result will be more diversity of programming choices.

2. As we discussed at your hearing, I strongly opposed the Dean Foods-Suiza Foods merger in 2001. The resulting milk processing company now controls 30% of milk nationally and almost 70 percent of the milk supply in New England. The Department, however, approved this merger despite these serious concerns raised by many in the Senate. Now farmers are receiving prices lower than they have seen in 25 years, while the retail price of milk has dropped only a few cents a gallon, if at all. I asked whether the Antitrust Division would be conducting any follow-up on the effects of the Dean-Suiza merger, and specifically, if it would examine whether this merger contributed to the recent severe drop in wholesale milk prices. You responded that "if information comes to light about what has happened since the merger that can help us do a better job in the future, we would want to consider that as well." Does this mean that the Division will not be doing any follow-up investigation on wholesale milk prices?

Answer: The Department is concerned about recent increases in concentration that have occurred in the dairy industry. We are committed to ensuring that both consumers and producers have markets unfettered by anticompetitive actions in which to buy and sell their milk. An example of our strong commitment to vigorous antitrust enforcement in the dairy industry is our recent enforcement action against Dairy Farmers of America to require it to divest its interest in Southern Belle Dairies. We follow competitive developments in the dairy industry closely and encourage anyone with any information suggesting anticompetitive activity to bring that information to us for review. As a law enforcement agency, we do not perform general pricing studies, except in a focused manner as part of an ongoing investigation. As with all of our decrees, however, should concerns come to light that this decree is not having the appropriate effect, we will review the issue carefully and investigate any information that could help us reach a conclusion, including pricing information.

3. Dairy is hardly the only commodity where consolidation has been a major issue. Serious concerns have also been raised in the poultry and livestock markets. The processors, however, seem unconcerned about the farmers who produce these products. Last year at a hearing before this Committee, the American Meat Institute actually called for even more vertical integration in agriculture markets. In the last Congress, I joined Senator Daschle and others in introduced a bill that would broaden the authority of the Packers and Stockyards Act to restrict the anticompetitive activities that these processors have used routinely to drive down commodity prices. Can I have your assurance that you will work with and your colleagues in the Department of Agriculture to scrutinize further vertical integration in these markets? Will you assist me and my colleagues in developing legislation to ensure that the Department of Justice and the Department of Agriculture can effectively police anticompetitive behavior on the part of food processors?

Answer: You can be assured that I, and the Antitrust Division, take very seriously the concerns raised regarding competition in the agricultural marketplace. We have been very active in this sector in recent years, and I expect us to remain so. We have a Special Counsel solely devoted to agriculture, Doug Ross, who reports directly to me on agricultural issues. We also have a strong working relationship with USDA, formalized in an August 1999 Memorandum of Understanding among the Division, USDA, and the FTC. In addition to vigorously enforcing the antitrust laws in this sector, we also stand ready to assist you and your colleagues as appropriate in considering other initiatives to protect competition in this important sector of our economy.

4. Our nation's citizens are increasingly turning to the Internet to find information, to listen to music and watch video, to research consumer goods and services, and to make purchases. With the dizzying pace of technological change and the equally quick rate of business innovation, how can the Antitrust Division ensure that the tasks of investigation and law enforcement do not lag behind marketplace activity? I recollect that a principal criticism of the Microsoft lawsuit was that the market had left the facts of the case far behind, and that any judgment would be relevant only to obsolete practices and situations. Are there tools and resources that the Division can implement to make sure that is not the case in its current and future investigations?

Answer: The changes brought about by rapid technological innovation often present challenging issues. Although the *Microsoft* case has generated commentary along these lines, this is not a new situation at the Division. Indeed, throughout the last century, many, many innovations have taken place that have transformed the economy. From the automobile, to radio, to telephone, to television, to air travel, to computers, technology dramatically has advanced time and again. The Antitrust Division is committed to ensuring that its enforcement is timely and effective. One of the great strengths of the antitrust laws is their flexible and adaptive nature that allows enforcers and the courts to approach the central issue of competition in different factual situations over time. The common law approach of the United States antitrust laws is a strength, not a weakness, of our system. From the Division's perspective, we will commit the necessary

resources and take the necessary steps to meet this challenge, including ensuring appropriate staffing, hiring experts as needed, and expediting litigation, as appropriate.

5. One continuing task for the Antitrust Division is the Microsoft settlement compliance issue. Recently, we all saw a press report from the Department announcing that the Antitrust Division had required Microsoft to make changes in the contracts it was entering into with others, and I appreciate your answers to Senator Kohl about the work the Antitrust Division continues to do in relation to the settlement. Can you please tell us a little more about how successful you believe the settlement has been in rectifying the anticompetitive harms the Department sued over, and how well Microsoft has been implementing the terms of the settlement decree?

Answer: The settlement decree represents a successful resolution of the case, in that it enjoins the conduct found to be unlawful, prevents recurrence of that conduct, and takes proactive steps to restore competitive conditions to the market affected by Microsoft's illegal conduct. More specifically, the Final Judgment contains prohibitions on the practices that the court of appeals determined were acts of monopoly maintenance, precludes other practices that Microsoft might engage in to impede middleware threats, and imposes affirmative obligations on Microsoft that create favorable conditions under which competing middleware products can be developed and deployed. Notably, the district court commended the quality of the Proposed Final Judgment, stating that the decree "adopts a clear and consistent philosophy such that the provisions form a tightly woven fabric . . . tak[ing] account of the theory of liability advanced by Plaintiffs, the actual liability imposed by the appellate court, the concerns of the Plaintiffs with regard to future technologies, and the relevant policy considerations." The settlement has already benefitted consumers by preventing Microsoft from taking exclusionary action toward competitive middleware, and by requiring Microsoft to (i) disclose more applications programming interfaces, (ii) make various changes to its Windows software, and (iii) make certain technology available for license. Because the Final Judgment provides preventive remedies for Microsoft's illegal maintenance of its monopoly, I believe the benefits to consumers from the settlement will only grow.

The Department has a dedicated, experienced team of lawyers and economists working, together with 17 state attorneys general, to ensure full compliance with the decree. The Department has also undertaken to issue, as appropriate, Microsoft Consent Decree Compliance Advisories, to inform the public with regard to decree issues and events to assist our enforcement efforts. Our compliance efforts thus far with respect to the technology license issue may be illustrative. Under the terms of the settlement, Microsoft is already offering for use by third parties on reasonable and non-discriminatory terms certain technology used by server operating system products to interoperate with a Windows operating system product. In the Department's first Advisory we noted that the we would undertake a careful and thorough review of the terms of those proposed licenses to determine whether they complied with the terms of the Proposed

Final Judgment. In the ensuing period, and as part of the review, the Department consulted with numerous parties likely to be interested in the licenses, as well as with Microsoft, and retained knowledgeable consultants. The Department also analyzed complaints regarding Microsoft's licensing terms. Using this information in its discussions on compliance with Microsoft, the Department secured Microsoft's agreement to substantially revise the terms of the licenses that Microsoft had initially offered, as well as to eliminate the non-disclosure agreement covering the terms of those licenses. In a second Advisory issued on April 21, 2003, the Department noted the revisions to the licenses, and that Microsoft would be further revising the licenses in response to continued feedback from the Department and other antitrust enforcement agencies. In particular, the Department noted that it would "continue to examine the royalties contained in the licenses and will be evaluating this issue in a concentrated way and on a separate track over the next several weeks," which we are currently doing.

Technology licensing is only one example of the Department's active role in this process. The Department has been equally active and responsive to concerns from the public in carrying out our responsibility to ensure Microsoft's compliance with all the terms of the settlement. Other examples where Department input, as informed by any concerns expressed by the public, has directly impacted compliance with the settlement decree, include Microsoft's: (i) implementation of uniform terms for OEM (original equipment manufacturer) licenses; and (ii) movement of the SPA&D (set program access and default) icon to a more prominent and permanent position on the Start menu for both OEM distributions and end-user downloads. Consistent with its obligations under the Final Judgment, Microsoft has also disclosed nearly 300 APIs (applications programming interfaces).

The Department also has initiated with the court a procedure for periodic status reports and court conferences on compliance and enforcement activities involving the Department, the settling states, and Microsoft. As part of that process, the parties to the Final Judgment filed on April 17, 2003, a Joint Status Report on Coordinating Enforcement of the Final Judgments. Among other things, that report: (i) described many of the steps that Microsoft has taken internally to ensure compliance with the settlement decree, including establishing an Antitrust Compliance Committee of the Board of Directors, appointing a Compliance Officer, and participating in the establishment of the Technical Committee (a body comprised of three members, charged with advising the Department and monitoring Microsoft's compliance on technical issues relating to the settlement decree); (ii) detailed an information-sharing agreement among the Department and the settling states, which is designed to facilitate monitoring of Microsoft's compliance efforts; and (iii) proposed a schedule and format for future court status reports and conferences.

The Department has vigilantly overseen Microsoft's compliance with the settlement decree and will continue to do so.

Questions from Senator Kennedy

1. In your consideration of the Univision/HBC merger proposal, did you complete a market-by-market analysis of whether or not Univision's current holdings in radio and television, along with their advertising practices, created an anticompetitive circumstance in any market the United States? If so, what were those findings?

Answer: The Division analyzes mergers to determine whether the acquisition of stock or assets to be acquired may result in a substantial lessening of competition pursuant to Section 7 of the Clayton Act. That merger inquiry, while it is informed by the current holdings of the proposed acquirer, does not extend to a separate market-by-market competitive analysis of the already existing holdings of the acquirer. Merger analysis, which is focused on the additional assets or stock to be acquired, takes the existing situation as a starting point. Of course, the larger the current holdings, the more likely it may be that competitive concerns may be raised by the proposed merger through the investigation.

2. Did you complete a market-by-market analysis of the combined Univision and HBC radio and television holdings, along with their advertising practices - which they have represented to Wall Street to include "packaging" in markets where the combined companies would dominate Spanish Language media. If so, did you find any potential anticompetitive circumstances in any market?

Answer: The Division analyzed the proposed acquisition of Hispanic Broadcasting Company by Univision pursuant to Section 7 of the Clayton Act and the Merger Guidelines. First, we identified relevant product and geographic markets in which competition might potentially be harmed by the merger. As a result of that analysis, we concluded that in Dallas, Texas; El Paso, Texas; Las Vegas, Nevada; McAllen-Brownsville-Harlingen, Texas; Phoenix, Arizona; and San Jose, California; there were a significant number of advertisers that considered Spanish-language radio to be a particularly effective advertising medium, and therefore that the provision of advertising time on Spanish-language radio stations to these advertisers was a market within the meaning of Section 7 of the Clayton Act. We then concluded that competition in these markets would likely be substantially reduced by the acquisition, given Univision's significant ownership stake and governance rights in HBC's principal competitor, Entravision.

3. Given the number of markets in which the combined Univision/HBC would have dominant or substantial holdings in Spanish Language radio exceeding any current or proposed limits that exist in the English language broadcast market, and given that Univision is the dominant or exclusive television presence in virtually every market, was any consideration given to requiring the divestiture of any stations by the combined entity in any market? Why does the Department's proposed consent decree require the reduction in the Univision holding of Entravision stock rather than station divestiture or rather than

station divestiture and stock divestiture?

Answer: The Division's investigation pursuant to Section 7 of the Clayton Act found that the transaction would likely harm competition that currently existed between HBC and its principal competitor Entravision, due to Univision's roughly 30 percent ownership stake and governance rights in Entravision. The proposed Final Judgment is designed to preserve that competition by restricting Univision's ability to control or influence Entravision. The Final Judgment has three important components. First, it requires the exchange of Univision's Entravision stock for a nonvoting equity interest with limited shareholder rights. Second, it requires the divestiture of a substantial portion of Univision's equity stake in Entravision. Third, it restricts Univision's ability to interfere in the governance of Entravision. The Division is satisfied that the divestiture of a substantial portion of the equity interest in Entravision by Univision, the surrender of several key control rights, and the other relief would preserve competition. Thus, we believe that the proposed Final Judgment would achieve substantially all the relief we would have obtained through litigation. The Division's proposed Final Judgment is currently pending before the United States District Court for the District of Columbia pursuant to the Tunney Act. More information can be found in the Division's Competitive Impact Statement, on our website at http://www.usdoj.gov/atr/cases/univision.htm.

Questions from Senator Kohl

1(a). Over the last year our Subcommittee has investigated allegations of anticompetitive practices among the large buying organizations that purchase medical equipment and devices for hospitals, what are known as group purchasing organizations, or GPOs. Some GPOs claim their exclusionary contracting practices will lower costs because they are able to extract lower prices from manufacturers by signing them to long-term, exclusive deals. But I am worried that in the long run these deals will actually lead to higher prices by entrenching the dominant position of large manufacturers and thereby destroying competition in the marketplace. If a dominant manufacturer faces little competition, it has no incentive to lower prices. Do you agree that we are correct to be concerned with the long-term effect of GPO contracting practices?

Answer: Exclusionary contracting practices can, depending on the circumstances, serve to entrench a dominant position of a large manufacturer. With respect to GPOs specifically, my understanding is that the Federal Trade Commission currently has an investigation underway looking at this precise issue. Consequently, it would be inappropriate for me to comment further.

(b) At the hearing, you stated that you would work with the Federal Trade Commission to re-examine the Health Care Policy Statement as they relate to GPOs. When can we expect this project will be completed?

Answer: This issue is expected to be one of the issues examined in conjunction with the Federal Trade Commission in the joint DOJ/FTC Health Care Hearings. Those hearings are currently expected to run through October 2003. After the hearings have ended, it is expected that the Agencies will jointly discuss and work together on issues that may need modification or refinement, including issues related to the Health Care Policy Statements and GPOs.

(c) Do you agree that the effect of hospital group purchasing on innovation should be an element of the guidelines? Do you believe the guidelines as currently drafted pay sufficient heed to this issue?

Answer: Certainly innovation is an important issue for antitrust enforcers. We expect the issue of the Health Care Guidelines' effects on innovation to be addressed by participants at the hearings. Once we have the benefit of their analyses, we will be in a better position to make an ultimate evaluation as to whether the Guidelines as currently drafted have paid appropriate attention to this important issue.

2. At your confirmation hearing, I asked you whether you believed that antitrust reviews of mergers and acquisition in the media industry should be solely concerned with

economic issues such as advertising rates, or should also focus on the impact of a merger on the marketplace of ideas and on diversity of expression in a market. You replied that the Antitrust Division has "to proceed under the standards of the Sherman Act" and that the FCC was responsible for looking at issues such as diversity of expression.

However, Mr. Pate, many believe the drafters of our antitrust laws such as the Sherman and Clayton Act were concerned about more than just technical economic issues but were concerned generally about undue concentration of economic power and the impact of mergers on our democracy. In an early case construing the Sherman Act, the Supreme Court noted that the statute was motivated by a concern over "the vast accumulation of wealth in the hands of corporations and individuals . . . and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally." Standard Oil Co. v. U.S., 221 U.S. 1, 50 (1910). Former FTC Chairman Pitofsky holds this view, pointing out that "[a]ntitrust is more than economics." This view would allow, indeed mandate, that antitrust enforcers examine the impact of a media merger on the marketplace of ideas, to see that diversity of news and information sources available to the public is not substantially harmed by a specific merger or acquisition.

Indeed, in considering a antitrust claim brought against a news media outlet, Justice Frankfurter stated that:

> **Truth and understanding are not wares like peanuts or potatoes. And so, the incidents of restraints upon the promotion of truth through denial of access to the basis for understanding calls into play considerations very different from comparable restraints in a cooperative enterprise having merely a commercial aspect.**

U.S. v. Associated Press, 326 U.S. 1, 28 (1945)(Frankfurter, J., concurring). More recently, the Supreme Court has stated that "assuring the public has access to a multiplicity of information sources is a governmental purpose of the highest order." Turner Broadcasting System v. FCC, 512 U.S. 622, 663 (1994).

Doesn't this precedent demonstrate that the Sherman and Clayton Acts permit the antitrust enforcement agencies to consider the effect of a media merger on diversity of news and information sources, as well as economic issues such as an examination of the transaction on advertising rates?

Answer: Media concentration is an important public policy issue. The First Amendment is a testament to the importance of free speech and press to our society. When assessing media mergers, as in assessing other types of mergers, the Division is obligated to follow the dictates of Section 7 of the Clayton Act, which provides that mergers that may tend substantially to lessen competition violate the statute. I will vigorously enforce the antitrust laws against

anticompetitive media mergers. Indeed, I personally appeared in court in the Division's challenge to the DirecTV/Echostar merger as an antitrust law violation.

In assessing whether a merger may tend substantially to lessen competition, the Division first analyzes the product and geographic markets at issue in the merger. With respect to media mergers, markets are typically a type of media (for example, radio or television) and local in nature (for example, a town or city). Once the appropriate markets are defined, the Division then determines the number of competitors in the markets and their market shares. We then analyze whether the competitive effects of the merger lead us to the conclusion that the merger may tend substantially to lessen competition. Typically, there is more likely to be antitrust concern about the competitive effects of a proposed merger in markets with a limited number of competitors. Thus, antitrust enforcement in those markets preserves additional competitors in the market.

More competitors in a market often, but does not necessarily, equate with more diversity in a market, depending on how one defines diversity. If diversity is defined as the number of different owners of assets in a market, then antitrust enforcement promotes diversity. If diversity is defined instead as the number of different points of view heard, even if the stations are controlled by the same corporate entity, antitrust enforcement may not equate with diversity. As an antitrust enforcer, the Division would not want to allow, for example, a merger to monopoly in a media market based on the contention that the different stations in the market, although controlled by the same entity, would, through contractual commitments or otherwise, present different points of view.

For a media merger, our analysis would certainly include, as appropriate, any potential effects on competition (horizontal as well as vertical) for the purchase of programming. We would consider whether the merger would increase concentration among purchasers of programming to such an extent as to substantially reduce competitive alternative outlets for programmers, or among programmers to such an extent as to substantially reduce competitive programming choices for purchasers of programming. We would also consider whether, in a market with significant concentration, a merger between a programmer and a purchaser of programming would give the merged firm the ability to anticompetitively favor its own programming or its own distribution outlets and thereby deprive consumers of competitive alternatives. We would consider these potential effects as to new programming and as to all forms of syndicated programming, in relevant national, regional, and local programming markets, as appropriate.

As this discussion indicates, it will often be the case that Division enforcement under Section 7 of the Clayton Act to preserve competition will have the effect of preserving a diversity of media viewpoints. This is a beneficial public policy outcome. As more programmers and media outlets compete for advertising and viewers, the likely result will be more diversity of programming choices.

3. We have long been concerned on the Antitrust Subcommittee with the continuing rise in cable TV rates. Year after year, consumers continue to suffer rate increases several times the rate of inflation. Many believe that a major reason that cable rates continue to rise is because the dominant cable TV companies face little competition in their local areas.

One of the few sources of competition to the established cable TV companies are provided by companies known as "overbuilders" – upstart companies like Starpower in Washington, D.C. that come into a city and build new cable systems from scratch to challenge the incumbents. But over the last few years we have been hearing allegations by the overbuilders that they have been the victims of allegedly predatory practices designed to drive them out of the market by the large, incumbent cable TV companies. These practices allegedly include incumbents offering drastically reduced, below-cost pricing of premium programming only in the areas where these upstart competitors operate. These allegations are especially disturbing because the presence of these new, competing cable companies are one of the few things that seems to discipline cable rate increases.

At the Antitrust Subcommittee's oversight hearing last year, I asked your predecessor Charles James if the Antitrust Division was investigating these allegations of predatory conduct directed against the overbuilders. He responded that the Division was beginning to take a look at the issue. Mr. Pate, what is the status of this issue today? Has the Division opened any new investigations or reached any conclusions?

Answer: The issue of potential anticompetitive actions by entrenched cable companies against so-called "cable overbuilders" is an important one. The Division has invited and continues to invite those with concerns about such actions to come to the Division with information that may present competitive concerns. We already have met with various overbuilders to discuss their concerns. Additional information from these parties that may help us focus on potential antitrust implications has been requested and we are awaiting that information. As with any allegation of predatory pricing, established case law requires a complicated analysis under rigorous legal standards. While we do not want to chill procompetitive price-cutting behavior, at the same time we want to prevent predatory behavior that damages competition and injures consumers. At this point we have not reached any conclusions, but our examination of the issue is continuing.

4. As you know, Comcast's merger with AT&T Broadband last year made Comcast the largest cable operator by nearly tripling its size to 22 million subscribers nationwide. An April 7, 2003, story on Business Week Online discussed how, since the merger, "Comcast is starting to throw its weight around." The story quotes industry observers as saying that Comcast is "starting to put the screws to programmers" by pressing them to cut the fees Comcast must pay to carry their channels. I have a couple of questions:

(a) Are you concerned that the increased concentration in the cable industry enables the cable companies to have undue market power over programmers?

Answer: Antitrust enforcers would be concerned if, through mergers that increased concentration, cable companies acquired market power over programmers that could lead to anticompetitive results. The Division will examine any possibility that increased concentration will lead to monopoly power that could have an adverse effect on the economic incentives facing programmers.

(b) Does the Antitrust Division have any plans to examine Comcast's behavior subsequent to the merger in order to assure that the company stays within the proper bounds of the antitrust laws?

Answer: With respect to the Comcast/AT&T Broadband merger, the Division publicly announced on November 13, 2002, that because the Federal Communications Commission had required Comcast to place the Time Warner Entertainment assets in a trust, it would not challenge the acquisition. The Division maintains an interest in ensuring that all companies, including Comcast, stay within the proper bounds of the antitrust laws. If we receive information that leads us to believe that an antitrust violation may have occurred we will conduct an appropriate inquiry and take whatever enforcement action may be warranted.

5. I grew concerned last year when the Antitrust Division's activity under your predecessor's leadership appeared to slacken. While I recognize that mergers and acquisitions happened at a much slower pace during the last couple of years than before, this diminished activity appeared to include civil non-merger investigations and cases brought, as well as criminal investigations. For example, as of September 2002, the number of civil non-merger investigations declined about 30% for FY 2002 from its annual average from the last four years of Joel Klein's term. Likewise, the number of criminal cases filed with two weeks remaining in FY 2002 was nearly half the average annual number of cases filed during the preceding five years. This drop in enforcement activity was not mirrored in your sister agency, the Federal Trade Commission.

What would the data show regarding the Antitrust Division's enforcement activity in the months since you assumed your position as head of the Division in an acting basis? Has the pace of enforcement activity quickened since you have taken charge? Further, please provide data to update the statistics you provided to me in September 2002.

Answer: Enforcement of the antitrust laws is the crucial function of the Antitrust Division. If confirmed, I intend to pursue vigorously enforcement against antitrust violations. Looking back, using any number of indicators of the pace of enforcement activity, the conclusion to be reached is that the Antitrust Division has been very active in enforcing the antitrust laws. On the criminal side, the last fiscal year saw a record number of days of jail time imposed. On

the merger side, the rate of investigations as a percentage of HSR filings has been increasing. We have brought major merger cases, even in a downtime for merger activity – cases such as DirecTV/Echostar, DFA/Southern Belle Diary, and Northrop Grumman/TRW, among others. On the civil non-merger side, since I became the Acting Assistant Attorney General for Antitrust, the Division has filed four civil non-merger cases, a total already equal to last year's full total, and a total which historically is among the highest rates in Division history if projected out to year end. Moreover, the Division has already initiated more civil nonmerger investigations thus far this year than it did in total for last year. At the same time, I would caution that merely looking at numbers may not tell the true story of antitrust enforcement. First, it is necessary to bring the right cases, not just any case. Second, one case can have deterrent effects that may far outweigh two or three or more other cases. Third, certain large cases may take an extraordinary amount of resources that could otherwise be used to develop smaller potential cases. Fourth, many cases, especially certain civil non-merger and criminal cases, may take a number of years to develop from initial investigation to successful litigation. For all of these reasons, a look only at the numbers may not give a fully accurate picture of enforcement efforts.

The specific statistical information you requested is contained in a separate attachment.

6. The result in the Microsoft case leaves some to wonder if the government's civil antitrust remedies are adequate. Although a unanimous Court of Appeals ruled that Microsoft illegally maintained its monopoly, and as a result, effectively destroyed one its principal competitors, Netscape, the only remedy in the settlement is certain restraints on Microsoft's conduct for the next five years. There is no requirement that Microsoft disgorge any profits it illegally obtained, nor is any civil fine possible. And the Microsoft case is not unique – in civil antitrust cases, the government is always limited to a remedy that is supposed to end the conduct constituting the antitrust violation, rather than obtain the profits the wrongdoer illegally gained.

Do you believe that the government's civil remedies are adequate? Wouldn't it be desirable to give the government the ability to obtain disgorgement of illegally obtained gains, or to impose civil fines when it prevails in civil antitrust cases? Will you work with us to consider legislative reform to address this issue?

Answer: The proper level of deterrence associated with fines and recoveries is an area which increasingly has become a topic of discussion in the antitrust bar. Although I believe the Division has been effective in using currently available tools to provide important protections for consumers, I recognize that there could be additional tools in our arsenal that could, in particular instances, be useful. For example, certain other legal systems have civil fine authority for government enforcement. At the same time, those systems typically do not provide for private treble damage recovery, which is a fundamental aspect of our system of enforcement. Any consideration of this issue would need to encompass potential concerns about double recoveries on the one hand, as well as the potential for chilling private incentives for pursuing antitrust actions on the other. I welcome the opportunity to work with you on any consideration of this

issue, recognizing the ultimate need for the appropriate balance.

7. Turning to criminal penalties for antitrust violations, many wonder if these are adequate to address the large, global antitrust conspiracies we have seen in recent years, such as, for example, the international vitamin cartel. It has been estimated that since 1997, the Justice Department has prosecuted criminal antitrust conspiracies affecting well over $ 10 billion dollars in commerce. The maximum jail time available for criminal antitrust violations is just three years – a penalty fixed nearly 30 years ago – while penalties for other white collar offenses such as mail fraud and wire fraud have recently been raised a maximum 30 year jail term.

Do you believe that the criminal penalties for antitrust violations are adequate? Doesn't limiting the penalty for antitrust violations to three years while mail and wire fraud subjects the offender to a 30 year jail term send the message that antitrust violations are not as serious offenses as other white collar criminal conduct? What do you think are the proper level for antitrust criminal penalties, both with respect to jail terms and fines? Will you work with us to consider legislative reform to address this issue?

Answer: The appropriate level of criminal penalties is an important and timely issue. The maximum criminal jail time for antitrust violations in particular appears to be substantially below what is appropriate. I understand that Senator Hatch and Senator Leahy have jointly co-sponsored a bill (S. 1080) which would increase the three-year maximum jail time to ten years. I fully support the increase in the maximum prison term for antitrust violators to ten years, especially due to the disparities pointed out in your question. Although I have not reached a conclusion on the question of the appropriate maximum level of criminal fines, there is also a legitimate question whether the current criminal fine statutory maximum of $10 million is sufficient, especially in light of the potential billions of dollars of damage that antitrust violations may cause. That is also an issue that I believe merits serious consideration. I would be very happy to work with you and the other members of the Committee on these important issues.

8. We have heard some complaints recently that the Antitrust Division is taking an inordinately long time to complete civil non-merger investigations, matters which, unlike merger investigations, have no statutory time limits. While I believe that allegations of anticompetitive conduct should be investigated thoroughly, I also believe that all companies are entitled to due process and, at some reasonable point, finality.

What processes and procedures do you have in place to ensure that civil non-mergers investigations do not drag out indefinitely? Doesn't due process demand that there is a point at which the Division must eventually bring civil, non-merger investigations to an end, and decide either to file suit to enjoin anticompetitive conduct or to close the investigation?

Answer: It is not in anyone's interest for civil nonmerger investigations to continue

indefinitely. I do not agree with the notion that the Antitrust Division should hold investigations open indefinitely so as to act as an industry regulatory body. It is important that any open civil nonmerger investigation be proceeding towards an appropriate conclusion, whether it be an enforcement action or a determination that no action is appropriate. At the same time, certain civil nonmerger investigations take a substantial period of time to evaluate. For example, in an investigation involving a new product market, it is often the case that the market is just being established and is continually changing and developing, and that the parties are changing their business plans and contracts many, many times. This requires that the competitive analysis take into account all of these changes and their competitive effects.

On the general topic of trying to ensure that matters are proceeding appropriately, the Division has established an internal weekly civil nonmerger calender and report, and there are weekly meetings on the status of section matters with the chiefs and assistant chiefs of those sections. While not all matters are discussed every week, this gives the leadership of the Division the ability to ensure that progress is being made on all investigations.

9. In the past several years, internet joint ventures formed by competitors have received attention, and considerable criticism from those who believe that such joint ventures can facilitate collusion among business rivals. Examples of such joint ventures are the travel site Orbitz, on-line music ventures, and the international currency exchange FX-All. These joint ventures appear to me to raise serious competition issues.

(a) How will you analyze such joint ventures to ensure that they do not lead to anti-competitive conduct among competitors?

Answer: There are two particular types of joint ventures that recently have received enforcement attention. First, there is the issue of a sham joint venture between competing entities to eliminate that competition under the guise of a "joint venture." The Division is very concerned about actions of this type, and has recently pursued two enforcement actions against such conduct. A prime example is the lawsuit against MathWorks, in which we alleged that the parties had used a dynamic control system design software "licensing" joint venture arrangement as a vehicle for market allocation.

The second type of joint venture that has received enforcement attention is the "new product" type of venture, in which the parties are offering a product that in some sense has not been previously offered – such as a product that is being offered in a manner whose convenience or other desirable attributes essentially creates a new type of product. Recently this has arisen in the context of a product being distributed on the Internet through a combination of competitors of the distributed product, such as Orbitz and certain on-line music ventures. These joint ventures are assessed under the rule of reason. We will examine the facts and circumstances surrounding the venture to determine its competitive effect under established legal principles.

(b) Many are concerned about what are known as "most favored nation" provisions in such joint ventures, provisions that require that the best price be given to the joint venture. Because these provisions mean that none of the participants can undercut the price by selling outside the joint venture, some believe these provisions deter price competition. What's your view of these "most favored nation" provisions?

Answer: The analysis of so-called "most favored nation" provisions depends on the factual context in which they arise. It is important to recognize that there is not one universal definition of a "most favored nation" provision. That term can be applied to provisions that work in different ways in different contexts. In some of those contexts the provision can be anticompetitive. For example, we opened investigations of MFNs with respect to Blue Cross in both Alabama and Pennsylvania because we were concerned about those clauses in the particular factual situation in those markets. The result in both cases was the withdrawal of the MFN by Blue Cross. In other cases, the provision can be more benign and may actually benefit consumers. A thorough factual analysis is required prior to condemning such provisions.

10. One of the priorities of our work on the Antitrust Subcommittee has been airline competition. We all know that the entire airline industry has gone through tremendous difficulties in the last two years, leaving the survival of several of the nation's leading airlines in doubt. We are sympathetic to the difficulties faced by these airlines, and their employees. Nonetheless, we remain committed to retaining a competitive airline market in the face of these challenges. Without real airline competition, millions of travelers are likely to suffer higher fares and diminished choices.

In the last year, much attention was focused on the plans by three large airlines – Delta, Northwest, and Continental – to form an "alliance." Last Fall, the Antitrust Division recommended to the Department of Transportation that this alliance be permitted, with some small modifications. And United and USAirways had earlier announced a code sharing arrangement.

In 2001, the Antitrust Division moved to block the proposed merger between United and USAirways. But now the agency has failed to register strong objections to code sharing and alliances between major carriers, including between United and USAirways and Delta/Continental/Northwest. Please answer the following questions:

(a) How will the Antitrust Division analyze alliances and code sharing among airline competitors? What is the difference between these alliances and code sharing, and a merger? If you wouldn't allow a merger, why would you allow airlines to engage in cooperative arrangements like code sharing and alliances?

Answer: The term "codeshare" can mean a number of different things based on the particular agreement that is being reviewed. In many cases a codeshare is substantially different

from a merger. The hallmark of a merger is that an independent competitor is giving up its power to determine price and output independently. After the merger, the price and output decisions are no longer two individual determinations based on individual interests, it is a decision made in the joint interest of the previously separate companies. In the codeshare agreements recently reviewed in the airline industry, the codeshare partners retained both the legal right and the economic incentives to make individual decisions on price and output. Critically, unlike the situation with a merger, the airlines in these codeshare arrangements do not jointly set price or schedules, nor do they pool revenues. Rather, each codeshare participant receives essentially all the revenue for passengers flying on their aircraft, thereby retaining important incentives to compete. Such codesharing agreements, if they retain these important incentives, can increase convenience for passengers and can result in lower, not higher, prices. Any such agreements, however, must be carefully evaluated on their individual facts to ensure that competition will not be harmed. The Division has insisted on the imposition of several conditions on recent codeshare arrangements to guard against harm to competition.

(b) Has the Antitrust Division's analysis of airline mergers and alliances been altered given the economic difficulties faced by the aviation industry today?

Answer: There is no "distressed industry" exemption from the antitrust laws. There is, however, a long-standing "failing firm" doctrine in the antitrust laws. This doctrine is rarely invoked, because the requirements established by the courts to satisfy it are rarely met. At the same time, antitrust analysis is highly fact-specific, and under Supreme Court precedent any information regarding likely future competitive significance in the industry is highly relevant to a merger analysis.

11. Mr. Pate, soon the FCC will have concluded that local telephone competition exists in more than forty states, permitting incumbent local phone companies - the "baby bells" – to offer long distance in those states. The 1996 Telecom Act gave the Antitrust Division an important role in making this determination, under what is known as the section 271 process. I have several questions regarding antitrust enforcement in the telecommunications sector.

(a) Now that the local phone incumbents have been granted approval to offer long distance phone service, many are concerned that their incentive to avoid anticompetitive behavior with respect to their local competitors is gone. What will you do to ensure that these "approved" states will continue to be competitive?

Answer: The Antitrust Division has played an important role in providing guidance to the FCC and the state regulatory agencies on the section 271 process, as well as in providing evaluations of section 271 applications to the FCC on the extent to which local markets are "open to competition." We intend to continue monitoring activities across the country. In states

where the Bell Operating Company has been granted section 271 authority, the Division will continue to play its traditional roles of enforcing the antitrust laws and engaging in competition advocacy. This means that the Division will investigate and bring appropriate actions when market participants violate Section 1 or 2 of the Sherman Act or when mergers are proposed. We will also participate in FCC and state regulatory proceedings where we can provide competitive analysis that would assist these agencies in promoting and maintaining the development of local competition.

(b) What will you do if these local markets "backslide" into entrenched monopolies marked by anti-competitive behavior?

Answer: The Telecommunications Act of 1996 contains a savings clause that explicitly preserves the Division's authority to bring actions under the antitrust laws. Under that enforcement authority, the Division would investigate and challenge the actions of an incumbent local provider if we concluded that it had engaged in anticompetitive conduct in violation of the antitrust laws. The 1996 Act also authorizes the FCC to take certain actions in the event of noncompliance with the market-opening provisions of the Act.

(c) Now that the section 271 process is winding up, what is the role of the Antitrust Division in overseeing the telephone industry and ensuring that true local phone competition can flourish? Would you support giving enhanced authority to the Antitrust Division - such as an enhanced, ongoing oversight role – to monitor the telephone industry's compliance with its obligations under the 1996 Telecommunications Act?

Answer: The antitrust laws give the Antitrust Division authority to protect competition in this important marketplace. Given our enforcement history and accumulated experience in telecommunications markets, we plan to remain fully engaged in monitoring these markets for possible antitrust violations. I would have to review any specific proposals that would modify our role prior to taking any position on them. I would note that the FCC will continue to have authority to enforce compliance with the numerous and detailed provisions of the 1996 Act and we will continue to work with them on issues that arise in these markets.

12. There have been many recent media reports that the regional bell companies are interested in acquiring one of the few remaining long distance companies, including a report that either BellSouth or SBC wishes to acquire AT&T. At the same time, the four remaining regional bell companies have shown no willingness to go into each other's territories to compete for local telephone customers. If such mergers are completed, and we end with the dominant local and long distance phone companies combining, will we be left with a few regional phone monopolies throughout the nation? Won't we end up in the same place we were 20 years ago, just with the national AT&T monopoly replaced by four regional phone monopolies that don't compete with each other? What can the Antitrust

Division do to prevent such a result?

Answer: The Antitrust Division is committed to maintaining competition in telephony. We will analyze any proposed merger to ensure that it does not violate the antitrust laws. To the extent that a proposed merger is likely to substantially lessen competition under Section 7 of the Clayton Act, we will enforce the antitrust laws against it. On the broader issue of competition in your question, it is certainly our hope that more, not less, competition will exist in the future in this industry. We would note that there is some reason for optimism based on the existence and continued development of alternative technologies to traditional wireline services, such as wireless and Internet-based telephony. In addition, as more fully explained in the answer to the next question, the 1996 Telecommunications Act's antitrust savings clause also ensures that we are free to pursue actions by local and long distance telephone companies that violate the antitrust laws.

13. The Supreme Court recently accepted review of a case which will decide whether incumbent telephone companies can still be sued for antitrust violations if they engage in anticompetitive behavior. The incumbent telephone companies contend that the only remedy for such behavior is found in the 1996 Telecom Act. I have two questions regarding the Justice Department's position in this case, Mr. Pate.

(a) Will the Justice Department argue that the antitrust savings clause in the Telecom Act means that the antitrust laws continue to apply to telephone companies, whether or not their conduct also violates the Telecom Act?

Answer: The Department is committed to the position that the antitrust savings clause in the 1996 Telecommunications Act means that the antitrust laws continue to apply to telephone companies, whether or not their conduct also violates that Act. We have taken that position consistently. Our most recent explication of our views on that topic are contained in the recent Supreme Court Amicus Brief filed in *Verizon v. Trinko*.

(b) Some observers are disturbed by the Justice Department's position in its brief supporting the grant of certiorari in this case. Some believe that the Justice Department brief appears to say the actions of a monopolist that have substantial anticompetitive effect are not actionable under the Sherman Act as long as they contain some efficiency, no matter how small. Why has the Justice Department taken this position? If this position is upheld, won't this significantly harm the ability to bring antitrust actions against monopolists?

Answer: We have not taken the position that any showing of an efficiency allows defendants to escape liability for exclusionary conduct. The basic position that the Department and the Federal Trade Commission have taken in the Amicus brief in *Verizon v. Trinko* is that in evaluating single-firm conduct – particularly in the context of claims for the imposition of a duty

to assist competitors -- an appropriate standard to use is whether the conduct asserted as an antitrust violation would make economic sense for the defendant but for the elimination or lessening of competition. We believe that this test sets forth an objective, transparent, and economically-based framework for assessing single-firm conduct. This test has support in existing case law and is consistent with well-established principles of antitrust jurisprudence, including prior decisions of the Supreme Court. We do not believe this standard is appropriately characterized as either pro-plaintiff or pro-defendant. We would note in that regard that the Department itself has utilized the standard as a plaintiff in two important enforcement matters, the *Microsoft* case and the *American Airlines* case.

14. Turning to agriculture, there has been a tremendous amount of consolidation in the agricultural sector of the economy in recent years. There have been many mergers among food processors, slaughterhouses, grain elevators, wholesalers, and numerous other agribusiness companies. For example, after all this consolidation, the top four meat packing firms in the US now control 80 percent of the market.

These mergers have caused a great deal of concern among our farmers, since family farmers have less and less bargaining power with respect to the large agribusiness companies. Many family farmers believe that consolidation among large agribusiness firms have made it increasingly difficult for them to survive. What is your view – have the antitrust laws been adequately enforced with respect to agriculture? And will you assure us that enforcement of antitrust laws in the agricultural sector of the economy will be a priority of the Antitrust Division?

Answer: The Department takes very seriously the concerns expressed by agricultural producers about competitive problems. The Department has brought a number of enforcement actions in the agricultural sector in recent years, including the following:

- Dairy Farmers of America/ Southern Belle Dairy – April 2003 – non-HSR reportable dairy merger – Division filed lawsuit to compel DFA to divest its interests in Southern Belle.

- Smithfield Foods – February 2003 – Division filed lawsuit for civil penalties for failure to comply with Hart-Scott-Rodino premerger notification requirements in acquisition of stock interest in competing meat packer.

- Archers Daniels Midland/ Minnesota Corn Processors – September 2002 – merger affecting corn wet milling – parties agreed to dissolve a joint venture with a competing corn wet miller.

- Suiza Foods/ Dean Foods – December 2001 – milk processing merger – parties agreed to divestitures and supply contract modifications.

- Akzo Nobel Chemicals and others – beginning June 2001 – price fixing of chemicals collectively known as MCAA, used to produce herbicides and other products – corporate criminal fines, as well as fines and prison sentences for executives involved.

- Cargill/ Continental – 1999 – grain and soybean trading merger – parties agreed to a number of divestitures to preserve competitive outlets for grain and soybeans producers.

- F. Hoffmann-La Roche Ltd., BASF Aktiengesellschaft, and others – beginning 1999 – price fixing of vitamins used as food and animal feed additives and nutritional supplements – corporate criminal fines, as well as fines and prison sentences for executives involved.

- New Holland/ Case Corp. – 1999 – tractor and hay tools merger – parties agreed to divestiture.

- Monsanto/ DeKalb – 1998 – corn seed biotechnology merger – parties agreed to license corn germplasm and spin off claims to certain technology.

- Archer Daniels Midland and others – beginning 1996 – price fixing of lysine, an important livestock and poultry feed additive – corporate criminal fines, as well as fines and prison sentences for executives involved.

I am committed to maintaining the Department's active involvement in the agricultural sector and to protecting competition there through aggressive antitrust enforcement as warranted.

15. Given the increasing globalization of the world's economy and the increasing numbers of mergers of American companies that affect the European market, international antitrust enforcement is more and more important. Some are concerned that American business transactions have not been treated fairly, and that decisions of European antitrust authorities may sometimes have been motivated by protectionist sentiments. Others are concerned by a divergence between both the procedure and substance of American and European antitrust review. This concern was highlighted two years ago, when the EC decided to block the GE/Honeywell merger after the Antitrust Division had approved it.

Please respond to following questions:

(a) Do you believe that European antitrust authorities are properly scrutinizing mergers and other antitrust issues involving American companies? What steps will the Antitrust Division take under your direction to better harmonize its antitrust review with the European antitrust authorities? Do you have any recommendations for Congress in this area?

Answer: We recognize that we may not always agree with our counterparts in Europe on

antitrust actions because there are different legal requirements in the two jurisdictions and there can be different factual circumstances as well (different market shares, different conduct, etc.). Given that, the possibility of different outcomes is to be expected from time to time. At the same time, the underlying basis for antitrust action should be appropriate legal and economic analysis. We continue to believe that the EU reached an unfortunate and incorrect result in the GE/Honeywell matter. We do not, however, believe that protectionism was a factor in their decision on that case. We also note the EU has since then embarked on an aggressive modernization program to substantially reform their system. Commissioner Mario Monti deserves great credit for his efforts in this regard. We believe those changes will help improve EU enforcement efforts. With respect to Congress, we believe that Congress' long-standing bipartisan approach to antitrust, including particularly your efforts along with Senator DeWine on the Antitrust Subcommittee, have set an important standard to ensure that the proper approach to antitrust is as a law enforcement matter as opposed to a political matter. This is a key example for other jurisdictions to follow in ensuring that antitrust does not become politicized.

(b) Please discuss the steps that the Antitrust Division is playing in the harmonization of antitrust laws with other nations outside of the EU.

Answer: The Antitrust Division has been and continues to be very active in the international arena with nations outside the EU, whether it be through the Organization for Economic Cooperation and Development, the World Trade Organization, bilateral discussions on a nation-to-nation basis or through the International Competition Network (ICN). As more and more nations, including developing nations, undertake antitrust enforcement, the efforts of the ICN will be particularly important. The ICN has been a remarkable success in its first two years, having emerged as a global network of antitrust authorities from nearly 70 developed and developing countries, representing 90 percent of the world's Gross Domestic Product. It is serving as an important vehicle for international convergence on substantive and procedural issues by developing guiding principles and best practice recommendations. Unlike ordinary bar organizations or similar groups, the membership of the ICN is limited to the public servants from various jurisdictions who participate in antitrust enforcement. At the same time, members of the private bar from around the world, businesspeople, academics, and representatives of international organizations (including OECD) are working with us as volunteers on each of the projects that ICN undertakes, giving the ICN the benefit of their knowledge, experience, and insights.

16. Before a merger or acquisition occurs, the merging parties often make assurances to antitrust regulators regarding their post-merger behavior. In some cases, these assurances become legally binding commitments in the form of consent decrees.

Does the Antitrust Division have any section, office, or personnel specifically tasked to examine the merging parties' compliance either with (i) pre-merger commitments or (ii) antitrust consent decrees? If the answer is in the affirmative, specify the number of staff

with this responsibility, the office or section responsible, and the number of person-hours spent on this responsibility in the last fiscal year. If the answer is in the negative, explain how premerger and consent decree commitments are monitored and why no specific personnel are tasked to this assignment. Also discuss whether you believe it would be desirable to have staff with the specific responsibility of monitoring compliance with pre-merger commitments and consent decrees.

Answer: Judgment enforcement is a critical part of effective law enforcement. It would be contrary to our law enforcement responsibilities to obtain a remedy and then not monitor and, if necessary, enforce it. The Antitrust Division takes great care in drafting decrees, requiring that there be sufficient requirements to keep the Division abreast of how the decree is being implemented. This may include periodic reporting obligations, visitation and document inspection rights, as well as other enforcement tools.

We are committed to decree compliance and enforcement. The responsibility for enforcing the Division's judgments lies with the civil sections to which the judgments are assigned according to commodity or industry allocations among those sections. Typically, the key enforcement personnel are those that worked on the enforcement matter in the first instance. Those individuals have the most knowledge about the industry and have developed industry contacts through the initial investigation that can serve them well in ensuring enforcement.

The Division has an active program to ensure compliance with its decrees. Within the past five years, the Division has filed four contempt petitions to enforce compliance with its decrees: *United States v. Microsoft* (D.D.C. 1997), *United States v. Interstate Bakeries Corp. & Continental Baking Co.* (N.D. Ill. 1999), *United States v. Smith Int'l & Schlumberger Ltd.* (D.D.C. 1999), and *United States v. Earthgrains Baking Cos.* (N.D. Ill. 2002).

17. The May 27, 2003 Washington Post reported that there was a new wave of consolidation occurring in the defense industry, with the largest defense firms acquiring smaller firms in the industry. Some industry observers have expressed concern regarding the impact of this consolidation on innovation in the defense industry. Are you concerned about the recent consolidation trend in the defense industry, and its potential effects on innovation? How will you analyze such consolidation?

Answer: There can be no doubt that any merger review in the defense industry needs to focus on the impact of the potential merger or acquisition on innovation. The Department has performed that analysis in past cases and will do so in the future. In conducting that analysis we have worked closely with the Department of Defense, who is the prime, if not sole, customer in many cases. Both we and the Department of Defense understand the importance of preserving innovation as part of a complete merger analysis. The most recent cases in which we have examined defense issues have led to enforcement actions. In both Northrop Grumman/TRW and

General Dynamics/Newport News we challenged the mergers because of the anticompetitive effect they would have on innovation. In Northrop Grumman/TRW, we negotiated a consent decree requiring the parties to make a number of non-discrimination commitments in order to preserve competition among both prime contractors and subcontractors for reconnaissance satellite military contracts. In General Dynamics/Newport News, the parties abandoned the merger after the Division filed suit to block it on the grounds that it would create a monopoly in nuclear submarine design and construction, and would substantially lessen competition for electric drive and surface combatants.

ATTACHMENT TO KOHL QUESTION #5

1. **For FY 2002 and 2003 to date, how many criminal antitrust cases did the Department file? How many of these cases involved:**

   - **public institutions, such as schools or hospitals, that were the victims;**
   - **activities connected with defense procurement;**
   - **activities connected with aviation;**
   - **activities connected with telecommunications/mass media;**
   - **activities connected with energy;**
   - **activities connected with Internet/computer software; or**
   - **activities connected with health care (including pharmaceuticals)?**

Please list and briefly describe each case. In your description, please include the court of jurisdiction, the date filed, and the status or disposition of the case.

For FY 2002 and FY 2003 (as of May 30, 2003), the Department filed the following number of criminal cases in the following requested categories:

Year	Public Entities	Media	Energy	Health Care	Total Cases Filed
FY 2002	4	7	1	3	33
FY 2003 as of 5/30/03	1	9	5	2	22

The Department did not file any criminal antitrust cases during the requested period in the aviation, defense procurement or Internet/computer software areas.

The following is a description of our cases involving public entities, media, energy, and health care.

A. Public Entities

1. New York Area Food Brokers

In this investigation, staff uncovered bid-rigging conspiracies which defrauded numerous

New York area public and non-profit entities, including New York City schools, children's facilities, homeless shelters, hospitals, and jails; Newark, New Jersey schools; and Nassau County, New York jails. This bid rigging affected contracts, valued at more than $210 million, to supply food to these public institutions. Staff in the Antitrust Division's New York Office has aggressively pursued restitution for the New York City Board of Education, the second largest purchaser of food in the country, and other affected agencies and to date has obtained more than $28 million in restitution for these victims. To date, 33 individuals and 15 companies have been convicted of these crimes. Our New York Field Office uncovered these conspiracies while looking into other collusive conduct in the advertising and display industry during a separate investigation which, by itself, has resulted in cases against more than 50 defendants to date.

In addition to rigging bids, the conspirators maintained a slush fund totaling hundreds of thousands of dollars, which was used to pay off potential competitors to bid high or not to bid at all for contracts that other conspirators were slated to win. Further, many of the defendants also engaged in, and were charged with, multiple other crimes, including tax offenses relating to the non-reporting of payoffs, kickbacks, and "off the books" compensation; obstruction of justice related to document destruction or concealment; and fraud offenses involving the payment of kickbacks and the fraudulent procurement of loans. All but two of the defendants charged in the investigation pled guilty to various bid rigging, fraud, and obstruction charges.

The following is a list of the cases brought in the New York food broker investigation during FY 2002 and FY 2003 (as of May 30, 2003).

- U.S. v. John Amitrano, (E.D.N.Y. 2002). Pled guilty, sentenced to serve 5 months in jail and 5 months home confinement and to pay restitution.

- U.S. v. Benjamin Walker, Jr., (S.D.N.Y. 2002). Indicted, pled guilty, and sentenced to serve 24 months in prison, and to pay $175,000 restitution to Manhattan substance abuse treatment organization and back taxes, penalties, and interest to the IRS.

2. Miscellaneous Public Entity Cases

Other miscellaneous cases the Division has filed since FY 2002 involving public entities include the following:

- U.S. v. Taylor & Murphy Construction Co., Inc., (W.D.N.C. 2002). Defendant pled guilty to making a false statement to the Federal Highway Administration in a certificate of independent price determination in a bid for a road construction project on the Blue Ridge Parkway. Defendant was sentenced to pay a $200,000 fine.

- U.S. v. Maymead, Inc., (W.D.N.C. 2002). Defendant pled guilty to making a false

statement to the Federal Highway Administration in a certificate of independent price determination in a bid for a road construction project on the Blue Ridge Parkway. Defendant was sentenced to pay a $100,000 fine.

- U.S. v. Thomas E. Keehn, Jr., (D.D.C. 2003). Defendant pled guilty to mail fraud in connection with the submission of phony bids to create the appearance of competition for home repair work for disadvantaged owners. The work was paid for by the District of Columbia Department of Housing and Community Development with federal and local funds. Defendant is awaiting sentencing.

B. Media

The Antitrust Division's New York Field Office has conducted investigations and prosecutions of bid rigging by advertising suppliers. In addition to the bid-rigging offenses, the investigations have uncovered commercial bribery, income tax evasion, fraud, and money laundering violations.

1. Advertising Vendors

The New York Field Office investigation thus far has resulted in the filing of 52 cases against 47 individuals and 10 corporations. Thirty-five individuals and ten corporations have been sentenced to date resulting in fines totaling over $7 million, court-ordered restitution in excess of $5 million, and jail sentences totaling more than twenty years. In addition, millions of dollars in back taxes have been recovered and private restitution agreements have totaled over $10 million.

The following is a list of the Division's advertising cases since FY 2002.

New York Cases

- U.S. v. Ivan Glick, (S.D.N.Y. 2002). Pled guilty, awaiting sentencing.
- U.S. v. Howard Marlin, (S.D.N.Y. 2002). Pled guilty and sentenced to pay $40,000 restitution.
- U.S. v. Gabriel Casas, (S.D.N.Y. 2002). Pled guilty and awaiting sentencing.
- U.S. v. Bertram J. Cohen, (S.D.N.Y. 2002). Pled guilty and sentenced to pay $300,000 restitution.
- U.S. v. Joseph Panaccione, AKA Joe Payne, (S.D.N.Y. 2002). Pled guilty and awaiting sentencing.

- U.S. v. Lori Montgomery, (S.D.N.Y. 2002). Pled guilty and awaiting sentencing.
- U.S. v. James Rattoballi, (S.D.N.Y. 2002). Pled guilty and awaiting sentencing.
- U.S. v. John Chessa, (S.D.N.Y. 2002). Pled guilty and awaiting sentencing.
- U. S. v. Steven J. Briggin, (S.D.N.Y. 2002). Pled guilty and awaiting sentencing.
- U.S. v. Benjamin Walker, Jr., (S.D.N.Y. 2002). Indicted, pled guilty, and sentenced to serve 24 months in prison and to pay $175,000 restitution plus back taxes, penalties and interest.
- U.S. v. Mitchell E. Mosallem, (S.D.N.Y. March 2002). Charged by criminal complaint due to risk of flight, later indicted on additional charge along with other defendants, see entry below.
- U.S. v. Mitchell E. Mosallem, John Ghianni; Haluk Ergulec; Birj Deckmejian; and The Color Wheel, Inc., (S.D.N.Y. May and Sept. 2002). Indicted in May 2002; Superseding indictment filed in Sept. 2002, with additional counts against Mosallem. See individual dispositions in entries below.
- U.S. v. Haluk Ergulec and The Color Wheel, Inc., (S.D.N.Y. 2002). Ergulec and Color Wheel pled guilty to superseding information. Ergulec sentenced to serve 37 months in prison and to pay $1.5 million restitution. Due to inability to pay, Color Wheel received no fine.
- U.S. v. Mitchell Mosallem; John Ghianni; Birj Deckmejian; and John F. Steinmetz, (S.D.N.Y. Dec. 2002). Second superseding indictment, adding John Steinmetz as a defendant. Mosallem pled to this indictment and is awaiting sentencing. Steinmetz and Deckmejian are awaiting trial.
- U.S. v. John Ghianni, (S.D.N.Y. 2003). Ghianni pled guilty to superseding information and is awaiting sentencing.

2. Miscellaneous Media Cases

Another media case filed since FY 2002 includes:

- U.S. v. New York Periodical Distributors, Inc. (N.D.N.Y. 2003). Defendant was charged with allocating markets for the wholesale distribution of periodicals in central New York, pled guilty, and was sentenced to pay a $500,000 fine.

C. Energy

The Division has brought the following energy-related cases since FY 2002:

- U.S. v. Pumps, Valves & Equipment, Inc., d/b/a The Scruggs Company ("PVE"), (N.D. Ga. 2002). Defendant pled guilty to conspiring to commit mail and wire fraud in connection with its payment of kickbacks to a former employee of the Henry Pratt Company, a manufacturer and supplier of equipment used in nuclear power plants. The kickbacks were paid in return for the Pratt employee's arranging for Pratt to buy equipment from PVE at inflated prices. PVE was sentenced to pay a $60,000 fine and restitution of approximately $80,000.

- U.S. v. Eurotech Industries, Inc., (N.D. Ga. 2002). Defendant pled guilty to conspiring to commit mail and wire fraud in connection with the payment of kickbacks to a former employee of the Henry Pratt Company, a manufacturer and supplier of equipment used in nuclear power plants. The defendant acted as a front company to facilitate Pratt's purchase of equipment from a co-conspirator at inflated prices. The defendant was sentenced to pay a fine of $16,000 and restitution of approximately $10,000.

- U.S. v. Industrial Valve Sales & Service, Inc., (N.D. Ga. 2002). Defendant pled guilty to conspiring to commit mail and wire fraud in connection with its payment of kickbacks to a former employee of the Henry Pratt Company, a manufacturer and supplier of equipment used in nuclear power plants, in return for the employee's arranging for Pratt to buy equipment from the defendant. The defendant is awaiting sentencing.

- U.S. v. John F. Triplett, (N.D. Ga. 2002). Defendant, a former employee of the Henry Pratt Company, a manufacturer and supplier of equipment used in nuclear power plants, was convicted after trial of conspiring to commit mail and wire fraud. Triplett received kickbacks from a supplier of surplus equipment in return for his arranging for Pratt to buy the equipment at inflated prices. Triplett is awaiting sentencing.

- U.S. v. Benjamin C. Buette, Jr., (D. Colo. 2002). Defendant pled guilty to wire fraud in connection with an attempt to rig bids for a contract to supply Conoco, Inc. with petroleum pipeline accessories for an expansion project for Conoco's North Salt Lake City pipeline and distribution facility. He is awaiting sentencing.

- U.S. v. Morganite, Inc. and The Morgan Crucible Company PLC, (E.D. Pa. 2002). Morganite, a U.S. company, pled guilty to fixing the price of carbon brushes and collectors, which are used to transfer electrical current in transit and automotive applications. Its British parent The Morgan Crucible Company PLC was charged with two counts of obstruction of justice related to the price-fixing investigation, including one count of corruptly persuading an employee to destroy subpoenaed documents, in violation of 18 U.S.C. § 1512(b)(2)(B), and a second count of witness tampering due to its actions

in counseling a co-conspirator to give false information to the Division, in violation of 18 U.S.C. § 1512(b)(1). Morganite was sentenced to pay a $10 million fine and Morgan Crucible was sentenced to pay a $1 million fine.

In addition, trial attorneys from the Division's San Francisco Field Office are currently participating in a California Energy Task Force, in conjunction with the U.S. Attorney's Office for the Northern District of California and the Federal Bureau of Investigation, which is actively investigating instances of criminal conduct that contributed to the California energy crisis of 2000 and 2001. The California Task Force coordinates with the Enron Task Force, the Criminal Division Fraud Section, the Commodities Futures Trading Commission, and the Federal Energy Regulatory Commission as well as with various U.S. Attorneys' Offices throughout the country and communicates regularly with state officials in California, Oregon, and Washington. Thus far, the California Task Force has secured the conviction of the following two former Enron executives in connection with their fraudulent manipulation of the California electricity markets.

- U.S. v. Timothy N. Belden, (N.D. Cal. 2002). In October 2002, Belden, Enron's former Director of West Trading, was charged with, and pled guilty to, conspiring to commit wire fraud for engaging in manipulative trading schemes in the California electricity markets. He is awaiting sentencing.

- U.S. v. Jeffrey S. Richter, (N.D. Cal. 2003). Richter, a former Enron energy manager, was charged in January 2003 with, and pled guilty in February 2003 to, conspiring to commit wire fraud in connection with Enron trading strategies and making false statements about those strategies to the FBI. He is awaiting sentencing.

D. Health Care

The health care related cases brought since FY 2002 include:

- U.S. v. DuCoa, L.P., (N.D. Tex. 2003). Pled guilty and sentenced to pay $500,000 fine.

- U.S. v. Elf Atochem S.A., (N.D. Cal. 2002). Defendant, a French corporation, pled guilty to fixing prices and allocating market shares of MCAA sold in the United States and elsewhere. The defendant also pled guilty to fixing the prices of certain organic peroxides used in the manufacture of container and packaging materials. The defendant was sentenced to pay a total fine of $8.5 million.

- U.S. v. Patrick Stainton, (N.D. Cal. 2002). The defendant, an executive of Elf Atochem S.A., pled guilty to fixing prices and allocating market shares of MCAA sold in the United States and elsewhere. Stainton was sentenced to pay a $50,000 fine and serve 3 months in a U.S. jail. Stainton is the first French national to serve time for violating the U.S. antitrust laws.

- U.S. v. Jacques Jourdan, (N.D. Cal. 2002). The defendant, an executive of Elf Atochem S.A. and a French national, pled guilty to allocating market shares of MCAA sold in the United States and elsewhere. Jourdan was sentenced to pay a $50,000 fine and serve 3 months in a U.S. jail.

- U.S. v. Hoechst Aktiengesellschaft, (N.D. Cal. 2003). The defendant, a German corporation, pled guilty to fixing prices and allocating market shares of MCAA sold in the United States and elsewhere. The defendant was sentenced to pay a $12 million fine.

2. **For FY 2002 and 2003 to date, how many civil, non-merger antitrust cases did the Department file? Please provide a separate enumeration of public institution, defense procurement, aviation, telecommunications/mass media, energy, Internet/computer software or health care cases. As in question 1 above, please briefly describe each case. In your description, please include the court of jurisdiction, the date filed and the status or disposition of the case.**

The Department filed 4 civil non-merger antitrust cases in FY 2002. The Department has filed 4 civil non-merger cases in FY 2003 to date (as of May 23, 2003). These cases are summarized below.

FY02: 4 civil non-merger cases filed

1. ***United States v. The Hearst Trust c/o The Hearst Corporation (D.D.C. 10/11/01)***

The Department filed a complaint at the request of the Federal Trade Commission alleging a violation of § 7A of the Clayton Act and charged The Hearst Corporation and its parent, The Hearst Trust, with failing to produce key documents before undertaking an acquisition subject to premerger review. Hearst allegedly violated the Hart-Scott-Rodino Act of 1976 (HSR Act) when it acquired Midi-Span Inc., an Indiana-based producer of integratable drug data files in 1998 without submitting to the antitrust enforcement agencies certain documents it was required to supply along with its premerger notification. The Department filed a proposed consent decree along with the complaint according to which the parties agreed to pay $4 million in civil penalties. The court entered the final judgment on October 15, 2001. [**Custom computer programming services.**]

2. ***United States v. The MathWorks, Inc. and Wind River Systems, Inc. (E.D. VA 6/21/02)***

The Department filed a complaint challenging an agreement between The MathWorks Inc. and Wind River Systems as a violation of §1 of the Sherman Act, and claiming the companies were illegally allocating the market for software used to design dynamic control systems. According to the complaint, The MathWorks and Wind River, which were head-to-head competitors for the development and sale of dynamic control system design software tools, entered into an agreement that ended competition between the two firms. The agreement gave The MathWorks the exclusive right to sell Wind River's MATRIXx products and required Wind River to stop its own development and marketing. The Department and Wind River simultaneously filed a proposed consent decree settling the lawsuit against Wind River. The consent decree required Wind River to divest its dynamic control systems design software at issue and to cooperate with any discovery in the case. Thereafter on August 15, 2002, the Department reached a settlement with The MathWorks, Inc. The decree required MathWorks to offer for sale the MATRIXx software it is distributing under an agreement with California-based Wind Rivery Systems Inc. The court entered the WindRiver decree on March 6, 2003 and the Mathworks decree on March 17,

2002. [**Software used to design dynamic control systems.**]

3. ***United States v. National Association of Police Distributions Equipment, Inc. (S.D. FL 7/29/02)***

The Department filed a complaint alleging that the defendant, National Association of Police Equipment Distributors (NAPED) of Boynton Beach, Florida, violated §1 of the Sherman Act by engaging in an unlawful group boycott of manufacturers that sell police equipment such as body armor, batons, uniforms and handcuffs directly to state and local governments under a federal program operated by the General Services Administration (GSA). A proposed consent decree was filed simultaneously to settle the suit. Under the terms of the decree, NAPED is enjoined from taking any action to discourage or prevent manufacturers from participating in the GSA Program. The court entered the decree on October 28, 2002. [**Police equipment.**]

4. ***United States v. Earthgrains (E.D. IL 9/10/02)***

The Department petitioned the Court to find Earthgrains Baking Companies, Inc., successor in interest to Earthgrains Company, in civil contempt for violating an order that had been entered by the court on July 3, 2003. According to the motion, Earthgrains violated the consent decree by failing to maintain assets prior to their divestiture, as required by the Hold Separate Stipulation and Order. To resolve the matter, Earthgrains agreed to pay a $100,000 civil penalty to the United States. [**White bread.**]

FY03: 4 civil non-merger cases filed

1. ***United States v. Mountain Health Care, P.A. (W.D.N.C. 12/13/02)***

The Department filed a complaint alleging that defendant Mountain Health Care, P.A. of Asheville, North Carolina, violated §1 of the Sherman Act by restraining price and other forms of competition among physicians in western North Carolina when it adopted a uniform fee schedule governing prices of its participating physicians. Physicians and physician groups that normally would have competed with each other adopted a uniform price schedule and authorized Mountain Health Care to negotiate with health plans on their behalf. Mountain Health Care agreed to contract with managed care purchasers that incorporated the collectively set fees. These actions resulted in higher rates charged to health plans leading to higher health costs for ultimate consumers. A proposed consent decree was filed simultaneously that, if approved by the court, would settle the suit. The decree requires Mountain Health Care to cease its operations and dissolve. **[Physicians services.]**

2. ***United States v. Village Voice Media, LLC and NT Media, LLC (N.D. OH 1/27/03)***

The Department filed a complaint alleging that defendants Village Voice Media, LLC of

New York and NT Media, LLC, two alternative weekly news publishers, violated §1 of the Sherman Act by engaging in an illegal market allocation agreement. According to the complaint, the defendants' illegal agreement resulted in an allocation of markets for advertisers in, and readers of, alternative news weeklies in the metropolitan areas of Cleveland, Ohio and Los Angeles, California. Prior to allocating these geographic markets, the defendants were head-to-head competitors in publishing alternative news weeklies. A proposed consent decree was filed simultaneously to settle the suit. Under the terms of the decree, the defendants are required to terminate their illegal market allocation agreement and to sell the assets of the alternative news weeklies that they agreed with one another to shut down in Cleveland and Los Angeles. The decree also allows affected advertisers to terminate their contracts and prohibits the companies from entering into any market or customer allocation agreements in the future. [**News weeklies.**]

3. ***United States v. Gemstar - TV Guide International, Inc. and TV Guide, Inc. (D.C. 2/6/03)***

The Department filed a complaint alleging that, starting in mid 1999, Gemstar and TV Guide agreed to stop competing for customers, decided together on prices and terms to be offered, and jointly managed their interactive program guide business during the mandatory pre-merger waiting period of the HSR Act. The Department said that their "gun jumping" conduct violated § 7A of the HSR Act, as well as § 1 of the Sherman Act. At the same time, the Department filed a consent decree to settle the case that requires the company to pay a record $5.67 million in civil penalties and agree to certain restrictions. The civil penalties are the highest ever paid in a "gun jumping" case. [**Cable and other pay TV services.**]

4. ***United States v. Smithfield (D.C. 2/28/03)***

The Department filed a complaint alleging that Smithfield Foods Inc., the nation's largest hog producer and pork packer, twice failed to comply with § 7A of the HSR Act before making certain acquisitions of stock of its competitor, IBP Inc., the nation's second largest pork packer. The complaint seeks a civil penalty of $5.478 million from Smithfield. The Department has alleged that Smithfield's acquisitions are not exempt from HSR Act notification requirements because Smithfield was taking steps toward a Smithfield-IBP combination. This matter is pending. [**Beef; hogs; boxed beef and pork.**]

3. **How many civil, non-merger antitrust investigations did the Department initiate during FY 2002 and FY 2003 to date? How many civil, non-merger antitrust investigations were pending within the Department during FY 2002 and 2003 to date? Please provide a breakdown for each year for major enforcement categories, including resale price maintenance, other vertical restraints, horizontal price fixing, predatory pricing, and other horizontal restraints. Please provide a breakdown for each year by major industry category. For each year, please indicate the average amount of time that an investigation remained open. For each year, please indicate what percentage of the pending investigations were closed without action, resulted in a modification of conduct by the party subject to the investigation or resulted in a case being filed.**

How many civil, non-merger antitrust investigations did the Department initiate during FY 2002 and 2003 to date? For each year, please indicate the average amount of time that an investigation remained open.

Chart 1: Count of Investigations Initiated from FY 2002 to Present

Fiscal Year	Matter Count	Average Duration in Years
2002	27	.7
2003 (as of 5/23/03)	28	.3

How many civil, non-merger antitrust investigations were pending within the Department during FY 2002 and 2003 to date?

Please refer to the attached Chart 2.

Please provide a breakdown for each year for major enforcement categories, including resale price maintenance, other vertical restraints, horizontal price fixing, predatory pricing, and other horizontal restraints.

Please refer to the attached Chart 2.

Please provide a breakdown for each year by major industry category.

Please refer to the attached Chart 3.

For each year, please indicate what percentage of the pending investigations were closed

without action, resulted in a modification of conduct by the party subject to the investigation or resulted in a case being filed.

Please refer to the attached Chart 4.

Antitrust Division
Matter Tracking System
Civil Non-Merger Investigations Pending
Fiscal Year 2002 - Present
Broken Down by Enforcement Category
Ordered by Fiscal Year

Chart 2

Report: MTS2AH31_5.PD

Report run on: *May 29, 2003 5:33 PM*

Fiscal Year	*Enforcement Category*	*Matter Count*
2002	Agreements Not to Compete	12
	Agreements to Restrict Production	2
	Attempt to Monopolize	2
	Bid Rigging	3
	Boycotts or Refusals to Deal - Horizontal	8
	Conspiracy to Monopolize	1
	Customer, Territorial or Market Allocation - Horizontal	5
	Decree Violation - Civil Contempt	1
	Exclusive Dealings and Requirements Contracts	4
	Horizontal Merger	4
	Intellectual Property Abuses	3
	Joint Venture	4
	Monopolization	17
	No Violation Assigned	1
	Other Offenses: Decree Violation - Contempt - Civil	3
	Other Offenses: Decree Violation - Other	1
	Other Offenses: Judgment Modification Proceeding	3
	Other Restraint of Trade	5
	Patent Abuses	1
	Predation	1
	Price Fixing - Horizontal	15
	Tying Agreements	1
	Vertical Merger	1
	No Violation Available	1
	Matter Count per Fiscal Year:	***99***
2003	Agreements Not to Compete	10
	Agreements to Restrict Production	2
	Attempt to Monopolize	3
	Bid Rigging	2
	Boycotts or Refusals to Deal - Horizontal	5
	Conspiracy to Monopolize	1
	Customer, Territorial or Market Allocation - Horizontal	2
	Decree Violation - Civil Contempt	1
	Exclusive Dealings and Requirements Contracts	3
	FTC Violation	1

Antitrust Division
Matter Tracking System
Civil Non-Merger Investigations Pending
Fiscal Year 2002 - Present
Broken Down by Enforcement Category
Ordered by Fiscal Year

Report: MTS2AH31_5.PD

Report run on: *May 29, 2003 5:33 PM*

Fiscal Year	*Enforcement Category*	*Matter Count*
2003	Failure to File Hart-Scott-Rodino	1
	Horizontal Merger	4
	Intellectual Property Abuses	1
	Joint Venture	3
	Monopolization	10
	No Violation Assigned	1
	Other Offenses: Compliance Proceeding	1
	Other Offenses: Decree Violation - Contempt - Civil	3
	Other Offenses: Decree Violation - Other	1
	Other Offenses: Judgment Modification Proceeding	3
	Other Restraint of Trade	7
	Patent Abuses	1
	Price Fixing - Horizontal	17
	Tying Agreements	1
	Vertical Merger	1
	No Violation Available	1
	Matter Count per Fiscal Year:	***86***

Antitrust Division
Matter Tracking System
Civil Non-Merger Investigations Pending
Fiscal Year 2002 - Present
Broken Down by Industry Category
Ordered by Fiscal Year

Chart 3

Report: MTS2AH31_6a.PDF

Report run on: May 29, 2003 5:34 PM

Fiscal Year	*Industry Category*	*Matter Count*
2002	Advertising, NEC	1
	Agricultural Chemicals, NEC	1
	Air Transportation, Scheduled	5
	Biological Product (except Diagnostic) Manufacturing	1
	Bituminous Coal and Lignite-Surface	1
	Blood and Organ Banks	2
	Bread, Cake, and Related Products	1
	Business Services, Not Elsewhere Classified	1
	Cable Networks	2
	Cable and Other Pay TV Services	1
	Computer Programming Services	1
	Computer Programming and Software	1
	Cotton	1
	Court Reporting and Stenotype Services	1
	Dairy Farms	1
	Data Processing Services	1
	Deep Sea Foreign Transportation of Freight	1
	Direct Health and Medical Insurance Carriers	3
	Drugs and Druggists' Sundries Wholesalers	1
	Electric Power Distribution	1
	Electric Power Generation	1
	Electric Services	6
	Electronic Computers	1
	Florists	1
	Functions Related to Deposit Banking	4
	General Medical & Surgical Hospitals	3
	General Medical and Surgical Hospitals	1
	General Warehousing and Storage	1
	Individual and Family Services	1
	Investment Banking and Securities Dealing	1
	Legal Services	1
	Machine Tools, Metal-Cutting Types	1
	Magnetic and Optical Recording Media Manufacturing	1
	Measuring and Controlling Devices, NEC	1
	Meatpacking Plants	1

Antitrust Division
Matter Tracking System
Civil Non-Merger Investigations Pending
Fiscal Year 2002 - Present
Broken Down by Industry Category
Ordered by Fiscal Year

Report: MTS2AH31_6a.PDF

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Fiscal Year	*Industry Category*	*Matter Count*
2002	Motion Picture Theaters, Ex. Drive-In	1
	Motion Picture and Video Distribution	1
	Music Publishers	3
	Natural Gas Transmission	1
	Office Machines, Typewriters, etc.	1
	Offices & Clinics of Medical Doctors	3
	Organic Fibers, Noncellulosic	1
	Other Basic Organic Chemical Manufacturing	1
	Patent Owners and Lessors	1
	Petroleum and Petroleum Products Wholesalers (except Bulk Stations and Terminals)	1
	Pharmaceutical Preparations	1
	Photographic Equipment and Supplies	1
	Police Protection	1
	Prefabricated Metal Building and Component Manufacturing	1
	Primary Batteries, Dry and Wet	1
	Pump and Pumping Equipment Manufacturing	1
	Racing, Including Track Operation	1
	Radio Broadcasting	1
	Railroad Rolling Stock Manufacturing	1
	Railroads, Line-Haul Operating	1
	Sanitary Paper Products	1
	Scheduled Air Transportation	1
	Scheduled Passenger Air Transportation	6
	Securities Brokerage	1
	Security Brokers and Dealers	1
	Software Publishers	1
	Special Industry Machinery, NEC	1
	Telephone Communications, Exc. Radio	2
	Telephone and Telegraph Apparatus	1
	Television Broadcasting	1
	Theatrical Producers and Services	1
	Travel Agencies	1
	Turbines and Turbine Generator Sets	1
	U.S. Postal Service	1

Antitrust Division
Matter Tracking System
Civil Non-Merger Investigations Pending
Fiscal Year 2002 - Present
Broken Down by Industry Category
Ordered by Fiscal Year

Report: MTS2AH31_6a.PDF

Report run on: May 29, 2003 5:34 PM

Fiscal Year	*Industry Category*	*Matter Count*
2002	Water Supply and Irrigation Systems	1
	Wired Telecommunications Carriers	1
	Matter Count per Fiscal Year:	***99***
2003	Advertising, NEC	1
	Agricultural Chemicals, NEC	1
	Air Transportation, Scheduled	2
	All Other Information Services	1
	Biological Product (except Diagnostic) Manufacturing	1
	Bread, Cake, and Related Products	1
	Cable Networks	2
	Cable and Other Pay TV Services	1
	Cable and Other Program Distribution	1
	Coastal and Great Lakes Freight Transportation	1
	Computer Programming Services	1
	Computer Storage Device Manufacturing	1
	Court Reporting and Stenotype Services	1
	Dairy Farms	1
	Deep Sea Foreign Transportation of Freight	1
	Deep Sea, Coastal, and Great Lakes Water Transportation	1
	Direct Health and Medical Insurance Carriers	4
	Direct Property and Casualty Insurance Carriers	1
	Drugs and Druggists' Sundries Wholesalers	1
	Electric Power Distribution	2
	Electric Power Generation	1
	Electric Services	4
	Florists	2
	Functions Related to Deposit Banking	3
	General Medical & Surgical Hospitals	2
	General Medical and Surgical Hospitals	2
	Individual and Family Services	1
	Iron and Steel Mills	1
	Legal Services	1
	Machine Tools, Metal-Cutting Types	1
	Magnetic and Optical Recording Media Manufacturing	1
	Men's Footwear (except Athletic) Manufacturing	1

Antitrust Division
Matter Tracking System
Civil Non-Merger Investigations Pending
Fiscal Year 2002 - Present
Broken Down by Industry Category
Ordered by Fiscal Year

Report: MTS2AH31_6a.PDF

Report run on: May 29, 2003 5:34 PM

Fiscal Year	*Industry Category*	*Matter Count*
2003	Motion Picture Theaters, Ex. Drive-In	1
	Motion Picture and Video Distribution	1
	Mushroom Production	1
	Music Publishers	3
	Newspaper Publishers	2
	Offices & Clinics of Medical Doctors	3
	Other Basic Organic Chemical Manufacturing	1
	Other Commercial Equipment Wholesalers	1
	Patent Owners and Lessors	1
	Petroleum and Petroleum Products Wholesalers (except Bulk Stations and Terminals)	1
	Pipeline Transportation of Natural Gas	1
	Primary Batteries, Dry and Wet	1
	Pump and Pumping Equipment Manufacturing	1
	Racing, Including Track Operation	1
	Radio Broadcasting	1
	Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing	1
	Railroad Rolling Stock Manufacturing	1
	Scheduled Air Transportation	1
	Scheduled Passenger Air Transportation	6
	Search, Detection, Navigation, Guidance, Aeronautical, and Nautical System and Instrument Manufacturing	2
	Security Brokers and Dealers	1
	Software Publishers	3
	Television Broadcasting	1
	Theatrical Producers and Services	1
	Travel Agencies	1
	Turbines and Turbine Generator Sets	1
	Water Supply and Irrigation Systems	1
	Matter Count per Fiscal Year:	***86***

CHART 4
Antitrust Division, Civil Non-Merger Investigations Results
Fiscal Year 2002 - Present (5-23-03)

Fiscal Year	Result	Matter Count	Percentage
2002	Total Cases Filed*	4	N/A
	Investigations Generating Cases	3	3.0
	Closed Without Action	28	28.3
	Modification of Conduct	2	2.0
	Pending	66	66.7
	Total	99	
2003 to 5-23-03	Total Cases Filed*	4	N/A
	Investigations Generating Cases	3	3.5
	Closed Without Action	9	10.5
	Modification of Conduct	3	3.5
	Pending	71	82.5
	Total	86	

*In Fiscal Years 2002 and 2003 to date, the Division filed three Clayton § 7A cases: in FY02, against Hearst, and in FY03, against Gemstar-TV Guide and Smithfield. The Division does not always open a formal investigation–in terms of the Division database–*prior* to filing § 7A complaints. Thus, the Hearst and Gemstar-TV Guide matters were not captured in the breakdowns on this chart, which reflects the results of formal civil non-merger investigations. Note that in its response to the Senate's Question 9, the Division does count the Hearst and Gemstar-TV Guide matters as investigations initiated *simultaneously* with filing § 7A complaints.

4. **For FY 2002-2003 to date please list and describe all investigations and activities undertaken by the Department relating to Internet-based, e-commerce ventures among competitors including B-to-B or B-to-C ventures (e.g. Orbitz, FXall, Covisint)? Please include all the relevant information sought in request 3.**

	FY 02	FY 03 (05/23/03)
# of Investigations	7	2
# of Investigations Pending	5	2
B-to-B	6	1
B-to-C	1	1
C-to-C	0	0
B-to-B Average Years Remained Open	.2	.1
B-to-C Average Years Remained Open	.9	.06
C-to-C Average Years Remained Open	0	0
% B2B Closed without Action	11%	0
% B2C Closed without Action	100%	0
% C2C Closed without Action	0	0

The following is a list of certain of the Department's civil investigations that were opened during FY 2002 and FY 2003 to date; please note that the Department is able to provide only limited information regarding pending, non-public civil investigations.

B-TO-C INVESTIGATIONS

FY 2002

Paypal, Inc./ Ebay
Opened 07/10/2002, closed 08/19/02 - Internet Micropayment Services (Closed without action)

B-TO-B INVESTIGATIONS

FY 2002

CheMatch/ChemConnect
Opened 1/22/02, Closed 3/5/02 - Chemicals
This investigation involved a merger between two joint venture online and Internet-based electronic trading platforms, minority-owned by chemical company competitors, for commodity chemicals trading for spot purchases. (Closed without action)

BrokerTec/ICAP
Opened 7/25/02, Ongoing - All other financial investment activities
In response to antitrust objections raised by the Department, ICAP plc and BrokerTec LLC – two of the world's largest interdealer brokers – agreed to restructure their planned acquisition to alter certain Revenue Commission Agreements (RCAs) and other terms entered into by BrokerTec's institutional shareholders in connection with the deal. The Department concluded that the transaction as originally proposed would have reduced competition for interdealer brokerage services in the trading of U.S. Treasury and agency securities.

Symmetricom/Datum
Opened 06/05/02, Closed 08/23/02 - Telephone Apparatus Manufacturing
This investigation involved the acquisition of Datum, Inc. by Symmetricom, Inc. Both companies produce network timing and synchronization equipment. (Closed with action)

Juniper/Unisphere
Opened 06/07/02, Closed 06/26/02 - Telephone Apparatus Manufacturing
This investigation involved the acquisition of Unisphere networks by Juniper Networks. (Closed without action)

ATP Internet
Opened 06/27/02, Ongoing - Scheduled Passenger Air Transportation

FY 2003 through May 23, 2003

First Data Corp./ Concord EFS Inc.
Opened 04/08/03, Ongoing - Automated teller machine networks
This investigation involves the acquisition of Concord by First Data.

5. **For FY 2002 and FY 2003 to date, how many antitrust consent decrees was the Department a party to? Please enumerate, including name of parties, date the consent decree was entered into, term of the consent decree, any actions taken by the Department to modify or enforce the decree, outcome of such actions and court of jurisdiction.**

Please see the attached chart.

CIVIL CONSENT DECREES FILED FY 02

TITLE: U.S. v.	TYPE+	VIOLATIONS	DATE FILED ++	DATE ENTERED	TERM OF DECREE	MARKET	MODIFICATION/ TERMINATION
1) The Hearst Trust c/o The Hearst Corporation and The Hearst Corporation (D.D.C. 10/11/01)	NM	§ 7 A Civ. Pen.	10/11/01	10/15/01	N/A	Intergratable Drug Data Files	
2) Federation of Physicians and Dentists, Inc. (D. Del. 08/12/98)	NM	§ 1 Sherman Act	10/22/01	3/01/02	10 Years	Physicians and Dentists	
3) Microsoft Corporation (D.D.C. 05/18/98)	NM	§ 1, 2 Sherman Act	11/02/01	11/12/02	5 Years	Computer Software Markets; Licensing-Installation of Browser	
4) Computer Associates International, Inc. and Platinum Technology International Inc. (D.D.C. 09/28/01)	NM	§ 7 A Civ. Pen.	04/23/02	11/20/02	10 Years	Computer software and services	

TITLE: U.S. v.	TYPE+	VIOLATIONS	DATE FILED ++	DATE ENTERED	TERM OF DECREE	MARKET	MODIFICATION/ TERMINATION
5) Wind River Systems, Inc. and The MathWorks, Inc. (E.D. VA 6/21/02)[1]	NM	§ 1 Sherman Act	06/21/02 (Wind River) 08/15/02 (Math Works)	3/6/03 (Wind River) 3/17/03 (MathWorks)	As To Defendant Wind River: Final Judgement shall expire upon the earlier of (1) the completion of all obligations imposed upon Wind River pursuant to Section IV of the Final Judgement or a Final Judgement requiring divestiture of all or any part of the MATRIXx assets; (2) the date on which a Final Judgement against the United States in this Case is no Longer subject to Appeal; (3) the date on which Wind River no longer has any right, title of interest in any of the MATRIXx assets (except for the Retained Rights); As To Defendant The MathWorks: The Final Judgement shall expire upon the earlier of (1) the date on which The MathWorks no longer has any right, title or interest in any of the MATRIXx	Dynamic Control Systems Design Software	

[1]Consent decree filed as to defendant Wind River on June 21,2002 and as to defendant The MathWorks Inc. on August 15, 2002.

TITLE: U.S. v.	TYPE+	VIOLATIONS	DATE FILED ++	DATE ENTERED	TERM OF DECREE	MARKET	MODIFICATION/ TERMINATION
					assets except with regard to ownership of patent rights as specified herein, or (2) the date of dismissal of this action as a result of the failure of the Trustee to accomplish the sale of the MATRIXx assets pursuant to the terms of this order.		
6) National Association of Police Equipment Distributors, Inc. (S.D.FL 07/29/02)	NM	§ 1 Sherman Act	07/29/02	10/28/02	10 Years	Law Enforcement Equipment Sold Through GSA Schedule 84-VI-A	
7) The Manitowoc Company, Inc.; Grove Investors, Inc.; and National Crane Corp. (D.D.C. 07/31/02)	M	§ 7 Clayton Act	07/31/02	12/11/02	10 Years	Boom Truck Business	
8) Archer-Daniels-Midland Company (ADM) and Minnesota Corn Processors, LLC (MCP)	M	§ 7 Clayton Act	09/6/02	Entry pending	10 years	Corn Syrup and High Fructose Corn Syrup	

CIVIL CONSENT DECREES FILED FY 03

TITLE : U.S. v.	TYPE+	VIOLATIONS	DATE FILED	DATE ENTERED	TERM OF DECREE	MARKET	MODIFICATION/ TERMINATION
1) Mountain Health Care, P.A. (W.D.N.C. 12/13/02)	NM	§ 1 Sherman Act	12/31/02	3/13/03	10 years	Medical and surgical hospitals	
2) Village Voice, LLC Media and NT Media, LLC (N.D. OH 1/27/03)	NM	§ 1 Sherman Act	½7/03	Entry pending	10 years	News weeklies	
3) Gemstar-TV Guide International, Inc. And TV Guide, Inc. (D.C. 2/6/03)	NM	§ 7A Clayton Act; § a Sherman Act	2/6/03	Entry pending	10 years	Cable and other program distribution	
4) Northrop Grumman Corp. and TRW Inc.	M	§ 7 Clayton Act	12/11/02	Entry pending	7 years	Radar reconaiss-ance satellite systems	
5) Univision Communications, Inc. and Hispanic Broadcasting Corporation	M	§ 7 Clayton Act	3/26/03	Entry pending	10 years	Advertising time on Spanish language radio	

8. **With respect to premerger notifications, for FY 2002 and FY 2003 to date, please indicate:**

(a) the number of investigations initiated by the Department;

FY	02	03 to date (5/23/03)
Number of HSR Investigations Initiated	76	41
Second Requests	22	12

(b) the number of requests for additional information;

Provided below is a breakdown by fiscal year of Requests for Additional Information (Second Requests) by industry. Multiple second requests for a single industry within a given fiscal are denoted by listing the number of second requests in parentheses after the industry listing.

FY 02

- ALL OTHER FINANCIAL INVESTMENT ACTIVITIES
- ALL OTHER INDUSTRIAL MACHINERY MANUFACTURE
- ANALYTICAL LABORATORY INSTRUMENT MANUFACTURE
- AUTOMATED EXPLOSIVE DETECTION SYSTEMS
- CABLE NETWORKS
- CORN SYRUP
- CORN SYRUP, HIGH FRUCTOSE CORN SYRUP, AND ETHANOL
- DECISION ANALYTICS SOFTWARE
- DEFENSE ELECTRONICS
- DRY CARGO INLAND BARGES
- ELECTRICITY
- HOT WATER HEATERS
- INFRASTRUCTURE SOFTWARE PUBLISHING
- INSTRUMENT MANUFACTURING FOR MEASURING AND TESTING ELECTRICITY AND ELECTRICAL SIGNALS
- MANUFACTURE AND SUPPLY OF NETWORK SYNCHRONIZATION AND TIMING APPARATUS
- MOBILE HYDRAULIC OR BOOM CRANES
- MOTION PICTURE THEATERS
- MULTICHANNEL VIDEO PROGRAM DISTRIBUTION
- RADIO BROADCASTING
- READY MIX CONCRETE
- REBAR, MERCHANT BAR AND SPECIAL BAR QUALITY STEEL PRODUCTS

- SCHEDULED AIRLINE PASSENGER SERVICE
- SEMICONDUCTOR MACHINERY MANUFACTURING
- SEMICONDUCTOR MANUFACTURING EQUIPMENT AND SYSTEMS
- TELECOMMUNICATIONS SERVICES; FIBER-OPTIC CABLE TELECOM CAPACITY
- TELEVISION BROADCASTING

FY 03

- ASPHALT PAVING MIXTURE AND BLOCK MANUFACTURING
- CONSTRUCTION SAND AND GRAVEL MINING
- CRUSHED AND BROKEN LIMESTONE MINING AND QUARRYING
- DAIRY PRODUCT MANUFACTURING
- DATA PROCESSING SERVICES (2)
- DEEP SEA, COASTAL, AND GREAT LAKES WATER TRANSPORTATION
- ELECTROMEDICAL AND ELECTROTHERAPEUTICAL APPARATUS MANUFACTURING
- FISH AND SEAFOOD WHOLESALERS
- GROCERY AND RELATED PRODUCT WHOLESALERS
- IRON AND STEEL MILLS
- IRRADIATION APPARATUS MANUFACTURING
- LAMINATED ALUMINUM FOIL MANUFACTURING FOR FLEXIBLE PACKAGING USES
- MOTION PICTURE THEATERS (EXCEPT DRIVE-INS)
- OTHER COMPUTER RELATED SERVICES
- OTHER CRUSHED AND BROKEN STONE MINING AND QUARRYING
- ROLLED STEEL SHAPE MANUFACTURING
- SOFTWARE PUBLISHERS
- SOLID WASTE LANDFILL (2)
- SPECIALIZED FREIGHT (EXCEPT USED GOODS) TRUCKING, LOCAL (2)
- STONE MINING AND QUARRYING

8. **With respect to premerger notifications, filed in FY 2002 and 2003 to date, please indicate:**

(c) **the number of proposed acquisitions that were abandoned following receipt of the Department's request for additional information;**

2002	1
2003 to date (05/23/2003)	1

(d) **the number of proposed acquisitions that were modified by the filing parties or where the filing parties agreed to conduct restraints after submission of the request but which were not undertaken through a consent decree, the names of the filing parties and the modifications agreed to (please enumerate);**

2002	2
2003 to date (05/23/2003)	1

2002: 2

ICAP/ BrokerTec	The deal was restructured to alter Revenue Commission Agreements (RCAs) and other terms entered into by BrokerTec's institutional shareholders in connection with the deal.
Veeco/FEI	Abandoned

2003: 1

Onex Corporation	Abandoned

8. With respect to premerger notifications, for FY 2002 and FY 2003 to date, please indicate:

(e) the number of court cases filed (please enumerate);

2002	4
2003 to date (5/23/2003)	4

FY 02: 4

1. U.S. v. SunGard Data Systems, Inc. and Comdisco, Inc. (D.C. 10/22/01)--shared hotsite disaster recovery services;
2. U.S. v. General Dynamics Corporation and Newport News Shipbuilding Inc. (D.C. 10/23/01)--Complaint--Nuclear Submarines-ABANDONED 10/29/01;
3. U.S. v. The Manitowoc Company, Inc., Grove Investors, Inc. and National Crane Corporation (D.C. 7/31/02)--Boom Truck business--DIVESTITURE;
4. U.S. v. Archer-Daniels-Midland Company and Minnesota Corn Processors, LLC, (D.C. 9/6/02)--Corn Wet Milling--Dissolution of an ADM-MCP joint venture with Corn Products International, Inc. (CPI).

FY 03 to date (5/23/2003)**: 4**

Please also note that in FY2003 the Department has challenged two other transactions that were not reportable under the HSR Act.

1. U.S. and the State of Missouri, State of Arkansas, State of California, State of Connecticut, State of Hawaii, State of Idaho, State of Illinois, State of Iowa, Comonwealth of Kentucky, State of Maine, Commonwealth of massachusetts, State of Mississippi, State of Montana, State of Nevada, State of New York, State of North Carolina, State of North Dakota, State of Oregon, Commonwealth of Pennsylvania, State of Texas, State of Vermont, State of Washington, State of Wisconsin, District of Columbia and Commonwealth of Puerto Rico v. Echostar Communications, Hughes Electronics Corp., General Motors Corp. and DirecTV Enterprises, Inc. (D.C. 10/31/02)--Complaint--Direct Broadcast Satellite Services; ABANDONED 12/10/02;
2. U.S. v. Northrop Grumman Corporation and TRW Inc. (D.C. 12/11/02)--Complaint/Decree--Radar Reconnaissance Satellites Systems;
3. U.S. v. Univision Communications, Inc. and Hispanic Broadcasting Corporation (D.C. 3/26/03)–Complaint/Decree–Advertising Time on Spanish Language Radio;
4. U.S. v. UPM-Kymmene, Oyj, Raflatac, Inc., Bemis Company, Inc. and Morgan Adhesives Company (N.D. IL 4/15/03)–Complaint–Labelstock; Pending Litigation.

8. **With respect to premerger notifications, for FY 2002 and 2003 to date,**

(f) please indicate the number of court cases settled by consent (please enumerate);

FY 02: 2

Case	Filed	Entered	Action
U.S. v. Manitowoc Company, Inc., Grove Investors, Inc., and National Crane Corporation (D.C. 7/31/02)	7/31/02	12/11/02	National crane or boom truck business
U.S. v. Archer-Daniels-Midland Company (ADM) and Minnesota Corn Processors, LLC (MCP)	9/06/02	Entry Pending	ADM and Minnesota Corn Processors must dissolve a Joint Venture with a competing wet corn miller

FY 03 to date (05/23/2003)**: 2**

Case	Filed	Entered	Action
U.S. v. Northrop Grumman Corp. And TRW Inc.	12/11/03	Entry Pending	Northrop is required to make its sophisticated satellite payloads available to competitors, along with other provisions.
U.S. v. Univision Communications	3/26/03	Entry Pending	Divestiture of Entravision shares and holdings

8. **With respect to premerger notifications, for FY 2002 and 2003 to date, please indicate:**

   (g) **the number of instances in which the Department obtained a temporary restraining order, a preliminary injunction or a hold-separate order after filing a complaint (please enumerate);**

FY 02: 1
U.S. v. Manitowoc Company, Inc., Grove Investors, Inc. and National Crane Corporation (7/31/02); Hold separate order

FY 03 to date (5/23/03): **1**
U.S. v. UPM-Kymmene, Oyj, Raflatac, Inc., Bemis Company, Inc. and Morgan Adhesives Company; Preliminary injunction hearing scheduled for June 9, 2003

8. With respect to premerger notifications for FY 2002 and 2003 to date, please indicate:

(h) the number of court cases that resulted in a litigated judgment (please enumerate);

During the relevant time period one matter, U.S. v. SunGard Data Systems, Inc. and Comdisco, Inc. resulted in a litigated judgment. The SunGard case was litigated and lost in FY 2002. In FY 2003 to date, no matters have been litigated to judgment.

The following cases were abandoned after the filing of a complaint during the selected time period:

Case	Result	Market
U.S. v. General Dynamics Corp. And Newport News Shipbuilding, Inc.	10/29/01-Parties Abandoned WON	Nuclear submarines
U.S. v. Echostar Communications, Hughes Electronics Corp., General Motors Corp. and DirecTV Enterprises, Inc.	12/10/02-Abandoned WON	Direct broadcast satellite services
U.S. v. SGL Carbon Aktiengesellschaft and SGL Carbon LLC	5/08/03-Abandoned WON	Graphite Electrodes

9. **For FY 2002 and FY 2003 to date, how many investigations of possible non-compliance with Section 7A of the Clayton Act were initiated by the Department? Please enumerate any enforcement actions taken.**

FY	02	03
Investigations Initiated	1	2
Cases Filed	1	2

Listed below is a summary of the § 7A cases filed by the Antitrust Division. The Hart-Scott-Rodino Act of 1976 (HSR Act) imposes notification and waiting period requirements on individuals and companies over a certain size before they can consummate acquisitions of stock or assets over a certain value. Parties are subject to a maximum penalty of $11,000 a day for each day they are in violation of the HSR Act.

FY 02 --7 A Cases: (1)

1. **United States v. The Hearst Trust c/o The Hearst Corporation and The Hearst Corporation**, 2001-2 Trade Cas. ¶ 73,451 (D.D.C. 2001). The complaint, filed at the request of the Federal Trade Commission, alleged a violation of § 7A of the Clayton Act and charged The Hearst Corporation and its parent, The Hearst Trust, with failing to produce key documents before undertaking an acquisition subject to pre-merger review. Hearst violated the HSR Act when it acquired Midi-Span Inc., an Indiana-based producer of integratable drug data files in 1998 without submitting to the antitrust enforcement agencies documents required to have been supplied along with its pre-merger notification. A proposed consent decree was filed simultaneously to settle the suit and the parties agreed to pay $4 million in civil penalties. The court entered the final judgment on October 15, 2001 and the civil penalties have been paid.

FY 03 --7 A Cases: (2)

1. **United States v. Gemstar - TV GuideInternational, Inc. and TV Guide, Inc.** (D.C. 2/6/03). The complaint alleged that, starting in mid 1999, Gemstar and TV Guide agreed to stop competing for customers, decided together on prices and terms to be offered, and jointly managed their interactive program guide business during the mandatory pre-merger waiting period of the HSR Act. The Department said that this "gun jumping" conduct violated § 7A of the HSR Act, as well as § 1 of the Sherman Act. At the same time, the Department filed a consent decree to

settle the case that requires the company to pay a record $5.67 million in civil penalties and agree to certain restrictions. The civil penalties are the highest ever paid in a "gun jumping" case.

2. **United States v. Smithfield** (D.C. 2/28/03). The Department filed a complaint alleging that Smithfield Foods Inc., the nation's largest hog producer and pork packer, twice failed to comply with § 7A of the HSR Act before making certain acquisitions of stock of its competitor, IBP Inc., the nation's second largest pork packer. The complaint seeks a civil penalty of $5.478 million from Smithfield. The Department has alleged that Smithfield's acquisitions are not exempt from HSR Act notification requirements because Smithfield was taking steps toward a Smithfield-IBP combination. This matter is pending.

11. **For FY 2002 and 2003 to date, please provide an annual breakdown of the total number of employees of the Antitrust Division. Please provide a separate accounting for attorneys, economists, and other support staff for each of these years. Please provide an aggregate breakdown of personnel assignments by major industry category. Please also provide the budget figures for each of these years calculated in actual dollars in 1990 dollars (based in a deflector index).**

2002	781
2003**	795

* As measured at the end of each Fiscal Year, September 30th
** Estimated

2002	346	153	61	221	781
2003***	355	163	61	216	795

* As measured at the end of each Fiscal Year, September 30th
** Clerks and support staff
*** Estimated

The Division currently does not have the ability to break out its historical staffing levels by major industry category, as has been requested. The Division, prior to its recent modernization, was not structured along industry lines but instead by enforcement function. The recent modernization has structured the Division so that for civil enforcement particular sections are responsible for particular industries. Enclosed as Attachments 1-2 are charts that show Division staffing levels by section for the periods of FY 2002 and FY 2003. Enclosed as Attachment 3 is a chart that shows budget figures for FY 2002 and estimated figures for FY 2003.

ATTACHMENT 3

Budget figures for FY 2002 - 2003.

Antitrust Division Staffing* and Budget							
Fiscal Year	Attorneys	Paralegals	Economists	Other**	Total	Budget	Value in 1990 Dollars***
2002	346	153	61	221	781	$130,791,000	$95,072,000
2003****	355	163	61	216	795	$133,133,000	not available

* As measured at the end of each Fiscal Year, September 30th

** Clerks and support staff

*** Indexed using the Administration's CPI-U estimates from the Bureau of Labor Statistics for 1997 through 2002.

**** Estimated

ATTACHMENT 2
DEPARTMENT OF JUSTICE ANTITRUST DIVISION
Staffing as of May 6, 2003

Washington Sections	Attorneys	Economists	Paralegals	Secretaries	Other	TOTAL
Office of Assistant Attorney General	11	1	0	4	1	*17*
Office of Operations	9	0	2	4	6	*21*
- FOIA	1	0	5	2	2	*10*
- Paralegal Unit	0	0	102	2	0	*104*
Appellate Section	11	0	0	3	1	*15*
Competition Policy	0	18	0	1	8	*27*
Economic Litigation	0	20	0	3	7	*30*
Economic Regulatory	0	20	0	4	2	*26*
Executive Office	0	0	0	2	32	*34*
- ISSG	0	0	0	2	22	*24*
Foreign Commerce	7	0	0	0	2	*9*
Legal Policy Section	8	0	0	2	1	*11*
Litigation I Section	25	0	0	5	0	*30*
Litigation II Section	33	0	0	6	2	*41*
Litigation III Section	29	0	1	6	0	*36*
National Criminal Enforcement Section	18	0	0	3	2	*23*
Networks and Technology Section	29	0	1	5	1	*36*
Telecommunications and Media Enforcement Section	30	0	0	7	1	*38*
Transportation, Energy, and Agriculture	30	0	0	7	1	*38*
WASHINGTON, DC TOTALS	*241*	*59*	*111*	*68*	*91*	*570*

Field Offices	Attorneys	Economists	Paralegals	Secretaries	Other	TOTAL
Atlanta Field Office	14	0	9	7	2	*32*
Chicago Field Office	12	1	3	6	3	*25*
Cleveland Field Office	15	0	4	5	2	*26*
Dallas Field Office	13	0	9	5	2	*29*
New York Field Office	18	0	8	5	3	*34*
Philadelphia Field Office	16	0	6	4	2	*28*
San Fran. Field Office	18	1	6	8	3	*36*
FIELD OFFICE TOTALS:	106	2	45	40	17	*210*
ANTITRUST DIVISION TOTALS:	*347*	*61*	*156*	*108*	*108*	*780*

ATTACHMENT 1
DEPARTMENT OF JUSTICE ANTITRUST DIVISION
Staffing as of August 27, 2002

Washington Sections	Attorneys	Economists	Paralegals	Secretaries	Other	TOTAL
Office of Assistant Attorney General	11	0	0	3	2	*16*
Office of Operations	10	0	2	4	6	*22*
- FOIA	1	0	5	3	2	*11*
- Paralegal Unit	0	0	99	3	0	*102*
Appellate Section	11	0	0	3	1	*15*
Competition Policy	0	18	0	3	10	*31*
Economic Litigation	0	18	0	3	8	*29*
Economic Regulatory	0	19	0	4	2	*25*
Executive Office	0	0	0	3	31	*34*
- ISSG	0	0	0	1	22	*23*
Foreign Commerce	7	0	1	0	1	*9*
Legal Policy Section	8	0	0	2	1	*11*
Litigation I Section	23	0	2	6	0	*31*
Litigation II Section	33	0	1	6	2	*42*
Litigation III Section	26	0	0	6	0	*32*
National Criminal Enforcement Section	18	0	1	4	2	*25*
Telecommunications and Media Enforcement Section	28	0	1	6	1	*36*
Transportation, Energy, and Agriculture	25	0	2	7	1	*35*
WASHINGTON, DC TOTALS	*226*	*55*	*114*	*71*	*93*	*559*

Field Offices	Attorneys	Economists	Paralegals	Secretaries	Other	TOTAL
Atlanta Field Office	14	0	10	6	2	*32*
Chicago Field Office	13	1	8	6	3	*31*
Cleveland Field Office	17	0	5	5	2	*29*
Dallas Field Office	13	0	9	5	3	*30*
New York Field Office	17	0	7	7	3	*34*
Philadelphia Field Office	16	0	6	4	2	*28*
San Fran. Field Office	18	1	6	8	3	*36*
FIELD OFFICE TOTALS:	108	2	51	41	18	*220*
ANTITRUST DIVISION TOTALS:	*334*	*57*	*165*	*112*	*111*	*779*

13. **For FY 2002 and FY2003 to date please describe in detail the Department's enforcement activities in the area of resale price maintenance and non-price vertical restraints. Please include in your answer the number of complaints received, the number of investigations initiated, and the number of enforcement actions (please enumerate and indicate whether civil or criminal). Please also describe any actions taken by the Antitrust Division to intervene or make amicus filings in private suits involving resale price maintenance or non-price vertical restraints.**

	2002	2003 (5/23/03)
Investigations	0	0
Enforcement Actions	0	0

Investigations

Such cases generally are referred to the Federal Trade Commission pursuant to historical divisions of responsibility between the agencies.

Enforcement Actions

The Division filed no resale price maintenance cases during the specified time periods.

Amicus activities

The Department has not filed an amicus brief in any private cases involving resale price maintenance issues or non-price vertical restraints during the relevant time period.

14. **For FY 2002 - 2003 to date, how many applications did the Department receive pursuant to the voluntary disclosure provisions of the National Cooperative Research Act of 1984? Please indicate the number of investigations opened or enforcement actions taken with respect to applications received under the Act.**

	FY 2002	FY 2003 (05/23/03)
Initial Filings Received	29	14
Investigations Initiated	1	0
Cases Filed	0	0

15 (a). For FY 2002-2003 to date, how many requests for business review letters did the Department receive?

Fiscal Year	Number of Requests
2002	5
2003 (through 5/23/03)	2

15(b) Please indicate how many of these requests involved activities connected with aviation, telecommunications/mass media, energy, Internet/computer software or health care (including pharmaceuticals).

Fiscal Year	Aviation	Telecom/ Mass Media	Energy	Internet/ Computer	Healthcare (Pharmaceuticals)	Other	Total
2002		2				3	5
2003 (through 5/23/03)				1		1	2

15(c) How many of these requests resulted in a Department request for additional information?

The Department does not keep track of this statistic. Most requests for additional information are made via the telephone, so even a physical examination of each business review file would not necessarily be revealing. However, the majority of requests for additional information are seeking clarification of the information initially submitted rather than extensive new information.

15(d) How many of these requests were withdrawn before the Department issued a letter?

It is not possible to supply an answer to the specific question of how many of the business review requests described in the answer to 15(a) were withdrawn before the

Department issued a letter. We can, however, provide the Subcommittee with the number of business review requests that were withdrawn on a fiscal year basis.

Fiscal Year	Number of Requests Withdrawn
2002	2
2003 (5/23/03)	0

15(e) Please indicate the number of business review letters that were issued and the average length of time between requests for a letter and receipt of the letter.

Fiscal Year	B.R. Letters Issued	Average Response Time (in Months)
2002	4	7.5
2003 (5/23/03)	4	10.2

16. What is the status of the Antitrust Division's efforts at coordinating antitrust enforcement standards with international antitrust authorities? How many person hours have been expended in this project? Please list and describe any substantial initiatives undertaken by the Division in this area (e.g. EU bilateral, GCI).

The Antitrust Division, working closely with the Federal Trade Commission, is actively engaged in efforts to coordinate antitrust enforcement standards with international antitrust authorities. Two exercises in particular focus precisely on promoting antitrust convergence -- the U.S.-EU Merger Working Group and the International Competition Network. The Division has a dedicated Foreign Commerce section that has been working on these projects, in addition to other matters implicating foreign jurisdictions. The Foreign Commerce section is assisted in these efforts by other Division employees who participate based upon their expertise.

U.S.-EU Merger Working Group

The decision taken during the fall of 2001 to step up the work of our existing joint merger working group to promote convergence between U.S. and EU merger policy began to pay valuable dividends toward the end of last year. Particularly important was the group's work on analyzing our policies towards conglomerate mergers, and its development of a set of merger review "best practices" that the Division, FTC, and the EC announced last October. Thanks in large part to the working group's efforts, we had one of the best U.S.-EU bilateral consultations ever last July. During that bilateral, we had a very focused exchange about U.S. and EU policies toward conglomerate mergers. We also used the bilateral to discuss the working group's recommendations for best practices.

The best practices are particularly significant in that they are a concrete demonstration of the U.S. and EU antitrust agencies' commitment to cooperate closely and keep each other fully

informed of developments throughout their respective merger investigations. Many of the best practices memorialize and make more transparent practices that have been in place informally for quite some time. So, even though the U.S. and EC investigative staffs and senior officials have communicated effectively with one another in many merger cases over the years, the best practices should help to standardize "good practice," and will provide important guidance to all participants in the merger review process.

With its work on merger review best practices done, the U.S.-EU merger working group has been focusing on efficiencies. Moreover, the group has been a vehicle for providing feedback to the EU's draft horizontal merger guidelines, a high priority on both sides of the Atlantic. I foresee us continuing to use the highly successful U.S.-EU Merger Working Group over the coming years to build upon our solid record of cooperation and convergence with the EU.

Incidentally, the working group model proved so successful in the merger context that we decided in the past year to introduce that framework in the civil non-merger context as well by launching an Intellectual Property Working Group with the EU. The group has already had several videoconferences -- including one on patent pooling -- with more sessions planned this year. Through this group, talented government antitrust experts on each side of the Atlantic can learn from one another and come up with optimal approaches to many of the difficult issues that face enforcers in matters that involve both antitrust and intellectual property issues.

International Competition Network ("ICN")

The Antitrust Division has been and continues to be very active in the international arena with nations outside the EU, whether it be through the Organization for Economic Cooperation

and Development, the World trade Organization, bilateral discussions on a nation-to-nation basis or through the International Competition Network (ICN). As more and more nations, including developing nations, undertake antitrust enforcement, the efforts of the ICN will be particularly important. Less than two years ago, we were able to establish the ICN. The ICN has been a remarkable success thus far, having emerged as a global network of antitrust authorities from nearly 70 developed and developing countries, representing 90 percent of the world's Gross Domestic product. It is serving as an important vehicle for international convergence on substantive and procedural issues by developing guiding principles and best practice recommendations. Unlike ordinary bar organizations or similar groups, the membership of the ICN is limited to the public servants from various jurisdictions who participate in antitrust enforcement. At the same time, members of the private bar from around the world, businesspeople, academics, and representatives of international organizations (including OECD) are working with us as volunteers on each of the projects that ICN undertakes, giving the ICN the benefit of their knowledge, experience, and insights.

17. Please indicate whether the Department is preparing or reviewing antitrust guidelines in any areas. For each project, please indicate the number of person hours already expended and estimate the additional time required.

While the Department continually evaluates its enforcement policies in light of advances in legal and economic thinking, at this time the Department is not preparing or reviewing any specific guidelines. The Department has, however, undertaken projects designed to improve its capabilities in the areas of coordinated effects analysis and merger remedies. These projects do not implicate any guidelines-related issues.

18. Please list all private antitrust cases in which the Department participated as amicus or has otherwise offered its views to a court. Please provide the Committee with a copy of all Department filings in these cases.

Listed below are all private antitrust cases in which the Department participated as an amicus or has otherwise offered its views to a court during FY 2002 and FY 2003 to date (as of May 23, 2003).

AMICUS CASES - DISTRICT COURT AND COURT OF APPEALS

Fiscal Year Filed	Case
2002	National Association of Recording Merchandisers, Inc. v. Sony Corp. of America, et al., C.A. No. 00-164 (EGS) (D.D.C. 2001)
2002	Covad Communications Co., et al. v. BellSouth Telecommunications, Inc., 299 F.3d 1272 (11th Cir. 2002)
2002	State of New York et al. v. Microsoft Corp. C.A. No. 98-1233 (CKK) (D.D.C.)
2003	Covad Communications Co., et al. v. Bell Atlantic Corp., et al, No. 02-7057 (D.C. Cir.)
2003	In Re: Initial Public Offering Antitrust Litigation, No. 01-CIV-2014 (WHP) (S.D.N.Y.)
2003	In Re: Stock Exchanges Options Trading Antitrust Litigation, 317 F.3d 134 (2d Cir. 2003)
2003	Empagran S.A., et al. v. F. Hoffmann-LaRoche, Ltd., et al., No. 01-7115 (D.C. Cir.)
2003	Southco. Inc. v. Kanebridge Corp., No. 02-1243 (3d. Cir.)
	AMICUS BRIEFS - SUPREME COURT
2002	Statoil ASA v. Heeremac V.O.F., 122 S.Ct. 1597 (2002)
2003	Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, No. 02-682
2003	Dee-K Enterprises Inc. v. Heveafil Sdn. Bhd., No. 02-649

19. **What percentage of the acquisitions reported to the Department under the premerger notification program during FY 2002 and FY 2003 to date involved foreign-owned or controlled firms? (If this information is not available, please provide any other information available to the Department concerning the level of acquisition activity by foreign-owned or controlled firms).**

	2002	2003 (as of 5/28/03)
Adjusted Transactions	1,142	640
Foreign Transactions	374	217
Percentage	32.7%	33.9%

20. **During FY 2002 and FY 2003 to date, has the Department challenged any acquisitions because of concerns with the concentration of ownership of various publishing firms, including newspapers and various book publishers?**

    (a) **Does the Department have any information about the concentration of ownership of newspapers, either nationally or on a local level?**

    (b) **Does the Department have any information about the concentration of ownership of book publishers, either nationally or at a local level?**

The Department submits the following additional information to supplement the response provided on September 19, 2002:

Although not a challenge to a merger or acquisition, in January 2003, the Department filed a complaint alleging that defendants Village Voice Media, LLC of New York and NT Media, LLC, two alternative weekly news publishers, violated §1 of the Sherman Act by engaging in an illegal market allocation agreement. According to the complaint, the defendants' illegal agreement resulted in an allocation of markets for advertisers in, and readers of, alternative news weeklies in the metropolitan areas of Cleveland, Ohio and Los Angeles, California. Prior to allocating these geographic markets, the defendants were head-to-head competitors in publishing alternative news weeklies. A proposed consent decree was filed simultaneously to settle the suit. Under the terms of the decree, the defendants are required to terminate their illegal market allocation agreement and to sell the assets of the alternative news weeklies that they agreed with one another to shut down in Cleveland and Los Angeles. The decree also allows affected advertisers to terminate their contracts and prohibits the companies from entering into any market or customer allocation agreements in the future.

21. (a) How widespread is the problem of document destruction?

Our staffs are always attuned to and pursue the issue of whether subjects have complied fully with compulsory process because full and complete compliance with subpoenas and civil investigative demands is vital to our ability to investigate and prosecute antitrust violations. Since FY 1997, the Division has brought six cases charging obstruction of justice or contempt related to document destruction or concealment.

(b) Has the Division brought any actions against defendants believed to have engaged in illegal document destruction?

Yes, the Division has brought the following cases involving document destruction or concealment since the beginning of FY 2002.

- U.S. v. Toho Carbon Fibers, Inc.; Toho Tenax Co., Ltd., f.k.a. Toho Rayon Co., Ltd.; and Jinnosuke Takeda, (C.D. Cal. 2002). Toho Tenax Co., Ltd. ("Toho Tenax") of Tokyo Japan; its American subsidiary Toho Carbon Fibers, Inc.; and Jinnosuke Takeda, a Japanese national and resident and former managing director of Toho Tenax were indicted on March 19, 2002 for obstruction of justice in violation of 18 U.S.C. § 1503. The defendants were charged with withholding and removing from the United States documents relating to pricing actions by and pricing communications among carbon fiber competitors. The withheld documents were discovered later in the headquarters of Toho Tenax in Tokyo by law enforcement agents of the Government of Japan. Toho Tenax and Toho Carbon Fibers pled to the indictment. Toho Tenax was sentenced to pay a $300,000 fine, while Toho Carbon was sentenced to pay a $200,000 fine. Takeda remains an international fugitive.

- United States v. Morganite, Inc. and The Morgan Crucible Company PLC (E.D. Pa. 2002). In November 2002, the Division brought a three-count information against carbon brush and collector manufacturer Morganite, Inc. of North Carolina and its British parent The Morgan Crucible Company PLC. Carbon brushes and collectors are used to transfer electrical current in transit and automotive applications. Morganite was charged with fixing the price of carbon brushes and collectors from 1990 to 2000, and Morgan Crucible was charged with two counts of obstruction of justice related to the price-fixing investigation. One of the obstruction counts charged Morgan Crucible with corruptly persuading an employee of another U.S. subsidiary to destroy subpoenaed documents, in violation of 18 U.S.C. § 1512(b)(2)(B). The other obstruction count charged Morgan Crucible with witness tampering due to its actions in drafting a "script" containing false statements that it had given the Division, and then giving the script to a co-conspirator company and requesting that witnesses from the co-conspirator company give the same false information to the Division, in violation

of 18 U.S.C. § 1512(b)(1). Both companies pled guilty; Morganite was sentenced to pay a $10 million fine and Morgan Crucible was sentenced to pay a $1 million fine. This investigation is continuing.

(c) Does the Department have sufficient remedies to deal with intentional document destruction designed to conceal antitrust violations?

The Antitrust Division believes that it is well-equipped to deal with intentional document destruction designed to conceal antitrust violations, and the new, tougher incarceration penalty of twenty years for individuals for document destruction is a significant enhancement to the previously-available remedies.

UNITED STATES SENATOR • OHIO

Mike DeWine

FOR IMMEDIATE RELEASE
MAY 21, 2003

CONTACT: AMANDA FLAIG
(202) 224-2315

HEARING STATEMENT
JUDICIARY COMMITTEE HEARING ON
HEW PATE
U.S. SENATOR MIKE DEWINE

Thank you, Mr. Chairman, and thank you, Mr. Pate, for appearing before us today. As Chairman of the Antitrust Subcommittee of this Committee, I am proud to welcome such a well-qualified nominee to lead the Antitrust Division. I won't go through all of your past accomplishments, but I will highlight your two Supreme Court clerkships -- one for former Justice Powell and one for Justice Kennedy -- and the ongoing leadership that you have provided the as Acting Assistant Attorney General for Antitrust during a period of great transition.

This transition period has not only included the departure of your predecessor, Charles James, but also that of two different Deputy Assistant Attorneys General -- one for International Enforcement and one for Economics. You are to be commended for the way the Antitrust Division has functioned during this transition period.

In today's challenging economic climate, vigorous antitrust enforcement remains vitally important to ensuring that our markets function properly and, ultimately, that American consumers get the benefit of better goods and services at better prices. The Antitrust Division is, of course, an integral part of our nation's antitrust enforcement efforts.

In fact, it is likely that the role of the Antitrust Division will grow in importance in the near future. I am thinking, in particular, of the issue of media consolidation.
It has been widely reported that the FCC is likely to weaken its media ownership rules early next month; accordingly, consumers will look increasingly to the Antitrust Division to carefully scrutinize potential mergers and acquisitions in the television, radio, cable, news, and entertainment markets. We must take care to not allow consolidation in these markets to harm consumer interests.

The pending NewsCorp -- DirecTV deal is an example of the type of media deal that creates the need for a thorough review. Although the FCC rulemaking may not directly implicate that deal, I think the proposed acquisition is emblematic of the type of consolidation that we are seeing throughout the media sector. Because of this, Senator Kohl and I plan to hold an Antitrust Subcommittee hearing next month on the NewsCorp/DirecTV deal, and we will closely examine the proposal at that time.

For today, however, there are a number of other key areas that we need to examine. When your predecessor appeared before the Antitrust Subcommittee last September, I stressed the importance of antitrust scrutiny for joint ventures.

While joint ventures differ from full-fledged mergers, they often have significant competitive impact and require similar, vigorous scrutiny from the antitrust agencies. Joint ventures also differ from mergers because the Hart-Scott-Rodino Act does not cover them. As a result, the Antitrust Division is not required to examine joint ventures under the statutory merger timelines. Despite the lack of statutory timelines, however, it is important that the Antitrust Division review these arrangements within reasonable time periods, without, of course, sacrificing careful, thorough, economically sound analysis. We also must recognize that the Antitrust Division and other American antitrust authorities are not the only important antitrust authorities in the world. As business becomes more global and commerce flows more freely around the world, companies that do business worldwide face nearly one hundred different antitrust enforcement regimes. Ongoing efforts to facilitate cooperation between various antitrust agencies around the world and efforts to coordinate procedural and substantive antitrust standards represent important advances in antitrust enforcement. I know you have worked a great deal on international coordination, and hope that those efforts continue.

I look forward to discussing with you these and other issues today, along with the successes of the Antitrust Division during your tenure as acting AAG and the challenges that still remain. I look forward to working closely with you to address those challenges. Thank you, Mr. Chairman.

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News Release

JUDICIARY COMMITTEE

United States Senate • Senator Orrin Hatch, Chairman

May 21, 2003 Contact: Margarita Tapia, 202/224-5225

Statement of Chairman Orrin G. Hatch
Before the United States Senate Judiciary Committee
Hearing on the Nomination of

R. HEWITT PATE FOR ASSISTANT ATTORNEY GENERAL FOR THE ANTITRUST DIVISION

It is our pleasure this morning to consider the nomination of Hew Pate Assistant Attorney General for the Antitrust Division at the United States Department of Justice.

I would like to start by welcoming Mr. Pate to the Committee and congratulating him for being nominated by President Bush. His impressive background and past government service make me confident that he will be a great asset to the Department of Justice, this Committee and the American people.

Over the last decade, the position of the Assistant Attorney General for Antitrust has grown in importance. The rapid transformation of our country's economy, particularly in new technologies and international markets, has raised public attention and policy focus on a variety of important antitrust issues. The Assistant Attorney General plays a crucial role in formulating competition policy and enforcing existing antitrust laws to make sure that our free-market economy operates efficiently and serves the public.

Mr. Pate comes before the Committee with an impressive track record of public service in the Antitrust Division. In June 2001, he was appointed as the Deputy Assistant Attorney General responsible for Regulatory Matters, and served ably under then Assistant Attorney General Charles James. In November 2002, after Mr. James' departure, Mr. Pate was appointed as Acting Assistant Attorney General for the Antitrust Division. During that time, he demonstrated his talent and ability to lead the Antitrust Division.

Prior to joining the Justice Department in 2001, Mr. Pate practiced at the prestigious law firm of Hunton & Williams in Richmond, Virginia, where he had a distinguished record in representing both plaintiffs and defendants in a variety of antitrust and business law cases. After graduating first in his class at the University of Virginia Law School in 1987, Mr. Pate went on to clerk for Fourth Circuit Judge J.

Harvie Wilkinson, Supreme Court Justice Lewis Powell, and Supreme Court Justice Anthony Kennedy. During his tenure at the firm of Hunton & Williams, Mr. Pate found time to teach at the University of Richmond and University of Virginia Law Schools despite the demands of his busy and sophisticated practice.

With such an impressive background, both in private practice and in antitrust enforcement, I am confident that Mr. Pate will be an excellent Assistant Attorney General for the Antitrust Division. I am hopeful that this Committee and the Senate as a whole will move quickly to confirm him.

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News from
HERB KOHL
United States Senator
Democrat of Wisconsin
330 Hart Senate Office Building • Washington, D.C. 20510 • (202) 224–5653

FOR IMMEDIATE RELEASE: **May 21, 2003**
Contact: Lynn Becker or Zach Goldberg **Phone: (202) 224-5653**

Statement of U.S. Senator Herb Kohl
Senate Judiciary Committee
Hew Pate Nomination

Thank you, Mr. Chairman. We meet today to consider the nomination of Hew Pate to be Assistant Attorney General for Antitrust. Mr. Pate, the mission of the Justice Department's Antitrust Division has never been more important. In our challenging economic times, we depend on the dynamism of competition to provide the economic growth and jobs necessary to propel our economy forward. Only the aggressive enforcement of our nation's antitrust laws will ensure that competition flourishes and consumers obtain the highest quality products and services at the lowest possible prices.

If confirmed, you will assume the leadership of the Antitrust Division at a crucial time. One example is the ferment in the media sector. In just the next couple of weeks, the Federal Communications Commission is expected to adopt new rules that will fundamentally relax the limits on media ownership that have existed for decades. This ruling is likely to unleash a wave of media consolidation and media acquisitions that have the potential to reshape the way Americans receive their news, information and entertainment programming. Only by maintaining diversity in media ownership can we ensure the diverse marketplace of ideas so essential to our democracy. The Antitrust Division will stand as our last line of defense against excessive media concentration.

Our work in the last year has also uncovered serious allegations of anti-competitive practices in the ways hospitals buy the medical devices essential to delivering quality health care to millions of Americans. Group purchasing organizations have been accused of adopting exclusionary contract practices which benefit dominant suppliers to the detriment of innovation

- more -

and patients. While the Federal Trade Commission has taken the lead in investigating this industry, the Antitrust Division's cooperation in revising the joint FTC/DOJ Health Care Guidelines will be essential to restoring competition to this vital sector.

Mr. Pate, the performance of the Antitrust Division over the last two years under your predecessor's leadership concerned us. From the defects in the Microsoft settlement – which many believe was unnecessarily weak and riddled with loopholes – to the general decline in the Division's enforcement activities, we were left to wonder if the Division was truly committed to its crucial mission of protecting competition. It is essential the next head of the Antitrust Division be committed to restoring the proud tradition of vigorous antitrust enforcement to the Justice Department. Your impressive record of achievement and fine reputation demonstrate that you are well qualified to restore our confidence and lead the Antitrust Division. I have been impressed with your dedication since you have been the acting head of the Division.

Mr. Pate, the position of Assistant Attorney General for Antitrust carries with it a special burden, and a special responsibility. The companies over whom the Antitrust Division has jurisdiction have ample resources to hire skilled and talented counsel to represent their interests. But no one represents the interests of the American consumer other than the Antitrust Division. Millions of consumers will depend on your efforts and your judgment. It is my sincere hope, and full expectation, that you will meet this challenge should you be confirmed.

Thank you, Mr. Chairman

# # #

U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

Statement of Senator Patrick Leahy
Senate Judiciary Committee Hearing
Nomination of R. Hewitt Pate – Assistant Attorney General, Antitrust Division
May 21, 2003

I want to join the Chairman, and my colleagues on the Antitrust Subcommittee – Senators Kohl and DeWine – in welcoming Mr. Pate this morning. The Antitrust Division is charged with a critically important role in protecting our nation's consumers and their markets, and I look forward to the dialogue we can have here today on these topics.

The geographic boundaries of our marketplaces are being pushed further and further out, and many of the competitive issues that were once only local have become regional, national, or even global in their impact. At the same time, the economy itself is suffering, and in down times the temptation to act anti-competitively is extraordinary. We also live in a world increasingly dominated by high tech and information industries. In those arenas, technological change and innovation are taking place at a dizzying speed, and we are seeing new and creative products and services developed every day. Fair and efficient policing of corporate behavior in those swiftly evolving markets is particularly important to ensure that the early entrants do not preclude competition from later rivals, and that a rapid accumulation of market power cannot be used to harm consumers.

Another hallmark of antitrust problems arising in recent years has been the increasing number of situations in which suppliers and distributors join forces, possibly to the detriment of consumers. Many of us may be accustomed to thinking of antitrust enforcement as focused on mergers of competitors, but as more and more vertical arrangements are entered into, we must be aware – and be wary – of such deals. I do not mean to imply that they are all anti-competitive, and indeed in some cases they may permit consumers a greater range of choice than they would otherwise enjoy, but I must caution everyone to examine them carefully. As we all move more and more of our acquisition of information, of goods, and of services to the Internet, the on-line businesses and markets will need the scrutiny of the Antitrust Division to help guarantee that those marketplaces provide digital-age consumers with the quality and quantity of offerings that have long been the promise of the Internet.

Sometimes, of course, such arrangements can work substantial harm. As you know, Mr. Pate, I am particularly concerned about the recent proposal by H.P. Hood and National Dairy Holdings – two very large milk processors – that would have left a single entity – Dairy Farmers of America, a very large co-operative and a significant investor in National Dairy Holdings – in control of 90 percent of the fluid milk market in New England. A deal like that would have left other co-ops and farmers without a local market for their milk. And if that were to happen, wholesale milk prices would drop even further. Those prices are already at a 25-year low, and we need to increase our vigilance, both here in Congress and in the Department of Justice, to ensure that dairy farmers and other agricultural producers are not harmed further by anticompetitive practices on the buying side of their markets.

I know that I and other Members are anxious to discuss many issues with you, and I look forward to a conversation that continues beyond this morning's hearing.

#####

senator_leahy@leahy.senate.gov
http://leahy.senate.gov/

Revised

MEMORANDUM

To: Senator Specter
From: Seema Singh
Date: May 20, 2003
Re: Judiciary Hearing -- Hewitt Pate

The Judiciary Committee is scheduled to hold a nominations hearing for Acting Assistant Attorney General Hewitt Pate on Wednesday, May 21, 2003 at 10:00 a.m. in SD-226.

ANTITRUST DIVISION FUNDING --The Administration has requested $141.9 million for FY04, an increase of $4.1 million from the FY03 funding request of $137.8. For FY03, Congress matched the President's request with $137.8 million. The Antitrust Division is staffed by 851 full-time employees.

ISSUES

CARBIDE GRAPHITE

NEW

Due to your intervention with Mr. Pate on April 15th, the Justice Department filed an antitrust action that was instrumental in ensuring that CG Electrodes Acquisition, LLC, could purchase the assets of Carbide/Graphite to operate them, which will put back to work 120 people. On May 2nd, CG Electrodes closed on the acquisition and the Justice Department subsequently dismissed the antitrust action. (Longer memos attached).

DEPT OF TRANSPORTATION COMPUTER RESERVATION SYSTEMS (CRS) RULEMAKING

The Department of Transportation is considering changing regulations governing airline reservation systems used by travel agents. Since 1984, the federal government has regulated computer reservation systems, or CRSs, to protect the marketplace and airline industry from anti-competitive behavior by large carriers. The regulations, last revised in 1992, are up for renewal.

CRS systems provide information on airline schedules, fares and seat availability to travel agencies and allow agents to book seats and issue tickets. Currently, there are four CRSs operating in the United States: Sabre (which owns Travelocity), Galileo (owned by Cendant), Worldspan and Amadeus. In the past, almost all airline tickets have been booked through CRSs (as opposed to directly through the airlines). Because most travel agents only use one system, airlines have had to participate in each of the four systems to assure that all agents have access to their flight information. This dependence of both airlines and travel agents on CRSs caused the department, in its last review of the CRS rules, to conclude that the rules were necessary to prevent harm to airline competition. However, the airlines' growing use of the Internet for selling tickets has weakened their dependence on the systems and possibly the need for at least some of the existing rules.

DOT rules required that information offered through CRSs be objective and unbiased and that participation in each CRS be open to all carriers on a nondiscriminatory basis. The department also required that information and booking functions provided for each airline be as reliable and current as they were for the owner airline, a provision known as "equal functionality."

There have been two major developments since the 1992 rulemaking. First, the airlines have been divesting their CRS ownership interests, and two of the systems – Sabre and Galileo – are no longer controlled by any airlines. Secondly, the airline tickets are now increasingly sold through the Internet (on web-sites such as Orbitz and Travelocity).

The notice of proposed rulemaking would, if made final, eliminate several provisions of the existing rules. One of these is the requirement that each airline with an ownership interest in a CRS participate in competing systems at the same level at which it participates in its own, if the terms are commercially reasonable. Another is the rule prohibiting discriminatory booking fees. The department has tentatively

concluded that these two rules may unduly limit the ability of airlines to bargain for better terms with the systems, and that ending them could allow market forces to provide better terms for carrier than they now have.

DOT is not proposing to regulate the sale of airline tickets over the Internet, similar to its past decision that the CRS rules should not cover "brick-and-mortar" travel agencies. The department will continue to address on a case-by-case basis any competition concerns raised by Internet travel services, such as in its ongoing informal investigation of Orbitz, the on-line agency created by the five largest airlines.

POSITIONS. Travelocity would like to maintain the 1992 regulations and opposes the rulemaking. Galileo would like to do away with the regulations and have complete deregulation of the ticket sales industry.

Travelocity has requested that you send a letter the Antitrust division and FTC urging them to weigh with the Dept. of Transportation.

Possible Questions.

1. The Department of Transportation has a rulemaking in process with antitrust implications. Is DOJ participating in the Computer Reservation System rulemaking? Will you be submitting comments?
2. I understand the Division has been looking at a number of supplier-owned joint ventures, including Orbitz (on-going since May 2000). Can you comment on where these investigations stand and what steps the Division might next take?

MEDICAL MALPRACTICE LIABILITY INSURANCE AND THE MCCARRAN-FERGUSON ACT

Some in Congress are considering the antitrust exemption for the business of insurance provided under the McCarran-Ferguson Act of 1945. Historically, insurers have relied on the Act's limited exemption from federal antitrust law to engage in cooperative activities that allow them to identify and measure risk, including joint collection, sharing, and analysis of loss cost data, and development of standardized policy forms.

S.352, THE LEAHY/KENNEDY/EDWARDS BILL (Introduced 2/11/03). The proposed bill provides: "nothing in [McCarran-Ferguson Act] shall be construed to permit commercial insurers to engage in any form of price fixing, bid rigging, or market allocations in connection with the conduct of the business of providing medical malpractice insurance."

The McCarran-Ferguson Act provides a limited exemption to the insurance industry from the federal antitrust laws. The Act provides that the Sherman Act, the Clayton Act and the federal Trade Commission Act apply to the business of insurance "to the extent that such business is not regulated by state law." That limited exemption from federal antitrust law does not extend to "any agreement to boycott, coerce or intimidate, or act of boycott, coercion or intimidation." State insurance commissions retain the right to review insurance rates and exercise regulatory authority over such rates.

The practical impact of the antitrust exemption has been eroded in recent years as courts have narrowed the definition of the business of insurance and broadened the definition of boycott and as an increasing number of states have subjected the industry to state antitrust law.

- Opponents of Repeal. The insurance industry strongly opposes this legislation. They assert that the legislation -- which is limited in application to only medical malpractice insurers -- is predicated on an unproven assumption that the high rates for medical malpractice insurance are the result of collusion among insurance companies. To the contrary, they say that the most significant cause of higher malpractice rates is rising costs of the underlying tort system.
- Proponents of Repeal. Proponents of repeal contend that the McCarran-Ferguson Act has permitted insurers to collusively set prices above competitive levels. Although insurance commissioners in every state retain the right to review rates, those rights are not actively exercised – the allegation is that state regulation has lacked real teeth and has been no substitute for antitrust enforcement. Further, they assert that there is nothing unique about the insurance industry to warrant the current exemption.

PENNSYLVANIA

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April 21, 2003

The Honorable Mike DeWine
Chairman
Subcommittee on Antitrust
Competition Policy and Consumer Rights
United States Senate
Washington, DC 20510

Dear ~~Mr. Chairman~~ Mike:

I am writing to request that the Antitrust Subcommittee hold a hearing on a matter that has been brought to my attention by a constituent company of mine, Travelocity, which raises serious questions about possible antitrust violations by competitor, Orbitz. Orbitz is jointly owned by five of the nation's major airlines – United Airlines, American Airlines , Delta Air Lines, Continental Airlines and Northwest Airlines.

The five airlines together account for four out of five tickets sold in the United States. Almost all major U.S. airlines, which account for more than 90 percent of domestic bookings, are represented to participate in Orbitz on similar terms with the five identified airlines.

At the heart of Travelocity's concerns is the so-called "most favored nation" agreement between Orbitz and the air carriers, which guarantees Orbitz access to the airlines' lowest fares to the exclusion of Travelocity. No other on-line travel site has such an agreement with the airline industry. I am concerned that this arrangement is designed to withhold competitively critical price information from other sellers of air transportation, thereby giving Orbitz an unfair advantage. Moreover, it is my understanding that the agreement includes an incentive structure that penalizes carriers who sell a substantial proportion of tickets outside of Orbitz.

Beyond the adverse competitive impact on Travelocity, these practices obviously result in higher airfares for consumers. This is especially problemsome at a time when the U.S. government is subsidizing the U.S. airline industry. By Orbitz's practice in driving airline prices up, fewer people travel, thereby increasing the losses to airlines resulting in the need for more federal assistance.

I am further advised that serious questions about Orbitz's business practices, in conjunction with United, American, Delta, Continental and Northwest, have resulted in the expression of serious concerns by some State Attorneys General, consumer groups and the Washington Legal Foundation.

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continued...page 2

In light of the on-going serious problems in the airline industry, I believe it is important to have a hearing and focus on these issues as promptly as possible.

My Best.

Sincerely,

Arlen

Arlen Specter

AS/ss

Mike —

My staff and I are glad to help in the preparation of the hearing and to assist in any way possible.

PENNSYLVANIA

JUDICIARY
APPROPRIATIONS
VETERANS' AFFAIRS
GOVERNMENTAL AFFAIRS

United States Senate
WASHINGTON, DC 20510-3802

R. Hewitte Pate, Esquire
Acting Assistant Attorney General
Antitrust Division
Department of Justice
Washington, DC

May 13, 2003

Dear Mr. Pate:

I write to you on behalf of a constituent on a potential antitrust violation which I would like you to evaluate. If you have enough time to consider this issue in advance of your confirmation hearing, I would like to raise it with you at that time.

My constituent, Travelocity, Inc., has brought to my attention activities of a competitor, Orbitz, which is jointly owned by five of the nation's major airlines – United Airlines, American Airlines , Delta Air Lines, Continental Airlines and Northwest Airlines.

The five airlines together account for four out of five tickets sold in the United States. Almost all major U.S. airlines, which account for more than 90 percent of domestic bookings, are represented to participate in Orbitz on similar terms with the five identified airlines.

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I am further advised that serious questions about Orbitz's business practices, in conjunction with United, American, Delta, Continental and Northwest, have resulted in the expression of serious concerns by some State Attorneys General, consumer groups and the Washington Legal Foundation.

Sincerely,

Arlen Specter

Via Facsimile

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STATEMENT TO THE JUDICIARY COMMITTEE ON THE
NOMINATION OF R. HEWITT PATE TO SERVE AS ASSISTANT
ATTORNEY GENERAL OF THE ANTITRUST DIVISION
May 21, 2003

Chairman Hatch, Senator Leahy, and my other distinguished colleagues on the Senate's Judiciary Committee, I thank you for holding this confirmation hearing.

Today, I am pleased to introduce a Virginian, Hew Pate, who has been nominated to serve as Assistant Attorney General for the Antitrust Division at the Justice Department. He is joined today by his family, including his wife Lindsay and his twin daughters, Elizabeth and Ellen.

I can personally attest to Mr. Pate's qualifications - as he has served as my own lawyer from time to time on matters of importance. So, I personally know Mr. Pate well and give him my highest commendation.

Mr. Pate's background makes him highly qualified to serve as Assistant Attorney General for the Antitrust Division at the Department of Justice. Subsequent to earning his law degree in 1987 from the University of Virginia, he served as a law clerk for Judge Harvie Wilkinson on the U.S. Court of Appeals for the Fourth Circuit. Mr. Pate then served as a law clerk to two Supreme Court Justices - Justice Lewis Powell and Justice Anthony Kennedy. Following his clerkships, Mr. Pate practiced law for several years as a partner on the antitrust team at the law firm Hunton & Williams in Richmond, Virginia.

In June of 2001, Hew returned to public service as a Deputy Assistant Attorney General in the Antitrust Division where he oversaw airline, transportation, energy, and regulatory issues. And, over the last year, Mr. Pate has proven his ability while serving as the Acting Assistant Attorney General for Antitrust.

Mr. Chairman, Hew is obviously a very accomplished American who has dedicated a large portion of his career to public service. He is well qualified, and I am certain he will prove to be a strong asset for the Justice Department.

I am pleased to introduce him to the Committee, and I look forward to the Committee reporting his nomination favorably.

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