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OVERSIGHT OF THE ENFORCEMENT OF THE ANTITRUST LAWS

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST,
COMPETITION POLICY AND CONSUMER RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

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WEDNESDAY, MARCH 7, 2007

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY
AND CONSUMER RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Subcommittee met, pursuant to notice, at 2:25 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Herb Kohl, Chairman of the Subcommittee, presiding.

Present: Senators Kohl, Feingold, Hatch, and Grassley.

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

Chairman KOHL. Good afternoon, ladies and gentlemen. We are glad to have you here today.

Today's hearing marks the first time in more than 4 years that we have held an oversight hearing to examine the enforcement of our Nation's antitrust laws. Today we will hear from Assistant Attorney General Barnett and FTC Chairman Majoras—both able and talented public servants. We commend Chairman Majoras for her leadership and her efforts to bring more competition to the prescription drug market.

However, we are concerned with the direction that the Antitrust Division has taken under this administration. With the exception of criminal enforcement, there is an alarming decline in the Division's antitrust enforcement efforts across the board, particularly with respect to mergers. Compared to the last 4 years of the Clinton administration, the number of merger investigations initiated by the Justice Department in the most recent 4 years has declined by nearly 60 percent, and the numbers of mergers actual challenged has declined by 75 percent.

These are not just statistics. These are real cases affecting consumers in many sectors of our economy. Whether it is the Whirlpool-Maytag deal, AT&T's acquisition of BellSouth, or anticompetitive conduct in agriculture, this Division has simply not done enough, in our opinion, to protect consumers. As a result of this hands-off approach, the Division is encouraging even more consolidation, including companies who have lost their attempts to merger to try again in this environment. To quote the New York Times, merger policy "often appears to be little more than 'anything goes.' "

Now, while all of these issues are worthy of significant attention, the most important antitrust issue for me and my constituents in

Wisconsin this year is AirTran's bid to acquire Midwest Airlines in a hostile takeover. Midwest Airlines, which is based in Milwaukee, Wisconsin, is a true extraordinary success story. Midwest Airlines is a unique company in the airline industry, home-owned and operated, an airline that offers the highest quality of service and is actually beloved by its customers. Midwest Airlines has been recognized as the best domestic airline more than 45 times in the past 17 years by a variety of industry surveys. Beyond this, Midwest Airlines is vital to the economy of Wisconsin and to the Greater Milwaukee area. It offers direct service to 33 key business center severy day from its hub in Milwaukee. Should AirTran acquire Midwest Airlines and decide in the future to reduce service from Milwaukee, the negative consequences for the Wisconsin economy would be enormous.

Unfortunately, the business model of AirTran is very difficult for Midwest Airlines. It is a no-frills, discount airline with low ratings for quality and customer service in industry ratings. No one doubts that the quality of Midwest's stellar service offered to consumers will suffer should AirTran complete this acquisition. Even more worrisome is AirTran's history of promising high levels of service when they enter a market and then abruptly breaking these promises and sharply reducing customer service. Dallas-Fort Worth, Washington Dulles, and Pittsburgh arejust three examples of cities in which AirTran has sharply reduced service in recent years, contrary to optimistic promises made just a few years earlier. In sum, an acquisition of Midwest Airlines by AirTran would very likely cause a substantial injury to consumers, and also to business—specifically the many thousands of travelers and businesses throughout Wisconsin and around the Nation who rely on Midwest Airlines for reliable, high-quality, and competitively priced air travel.

I was, therefore, very disappointed and surprised to learn that the Justice Department recently closed its investigation of the proposed AirTran-Midwest deal after only a cursory review lasting fewer than 30 days. Despite the obvious dangers, as I detailed, of this acquisition in terms of frequency of service and quality of service for the many thousands of Midwest Airlines customers, your Division off the Justice Department did not initiated the full "Second request" investigation that most in the industry did expect. I cannot, frankly, understand how the Justice Department could conclude after such a brief review that this deal with pose no risks to competition and consumers, considering the comments that I have made here today. So, Mr. Barnett, I will ask you about this very important deal and for a commitment to reopen this investigation to examine its impact to consumers and businesses in Wisconsin.

We will discuss this essential issues and, if time permits, others, which include consolidation in the oil and gas industry; reverse payments in the pharmaceutical industry; mergers and investigations in the agriculture sector; the interpretation of the Tunney Act, among many others. We will be monitoring your agencies carefully, Mr. Barnett and Chairman Majoras, with respect to these and other issues as you carry out your vital responsibilities on behalf of American consumers.

Senator Grassley, would you like to make a comment or two?

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Please, yes. First of all, with your comments about the airline issue and also the agriculture issue, I would associate myself with your remarks and probably extend a little bit on agriculture at this point.

First of all, we need to ensure that the Justice Department and the Federal Trade Commission are being aggressive in the enforcement of antitrust laws. It critical that companies compete in a fair manner so that consumers can enjoy more choice as well as lower prices for goods and services. Vigorous of antitrust laws will help create and maintain an open, fair, and competitive marketplace. And, of course, if that is good for the American consumer—and it is—it is also good for the American economy. We also need to ensure that the department of Justice and the Federal Trade Commission have the necessary resources and expertise to do a good job.

I probably will not be able to be here, so I am submitting some questions in writing for you to respond in writing. I would appreciate it if you would do that. There are a couple points, though, that I want to make, and they follow on one of the things that the Chairman said.

First, I am concerned about the state of American agriculture. There is just too much concentration in the industry. I am concerned about reduced market opportunities, possible anticompetitive and predatory business practices, vertical integration, and fewer competitors. For example, late last year I wrote a letter to the Antitrust Division expressing my serious reservations about the proposed Smithfield Foods and Premium Standard Farms merger. Because of my concern about agriculture business consolidation, I am particularly interested in how the Antitrust Division and the FTC review agriculture culture mergers. The antitrust laws are supposed to protect consumers, but they are also supposed to keep the market fair and open for all market competitors.

In 2003, the Judiciary Committee held a hearing on monopsony in agriculture culture and looked at the buying powers of processors in our Nation's agriculture cultural markets. Former Assistant Attorney General Pate agreed that agriculture cultural markets can be very different from other markets, although Mr. Pate indicated that the Justice Department does look at vertical concerns in specific mergers. I am not convinced that the Antitrust Division is considering all the anticompetitive effects of monopsonies and bargaining power. I am not sure that they are looking at all the right things when they review agriculture culture mergers. We should seriously consider whether the Antitrust Division should issue guide lines specific to agriculture culture, as it has done with specific guide lines, for instance, in the health care industry, or whether it should issue general monopsony guide lines. I hope that the Chairman of the Committee as well as the Chairman of the Antitrust Subcommittee will work with me to craft legislation to deal with the unique antitrust concerns facing agriculture culture today.

In addition, I would want to compliment Commissioner Majoras on the FTC's efforts in ensuring that drug companies, both name brand and generic, play by the rules and do not stiff the American consumer. I would particularly like to compliment the Commission's proactive efforts in pursuing reverse payments. I am working with the FTC, Senator Kohl, Senator Leahy, and others to refine the legislation that recently was approved by the Judiciary Committee to put a stop to these anticompetitive deals.

On another matter, I urge the FTC to quickly complete a study on the practice of authorized generics that I requested with Chairman Leahy and Senator Rockefeller so that we can move forward on these issues.

I appreciate this opportunity, Mr. Chairman, to make a statement at this point.

Chairman KOHL. Thank you, Senator Grassley.

We also have a statement for the record from Senator Harkin, and now to the Ranking Member on this Committee, Senator Hatch.

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

Senator HATCH. Well, thank you, Mr. Chairman. I appreciate your leadership on this, and we welcome you two leaders to the Senate, and we appreciate the work that you do down there. It is very important stuff.

It is a pleasure to be with you today for the first of what I hope will be several hearings which thoroughly explore and examine the vital subject of antitrust law. Today's topic is the Federal Government's enforcement of those laws.

You might ask, Why is this important? Why is so distinguished a panel with us here today? In one word: competition. Competition is the corner stone of our economy. It ensures efficient markets which, in turn, provide consumers quality goods at market prices, and antitrust laws are the rules that ensure that the American economy maintains that competition or that competitive effect.

In effect, antitrust law ensures one of the fundamental tenets of the American dream: If you build a better mousetrap, you will be successful in the American marketplace. That is why effective, efficient, and fair enforcement is so important.

Today's hearing is intended to assist us in our on going oversight of the enforcement efforts of the two Government entities that are charged with enforcing these crucial laws. As with any endeavor, I am sure that there is some room for improvement with respect to current enforcement efforts, but I have personally been generally pleased with the enforcement efforts of both the Antitrust Division and the Federal Trade Commission.

Now, this can be seen in the vital area of merger review. Assistant Attorney General Barnett has just instituted a revision to the Merger Review Process Initiative that holds the promise of moving the Division's resources more efficiently to those cases that truly require further review and consideration.

However, we have already seen some progress. In 2006, the Antitrust Division brought more merger challenges than the previous 2 years combined. It should also be noted that during the same period, the Division increased the number of criminal fines that it obtained by 40 percent to $470 million. That is the second highest level in the Division's history.

Change can also be seen in how the Antitrust Division analyzes mergers. No greater change can be seen than in the Whirlpool-Maytag merger. Under a traditional analysis, the Division would have placed great reliance on the market share that the resulting corporation would have enjoyed. However, these are different times when globalization and the speed of commerce are rapidly changing markets.

Therefore, the Division worked with the parties to the merger and developed a detailed market analysis. What didthat show? That the merger would not have an ill effect on competition since overseas competitors were quickly expanding their market share. It also showed that appliance retailers could and do quickly change the appliance brands that they choose to carry in their stores—only further under lining the premise that a traditional market analys is might not be as effective in this situation. Equally as impressive in the Whirlpool-Maytag merger was the fact that the Division's decision was made in 6 months. The Federal Trade Commission is also making strong strides.

Just as the Division has sought to create a newopenness about how it reaches its conclusions on merger reviews, the Federal Trade Commission has also issued detailed decisions in such cases as frustrated—"frustrated," I think that is a Freudian slip—as Federated Department Stores' acquisition of May Department Stores. The FTC has also sought greater transparency with there forms to the merger review process. These reforms, which generally formalize practices that the FTC currently uses, aim to reduce the transaction costs that are accrued during an investigation.

However, most impressive is that even though pre-merger filings have increased by 28 percent since fiscal year 2004, the numbers of requests for additional information kept pace and increased by approximately 40 percent during the same period.

I am also very interested in the role that the FTC is playing in maintaining competition and protecting consumers in energy markets. The Commission has performed admirable work in this by consistently monitoring the retail gasoline and diesel prices in 360 cities.

Now, in closing, I would like to thank both of today's witnesses for being here today and for their responsiveness to our requests for information prior to the hearing. And while I am sure that we will all disagree from time to time on particular issues, I have been generally impressed by the strong commitment and leadership both of you have demonstrated as you have served in these very, very important positions. And I look forward to working with you through out the coming years, and I hope that this Committee will become a great help to antitrust enforcement in this country and the knowledge of antitrust and what we need to do in this country as well. And I am sure under Chairman Kohl's leadership we will be able to do that.

Thank you, Mr. Chairman.

Chairman KOHL. Thank you very much, Senator Hatch.

At this time we will introduce our two witnesses. Assistant Attorney General Thomas Barnett was confirmed by the Senate on February 10, 2006. He has served within the Antitrust Division and other leadership positions since April 18, 2004. Prior to joining the Justice Department, Mr. Barnett was a partner in the law firm of Covington & Burling. Mr. Barnett graduated from Harvard Law School, received an economics degree from the London School of Economics, and received his B.A. from Yale.

Our second witness will be Chairman Deborah Platt Majoras, who was sworn in to lead the Federal Trade Commission on August 16, 2004. Prior to this position, she was a partner at the law firm Jones Day in Washington, D.C. Before that, she served in leadership positions in the Antitrust Division of the Justice Department for 3 years. Ms. Majoras graduated from Westminster College and received her J.D. from the University of Virginia.

We welcome you both, and would you please stand and raise your right hand? Do you affirm that the testimony that you will give here today will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. BARNETT. I do.

Ms. MAJORAS. I do.

Chairman KOHL. We thank you.

Mr. Barnett, would you please proceed with your testimony?

STATEMENT OF THOMAS O. BARNETT, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. BARNETT. Thank you, Mr. Chairman. It is an honorand a privilege to testify before this Committee, with which there is a long and productive working relationship. I have submitted written testimony, and I will confine my oral remarks to a few points.

The United States economy is truly one of the great wonders of the world, and it is our free enterprise system and the antitrust laws that we have that drive the creativity, the innovation, and the growth that is the hallmark of that economy. I am proud of the efforts and the successes of the Antitrust Division in enforcing the antitrust laws and providing support for that key under pinning of our free enterprise system. I will touch briefly on a few areas.

First, our cartel enforcement, our criminal enforcement against price fixing, customer allocation, and other naked agreements not to compete is clearly the world's leader ship program, or leads the world. As Senator Hatch acknowledged, last year we obtained over $400 million in fines. We continue to—this year we have already almost tied the record number of days for prison sentences imposed, and that is less than halfway through the year. We are well on track to continue the excellent record that the Antitrust Division has in the criminal enforcement area, and continue our leadership position in the United States and around the world.

Merger enforcement is an area where we also remain very active. It is a fact-intensive investigation where we seek to apply the law, and the general principles set forth in the Merger Guidelines, to the facts developed in our investigation to make a decision or determination as to whether a merger threatens to harm the competitive process and consumer welfare.

Last year the Division had 16 mergers in which we either filed a complaint or in which the parties modified the transaction in response to our investigations. That is the highest number of enforcement actions during the last 5 years, and certainly since 2001, at the end of the so-called merger wave. And these actions were in important basic industries, including steel, nickel, the newspaper industry, and school milk.

At the same time, we have made progress in terms of improving the efficiency of our merger review process, reducing the average length of investigations, and reforming the second request process to reduce the burdens on the parties, as well as on the Division.

Our non-merger civil enforcement program encompasses a broad range of activities. One stellar example includes the real estate industry where we have engaged not only in enforcement activity but also advocacy efforts to try to remove impediments to competition. This is a critically important industry in that it affects almost every American. It is the largest asset most Americans own, the largest single transaction most Americans engage in. That is one of the reasons why we focus particular attention in this area, and we believe that we have had some significant successes.

No discussion of Division activities would be complete without addressing our extensive activities on the international front. It is truly a global economy and a global competition enforcement network. We engaged in more than 100 jurisdictions that now have antitrust regimes on multiple levels. We are active in leadership positions in the International Competition Network which the FTC and the DOJ helped to found in 2001. We are active in the leadership of the Competition Committee of the OECD. We engage in bilateral discussions with many of our partners, including the European Commission, Canada, Mexico, Japan, Korea, Australia, and others. It is a truly important area of our work, and we devote substantial resources to it. China is another country that we have been paying particular attention to, given its importance.

None of the activities and none of the accomplishments of the Division would be possible—and I would be remiss if I did not underscore this—without the talent, the dedication, and the experience of the many people who serve within the Antitrust Division. It is certainly a pleasure and an honor for me to be a colleague with them and to serve the United States economy in this manner.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Barnett appears as a submission for the reord.]

Chairman KOHL. Thank you, Mr. Barnett.

Ms. Majoras?

STATEMENT OF DEBORAH PLATT MAJORAS, CHAIRMAN, FEDERAL TRADE COMMISSION, WASHINGTON, D.C.

Ms. MAJORAS. Thank you, Chairman Kohl, Ranking Member Hatch, other members of the Subcommittee. I am very pleased to appear before you today to discuss the FTC's significant efforts to ensure that competition, which we have all acknowledged today is so critical, remains robust. We endeavor to focus our enforcement efforts on sectors of the economy that have extraordinarily significant impacts on consumers, such as health care, energy, real estate, and technology.

Merger enforcement, with its increasingly global component, continues to consume a significant amount of our resources. Using the streamlined merger review procedures that I introduced last year, in fiscal year 2006, we identified 16 transactions that raised concerns for competition, obtained relief in 9 cases, and the other 7 were abandoned or restructured. So far in this fiscal year, the Commission has issued 12 second requests, and already 10 cases have resulted in enforcement action or withdrawal.

In the health care sector during the past year, the agency achieved substantial relief in seven mergers by obtaining consent decrees in the area of generic drugs, over-the-counter medications, injectable analgesics, and other medical devices and diagnostic services. Outside of mergers in health care, the Commission continues to be aggressive in challenging price-fixing agreements among competing physicians, and in the detection and investigation of agreements between drug companies that delay generic entry.

Our Federal court challenge to an alleged anticompetitive agreement involving Ovcon has led to the introduction of lower-priced generic products. Under threat of preliminary injunction, Warner Chilcott waived the exclusionary provision that was preventing Barr from entering with its generic, which Barr almost immediately then began selling.

Beyond enforcement, we continue to stand up against exclusion payment settlements by working with Congress on bipartisan efforts to advance a workable legislative remedy, and we thank the members of this Subcommittee for your leadership in this critical area.

We continue to devote significant resources to the energy sector. During the past year, Chevron and USA Petroleum abandoned their proposed transaction after the FTC raised questions. The FTC challenged EPCO's proposed $1.1 billion acquisition of TEPPCO's natural gas liquids storage business, and we challenged a proposed $22 billion deal involving energy transportation storage and distribution firm Kinder Morgan.

The Commission continues to monitor, as Senator Hatch noted, retail gasoline and diesel prices in 360 cities and wholesale prices in 20 urban areas in an effort to detect early any evidence of illegal conduct.

Recognizing that purchasing a home is the most significant investment that most Americans will ever make, the FTC has actively investigated restrictive practices in the residential real estate industry. In the past year, the agency has brought eight enforcement actions against associations of realtors or brokers who adopted rules that with held the valuable benefits of the Multiple Listing Services that they control from consumers who chose to enter into non-traditional listing contracts with brokers.

In the all-important technology area, last month the Commission issued a final opinion and order in the non-merger proceeding against technology developer Rambus. The Commission determined that Rambus unlawfully monopolized the markets for four computer memory technologies that had been incorporated into industry standards for DRAM chips. In addition to barring Rambus from making similar misrepresentations or omissions to organizations again in the future, the order requires Rambus to license there levant technology and set maximum allowable royalty rates.

Our efforts to stand up for consumers and competition do not end with law enforcement. In the past year alone, the FTC has formally provided competition advice to policy makers on issues related to attorney matching services, contact lens sales, real estate services, pharmacy benefit managers, wine distribution, patent rules of practice, and online option trading assistance, to name a few. Our amicus program remains active, and we have aided the Antitrust Modernization Commission in its examination of our Nation's competition laws.

To ensure that our knowledge remains fresh, we are actively engaged in market research, with recent hearings, for example, exploring the boundaries of impermissible conduct under Section 2 of the Sherman Act and a recent workshop to examine broad band connectivity competition policy.

In April, the FTC will host a 3 day conference entitled "Energy Markets in the 21st Century: Competition Policy and Perspective," bringing together leading experts from around the energy area.

And, finally, because educated consumers are empowered consumers in the market, we recently launched a multidimensional outreach campaign targeting new and bigger audiences with a message that even as markets rapidly change, one thing remains the same, and that is that competition counts to consumers. And so we are building a library of materials, both in print and online, in our efforts to better reach consumers and educate them on the vital importance of vigorous competition in this economy.

Mr. Chairman, members of the Committee, you have my commitment that I and the fine men and women of the Federal Trade Commission will continue to work tirelessly to preserve competition and protect consumers. And I will be happy to take your questions. Thank you.

[The prepared statement of Ms. Majoras appears as a submission for the record.]

Chairman KOHL. Thank you very much, Ms. Majoras.

Now, Mr. Barnett, many questions have been raised about the Antitrust Division's reluctance to challenge important mergers and acquisitions that may harm consumers. One proposed acquisition that very much worries me, as you know, is AirTran's plans to acquire Midwest Airlines, an airline based in my own home State of Wisconsin. Midwest Airlines is a true huge success story. It is beloved by the millions of travelers, both travelers who personally get on the airplane as well as businesses, who use it every year for its high quality of service. Midwest Airlines has been recognized as the best domestic airline more than 45 times in the last 17 years by a variety of industry-rating surveys. The 2005 Zagat Air Travel Survey rated Midwest Airlines as the top-rated domestic airline. And, most recently, Midwest Airlines placed first among single-class service in the 2006 Conde Nast Traveler Business Travel Awards Poll.

Now, by contrast, AirTran ranked last among the ten airlines rated. As a no-frills, discount airline, AirTran has a very different business model from Midwest Airlines, and acquisition of Midwest by AirTran would very likely result in a substantial decline in the quality of service currently realized by the many thousands of travelers throughout Wisconsin and around the Nation who use Midwest.

Additionally, businesses in my home State have enormous worries regarding the consequences of such a merger. Should AirTran decide in the future to reduce service to the 36 major business centers served every day from Midwest's Milwaukee hub, substantial economic damage would be the result of that kind of a decision. The frequent and efficient service offered by Midwest to dozens of key business markets from Milwaukee is essential to the Greater Milwaukee and the overall Wisconsin economy.

The history of AirTran causes me special worry in this regard. AirTran has a history of entering new markets, promising to enhance services, and then, in fact, reducing service, despite its promises. For example, since 2004, AirTran has exited 29 markets it had promised to serve, sometimes returning in a scaled-down version and sometimes not returning at all. Notably, at Dallas-Fort Worth, AirTran promised a mini-hub with 30 flights a day to 7 destinations by the end of 2004. The reality was far different. AirTran never attained more than 17 flights a day at Dallas-Fort Worth and presently has only 8 flights a day to 2 destinations. Similarly, AirTran has reduced service at Washington Dulles from 16 to 7 daily departures and at Pittsburgh from 13 to 6 daily departures.

I have special personal experience of what can happen when an out-of-town company without ties to the local community acquires a respected local business serving local consumers. Years ago, my family sold our chain of grocery stores to an out-of-town buyer. We were the dominant Wisconsin grocery store chain. We were successful mainly because of our superior service to customers and our dedication to serving the needs of the local community, which we as the founding family understood in a way that outsiders could not understand.

The new owners of the Kohl's Food Stores lacked this commitment to the local consumer, and they eventually closed the local supermarkets entirely that our family had spent a lifetime building, much to the disappointment of thousands of Wisconsin consumers. This experience has taught me first hand how crucial local ownership can be in operating a particular business and what dangers can ensue and, in fact, happen when people from somewhere else take over a business, the success of which was not entirely but heavily dependent on the quality and the knowledge of local ownership.

So, therefore, I was very surprised and disappointed to learn that the Justice Department had recently closed this investigation of AirTran's planned acquisition after just a brief review of fewer than 30 days. Despite the obvious competitive implications of this acquisition and its potential danger for reduced service for the many thousands of Midwest Airlines customers, your Department did not initiate the full second request investigation that most in the industry expected.

Question: I understand that AirTran does not presently have many overlapping routes with Midwest Airlines, but I do not think that that should be the end of your inquiry. Isn't one important consideration in an antitrust review whether the merger is likely to harm the quality of service offered to consumers? Do we not have reason to worry that if acquired by AirTran, the very high quality of service Midwest currently offers to its customers will possibly be severely degraded? And isn't this a basis for investigating this merger more fully, Mr. Barnett?

Mr. BARNETT. Thank you, Mr. Chairman. Certainly, the air transportation industry is a critical and highly important part of our economy, and we take threats to competition in that industry very seriously. When we examine mergers, we look at the breadth of competition, which would include price competition as well as competition on quality. And in that respect, yes, that is certainly a consideration that weshould take into account.

I am more than happy to take the comments that you have provided today as well as any other information that you, your staff, or any of your constituents may have to bear on this transaction back with me to examine it and to consider whether there is any appropriate antitrust concern there that we should pursue. And if we identify such a concern, we are certainly not precluded from pursuing it and will do so.

Chairman KOHL. Well, I am really pleased to hear that. What you are indicating is that, you know, you are flexible and open-minded on this, that you want ultimately to do the right thing. And if we can bring additional facts to bear, you are indicating that your Department is willing to take another look and, who knows, perhaps arrive at a somewhat different conclusion based on evidence. Is that what you—

Mr. BARNETT. Yes, Mr. Chairman.

Chairman KOHL. Well, I thank you so much. That makes me feel really good.

Mr. Barnett, many consumer advocates and independent antitrust experts are concerned with what they believe is a significant cutback in antitrust enforcement in recent years. Particularly since you became the Assistant Attorney General, they cite several problems with antitrust enforcement on your watch.

First, as I mentioned in my opening statement, there are the Antitrust Division's own stats which show a sharp decline in enforcement activity in recent years.

Second is the fact that you refused to take any action to block or modify several large controversial mergers among direct competitors. Prominent among these was your approval of the Whirlpool-Maytag merger, reportedly over the objections—reportedly—of your career staff.

Another example was your approval of the AT&T-BellSouth merger last fall without placing a single merger condition on the deal or requiring any divestitures of any sort. Several weeks later, the FCC insisted on and obtained a series of pro-competition conditions on the merger.

And, third, many analysts believe that now is the best time in decades to get previously unthinkable mergers through your Department review process. The announcement 2 weeks ago of the merger of the only two satellite radio companies, XM and Sirius, and Monsanto's attempts to acquire the seed business of Delta and Pine Land, the very same deal rejected by the Justice Department 8 years ago under the last administration, are just two examples.

To those of us who care about antitrust enforcement, Mr. Barnett, this adds up to a picture that causes us concern. So my question to you is this: Are your critics correct or are they incorrect that your Department has adopted too much of a hands-off approach to merger enforcement and that some of them say that now is the best time to get deals done? But, however, whatever your critics may suggest or say, we are interested in your opinions and your thoughts on this matter.

Mr. BARNETT. Thank you, Mr. Chairman.

The short answer is that the critics are not correct. The Antitrust Division has consistently applied the merger guidelines set forth basically in the 1992 guidelines and subsequently amended consistently.

What is important to remember is what those guidelines make quite clear is that merger review is a very fact-intensive analysis. We do much more than look at just the market shares of the companies. We look at the complete competitive process to try and get an understanding of what effect the merger is likely to have in the particular situation.

In the instances of Whirlpool-Maytag, for example, we issued a closing statement, and I have previously publicly said the initial market shares gave all of us concern, gave us pause, indeed created a presumption of concern. But once we had conducted a very extensive 6 month investigation, we ultimately concluded that the competitive dynamics of the market place indicated there were other competitors that could, had, and would be in a position to expand rapidly in the face of an anticompetitive price increase. Based on traditional principles, we did not take action in that case. Similarly, in the other transactions.

I would note just very briefly, if I may, that there are many other transactions, 16, in which we did take action that those critics seem to be ignoring.

Chairman KOHL. I thank you. My time in this round is up. I will have questions for Ms. Majoras in the nextround, but let me turn to Senator Hatch.

Senator HATCH. Well, thank you, Mr. Chairman.

One treatise in antitrust law points out that in 1977 the Division boasted a staff of 421 attorneys. However, that number had fallen to 229 in 1989. And a further example is cited that during the 1980s the largest percentage of criminal indictments for bid-rigging contracts for roads, airports, or other construction projects for local government—and that is what they were for, and it was a particularly active time, that particular time. By comparison, in the 1990s criminal enforcement focused on international price-fixing conspiracies involving large firms and major industries. So it is easy to see why statistics do not always mean anything, but if you read—the initial reading of the information, you know, that has been provided by the Department of Justice shows that there maybe some standing to the argument because, for example, the number of investigations of mergers has fallen from 139 in 2000 to 77 in 2006. The number of requests for additional information has likewise fallen from 55 in 2000 to 17 in 2006. But then, again, I would point out that improvements are occurring, too, and you cannot just rely on statistics to determine whether the Division is doing a great job of not.

In 2006 alone, the Antitrust Division brought more merger challenges than the previous 2 years combined. And it should also be noted that during the same period the Division increased the number of criminal fines that it obtained by 40 percent, like I say, to 470 million bucks, the highest ever—or I guess it is the second highest level in the Division's history. On the issues the Subcommittee will focus on, one of them involves consolidation of the agriculture cultural sector and recent mergers in that area. In that regard, the pending Monsanto, Delta, and Pine Land transaction has, as you know, generated some controversy. And as you know, this is Monsanto's second attempt to acquire Delta and Pine Land. Monsanto abandoned its previous proposed merger in 1989, if I recall it correctly—1999, I guess it was, due in part to the Division's opposition.

Now, in my view, this merger raises a number of interesting questions that are rarely discussed in this type of forum. While I do not intend to ask you, you know, about the details of the merger review of this particular transaction, I think it would be appropriate for you to discuss in general terms your approach to analyzing the competitive aspects or effects, I think would be a better word, of this type of merger.

Specifically, I am interested in how the Division views a company's patent portfolio with respect to assessing its market power. In general terms, I find myself in agreement with the Government's position in the Independent Ink case, which involved a question of whether a company's patent interest should result in a presumption of market power for purposes of antitrust tying analysis. But I really would be interested in hearing more about how the Division analyzes the effects of the patent interests and the absence of such a presumption, both with respect to potential strategic behavior, such as vertical foreclosure, and with respect to market power analysis in both its merger and non-merger enforcement. I would love to have you chat with us on that.

And then, Chairman Majoras, I know that the FTC has been active in considering the competitive and strategic implications of patent assets as well. So I would be pleased to hear from you, after Mr. Barnett has responded to the first part of this question.

Go ahead.

Mr. BARNETT. If I may, if I can interject at the outset, with respect to the overall level of merger enforcement, it is important to note that the number of filings, merger filings, in the late 1990s was well over 4,000 a year. It dropped to under 2,000 after that, and that is a relevant consideration.

With respect to Monsanto, obviously, the Monsanto matter is a pending matter, and so I will just note that it is a pending investigation that we continue to look at. We have not made a decision on it.

Patent portfolios, as you indicated, the Supreme Court has confirmed our view that the existence of a patent by itself does not create a presumption of market power. That does not mean a patent cannot create market power. To the contrary, we look at the particular facts and circumstances, and if a patent portfolio, if you will, effectively precludes any other person from providing a reasonably substitute product, something that consumers would conside ran adequate substitute, without infringing upon that patent port folio, then the patent owner may well have market power. And that is fundamentally no different than how we assess any other set of assets that a company may hold. With respect to vertical considerations, we do look at vertical issues. Indeed, the Department has brought cases that involve vertical concerns. Several years ago, the Division challenged a merger between Northrop Grumman and TRW based on a vertical concern between different components of a satellite system.

So what we are looking at is whether or not essentially market power in a particular—one or both of the vertical markets at issue will create some sort of anticompetitive horizontal effect at one level or the other. And there are certainly theoretical circumstances where that can occur, and if the evidence substantiates that, we can and will pursue a challenge to the merger under those circumstances.

We are also mindful of the fact that vertical merger scan create significant efficiencies, and that is an additional factor that we have to take into consideration.

Senator HATCH. Well, thank you, Mr. Barnett.

Ms. Majoras?

Ms. MAJORAS. Yes, thank you, Senator Hatch. The Federal Trade Commission, as the Antitrust Division does, views the inter face between competition and intellectual property policy to be absolutely critical in today's economy, and we have come at this from a couple of different ways.

As you are probably aware, a couple of years ago the FTC published a report on patent reform recommendations. What we learned over time in our enforcement cases is that while IP and competition are designed to accomplish the same goals, if one of the systems gets out of whack, so to speak, it can have an adverse impact on consumers. And here our point in that report is that if patents are not properly granted in the first instance and the patent grants some market power, then competition can be distorted. So we have a great interest in the patent system, as many others do today, including many Members of Congress.

The second area, of course, is in our enforcement cases, Rambus being an example that I mentioned in my opening remarks, in which Rambus had patents and also was seeking to acquire more patent protection. At the same time Rambus was working within a standard-setting organization in which the clear expectation of all of the members was that if a member had patents and there was a discussion of technology that would be patented that would be incorporated into the standard, that needed to be disclosed because members would want to know that before incorporating it into the standard. Rambus did not, and the Commission made the decision that by not doing that, Rambus had illegally monopolized certain particular critical technology markets.

And then, of course, in our cases in the Hatch-Waxman context, in which we have looked at settlements between brand and generic companies, obviously there, too, the issues of patents have been critical.

So those are a few of the areas that highlight our work.

Senator HATCH. Do you share Leibowitz's position that we should have a bright-line situation with regard to Hatch-Waxman? Or is that debated at the FTC?

Ms. MAJORAS. Well, we have had great debate within the FTC on that from the beginning. What I asked staff to do from the very beginning was to look at all options, and we have looked at all options.

My view is that having, if you want to call it, a bright line, that is fine, that then excludes categories of settlements that we know would be, more often than not, pro-competitive would probably be the best way to go here, having looked at all of the different possibilities, we think. And I would be pleased to talk to you about that further.

Senator HATCH. Well, we would like your advice onthat. It is not necessarily related to this hearing, but I just wanted to ask you that question as a follow-on.

My time is just about up, so I will yield. I will submit further questions in writing.

Chairman KOHL. Thank you.

Senator Feingold?

Senator FEINGOLD. Thank you very much, Mr. Chairman, and thank you for holding this hearing. During the past 6 years there has been far too little oversight of the two agencies that deal with antitrust issues. In fact, I understand that this is the first hearing where the Assistant Attorney General for the Antitrust Division has testified since September 2002, which, of course, was during that brief period when you, Senator Kohl, were the Chairman of the Subcommittee.

Obviously, the Chairman takes his oversight responsibilities very seriously, and I think the public is well served by the Chairman's approach. The major antitrust laws of this country are just about a century old. They reflect the basic underlying principle that the public receives over whelming benefits from competition and that the Government has an important role to play in ensuring that businesses do not engage in anticompetitive behavior. As the Supreme Court said in the *Topco* case, "Antitrust laws...are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."

These are lofty sentiments, but laws are just empty words and dusty books without enforcement. And I am becoming increasingly concerned that the Justice Department is not acting to enforce the antitrust laws in the best interests of the American people.

I understand that neither the Department nor the FTC has challenged a merger in court since 2004. I suppose that could be because no one is proposing anticompetitive mergers, but I have my doubts. One case that was particularly surprising to many was the Department's failure to challenge the acquisition of Maytag by Whirlpool, giving the combined company a 75 percent share of the market in some home appliances. The New York Times reported that the decision demoralized career antitrust lawyers in the Department.

I find this very troubling, and I sincerely hope the Department is not relinquishing its historic responsibility to protect the American consumer from anticompetitive behavior.

Mr. Barnett, based on my understanding about what happened earlier in the hearing, I do want to indicate that I was pleased to hear that you told the Chairman, Senator Kohl, that you will take another look at the AirTran-Midwest merger. That is a very big issue in our State, and I was very concerned that the Department concluded its inquiry so quickly.

Let me turn to a couple of questions. Again, Mr. Barnett, one of the concerns I have about the apparently lax attitude of the Department of Justice toward merger cases is that it is encouraging mergers and acquisitions that perhaps the parties might not otherwise propose because the antitrust concerns are so obvious. We saw, again, as I mentioned, the Whirlpool acquisition of Maytag. XM Radio is proposing to merge with its only satellite radio competitor, Sirius. And there is even a company pursuing an acquisition that it had abandoned some years ago because the Department at that time opposed it. I am talking here about Monsanto, which is set to acquire cotton seed producer Delta and Pine Land Company, known as DPL. Monsanto already controls a majority of the biotech seed traits used in cotton, corn, and soybeans. While DPL is focused on cotton, many of the traits they are developing for cotton apparently can be applicable to corn and soybeans as well.

My constituents in Wisconsin are very worried that the merger would eliminate DPL as a competitor with Monsanto in the development of biotech seed traits, an area that is already fairly concentrated. Moreover, not all farmers want to grow genetically modified crops, and they are concerned about this merger's effect on competition in the conventional and organic seed markets as well.

So my question to you is do we have reason to worry that the Department's attitude toward mergers has changed so much that this particular merger might actually be cleared this time around? What steps is the Department of Justice prepared to take to protect the farmers in Wisconsin and elsewhere, whether they grow genetically modified crops, conventional crops, or organic crops, from the possible anticompetitive effects of this merger?

Mr. Barnett?

Mr. BARNETT. Senator, the Monsanto matter is a pending investigation, and this is not an appropriate forum for me to go into the specifics of that matter. But I will tell you generally that the Antitrust Division continues to apply the same principles that have been applied for two decades to antitrust enforcement in a bipartisan manner under the Merger Guidelines.

We look to whether or not the merger threatens harm to the competitive process and consumer welfare, and based upon the extensive investigations that we undertake, the interviews, the documents, and the other sources of information, we make an assessment as to whether or not a merger violates Section 7 of the Clayton Act.

If we conclude that it will do so, we aggressively pursue relief. Now, that relief can be narrow if the threatened harm from the merger is relatively narrow. Indeed, in such a situation, we think it is beneficial to be able to carve out and fix that narrow part of the merger and allow the remainder of the merger to proceed forward, which may have efficiencies and bring benefits to consumers. If that is not possible, we will seek to block the merger in its entirety.

Whether we end up in court or not—you cited a statistic about not going to court since 2004. I respectfully disagree. We have filed complaints in each of the fiscal years. Indeed, we filed ten complaints in the last fiscal year. The parties chose not to litigate. They chose to cave, if you will, and accede to the remedy that was being requested.

Indeed, last year we were on the eve of a jury trial in the Southern Bell-DFA merger transaction when the parties decided to enter into a settlement that gave us complete relief.

So the short answer to your question is that we will investigate each matter on the merits, make a call as we see it, and pursue aggressively whatever relief we think is necessary to protect consumers, and if that involves litigating in court, we will so do, are happy to do so. But if we can do it through a more efficient consent decree proceeding, we will happily pursue that as well.

Senator FEINGOLD. I understand your hesitation to talk too specifically, but you sort of generally talked about the way this is analyzed. I guess I just want you to say whether the concerns about the possible anticompetitive effects on farmers in Wisconsin will be taken into account in this Monsanto matter.

Mr. BARNETT. Certainly. We take into account all potential anticompetitive effects when we do a merger investigation. We attempt to be as comprehensive as possible, and we would certainly consider any potential anticompetitive effects on farmers in Wisconsin.

Senator FEINGOLD. What does it tell you about the Department's merger policy that a company is coming back 8 years later with a merger that it could not obtain approval for before?

Mr. BARNETT. Well, it does not tell me necessarily much of anything other than that 8 years have passed, and market conditions can change quite rapidly. We are not evaluating this merger based upon the conditions that existed in 1999. We are looking at the proposed merger based upon the market, the conditions, the competitors, the customers, the intellectual property rights, et cetera, et cetera, that exist in 2007. They may or may not have changed, and that may or may not have an effect on the outcome.

Senator FEINGOLD. But you do not think it is possible that Monsanto thinks it has a better shot of winning now because of the nature of the enforcement?

Mr. BARNETT. I cannot comment on what is going on subjectively in somebody else's mind. What I can tell you is that we are consistently applying the same principles that the Division has applied for at least 15 or 20 years under the Horizontal Merger Guidelines.

Senator FEINGOLD. Let's talk about the *Schering-Plough* case, which, as you know, was brought by the FTC because of allegations that Schering-Plough made payments to two companies in a patent infringement case to delay their entry into the market for a particular potassium supplement drug. These are the so-called exclusion payment settlements that Senator Kohl is attempting to prohibit in his bill, the Preserve Access to Affordable Generics Act.

And, I might add that bill has broad bipartisan support, and I am pleased to be a cosponsor of it.

In the *Schering-Plough* case, the Eleventh Circuit reversed the FTC's action, and as I understand it, the FTC wanted to appeal that ruling to the Supreme Court. It has been reported that the Solicitor General acted on your advice in arguing to the Supreme Court that it should not take the case.

Did you recommend that the Solicitor General oppose Supreme Court review in the case? And if so, can you explain your reasoning?

Mr. BARNETT. Well, Senator, I was, in fact, recused from that matter, so I did not participate in it. So the Solicitor General would not have been responding to a recommendation from me.

Having read the brief, I would just observe that the brief did not actually go to the merits, the underlying antitrust merits, but addressed specifically the cert worthiness of the case, which is a distinct issue. So the short answer is that I did not participate, though.

Senator FEINGOLD. Commissioner, do you want to comment on that case?

Ms. MAJORAS. Thank you, Senator. You know, at the FTC we believe it is an extremely important case. We believe billions of dollars are at stake for consumers, and it was very disappointing to us, obviously, that the Eleventh Circuit did not see it our way. I think it is possible that the Supreme Court may take a similar case within the next year, and we are hopeful that that may happen. But we are not waiting. We are doing two things: we are working with Congress to determine whether we can come up with a workable legislative fix that will benefit consumers; and, second, we are continuing, as we are obligated to do, to look at the agreements between brands and generics to settle patent litigation, to determine whether we believe that any of them are anticompetitive. And we are opening investigations and continuing our work in the area.

Senator FEINGOLD. Thanks to both the witnesses.

Thank you, Mr. Chairman.

Chairman KOHL. Thank you, Senator Feingold.

Just to get a little bit more on the record on that issue, one of my—as well as Senator Feingold, and I am sure Senator Hatch also, one of the priorities we have is finding ways to bring more competition to the prescription drug market. And one of the best ways to do this is by generic drug competition, as you both know. Generic drugs, as you know, have the potential to save consumers many billions of dollars. One of the biggest obstacles to competition from generic drugs is the practice of brand-name drug manufacturers to settle patent cases by paying generic companies millions of dollars to simply stay off the market. And along with several of my colleagues, we sponsored a bill and now have passed it through the Judiciary Committee to make this practice of paying off—of disallowing companies to pay off generic companies and there by harming consumers in the process.

In 2005, the Eleventh Circuit Court of Appeals issued a decision that these payoff settlements do not violate antitrust law, reversing a decision of the Federal Trade Commission. The Justice Department filed a brief opposing Supreme Court review and sided with the Eleventh Circuit against the FTC.

Mr. Barnett, why did the Justice Department take that position?

Mr. BARNETT. Mr. Chairman, as I indicated, I did not personally participate in that matter, so it is difficult for me to answer the specific question. I can make two observations in an effort to try to be responsive and helpful.

The first is that, you know, these are—well, as I previously indicated, the brief, upon my reading of it after it was filed, did not feel that the—indicated it was not necessarily the best vehicle for the Supreme Court to address the issue that was presented, the legality of these reverse payment settlements. It did not get to the bottom-line question as to what the standard ought to be in that case.

More generally, you know, this is an area which I would readily agree is very important to consumers. Access to health care generally and to effective drug treatments that are affordable is also extraordinarily important.

I would further agree that the settlement of these cases can be anticompetitive and can be harmful. I would also add, however, that there are considerations on the other side. There are reasons why our system encourages settlement as a general matter. Resolving litigation early can not only avoid out-of-pocket costs, but the uncertainty that surrounds this set of assets while litigation is pending can have real costs and consequences as well.

And so I have great respect for and sympathy with what Chairman Majoras was saying, that a complete per se approach here, one should think carefully about that because there are considerations on both sides.

Chairman KOHL. Getting back to you, Ms. Majoras, I know that the FTC, as you have said, has done much good work in attempting to take action to prevent these payoff settlements. However, after the Eleventh Circuit's Schering decision, the ability of the FTC to enforce the antitrust laws to prevent these settlements is in doubt. Doesn't it make the bill that I have referred to, which you are very much aware of and have worked on, doesn't it make the bill all that much more necessary?

Ms. MAJORAS. Well, there is no question that our ability to attack these settlements from an antitrust perspective has been hampered by the Eleventh Circuit decision. No question. And we think it is important enough that we should work the problem from several different fronts. One is we want to work with you on this legislation, and I do think that that is extremely important. And, second, as I said, we will continue in the meantime investigating the settlements we have before us; settlements with the reverse payments, not surprisingly after the Eleventh Circuit decision, have gone way up from where they were before. And while I agree whole heartedly with Mr. Barnett that we have to look at all aspects of this because we do not want unintended consequences, I just note that during the years in which there was great antitrust risk for entering into these agreements, parties still settled lots of patent litigation. They just did not do it by having the brand pay the generic consideration in exchange for staying out of the market.

So we are not trying to prohibit settlements. We are trying to prohibit settlements which—as a very prominent antitrust law professor said last week at a conference at which we both spoke, if these agreements were being reached outside this patent settlement context, they would be subject to criminal enforcement under the antitrust laws. So we need to, yes, weigh the benefits of patent settlement, but we also have to think about what is really going onhere.

Chairman KOHL. That is good.

Mr. Barnett, many shippers who depend on railroads to obtain their raw materials or ship their products to market, such as electric utilities who need coal or farmers who are shipping grain, believe that they have been victimized by the dominance in their area of a few freight railroads that they must use. In many cases, these so-called captive shippers have only one railroad that serves them. These captive shippers report that they have been the victims of price gouging and other monopolistic and anticompetitive conduct by the one railroad that they have to use, leading to price increases that will ultimately be passed along to consumers. This problem exists in my own State of Wisconsin, among many States.

Over the past 20 years, the railroad industry has consolidated to the point where only four Class I railroads provide over 90 percent of the Nation's rail capacity, and they rarely compete with each other. The railroad industry is protected by obsolete antitrust exemptions that in many cases exempts them from antitrust scrutiny, prevents private parties from availing themselves of antitrust remedies, and prevents the Justice Department from reviewing railroad mergers. These exemptions do nothing more than shield very often anticompetitive, monopolistic conduct by railroads.

Yesterday I introduced a bill to repeal the railroad's antitrust exemptions. Do you support such a repeal of these antitrust exemptions? Do you recognize that in many cases the present situation puts these people who must use that railroad and have no other opportunity at a competitive disadvantage in a way that almost prohibits their ability to operate their businesses if, in fact, there is nowhere else that they can receive shipments except through this one railroad which enjoys antitrust exemption?

Mr. BARNETT. Well, Mr. Chairman, the Antitrust Division has a long history of promoting the view that exemptions should be rarely granted and, when granted, narrowly construed. Further, when I testified before the Antitrust Modernization Commission, I expressly encouraged them to recommend that Congress re-examine existing immunities and exemptions from the antitrust laws to see whether they are still warranted under current conditions. I believe that is a view that Chairman Majoras and I are in complete agreement on. And so I applaud your efforts to introduce such a bill and to look at this issue.

Given that it was just introduced, I do not believe that the administration has yet had time to form a position on it, but as I say I underscore that I applaud your efforts and commit the Division to trying to work with you on that bill as you examine the issues.

Chairman KOHL. That is great.

Are you familiar enough to make a comment, Ms. Majoras?

Ms. MAJORAS. Well, like Mr. Barnett, I can tell you that I am almost always opposed, as I believe the rest of the Federal Trade Commission likely is, to exemptions to the antitrust laws. And I absolutely think that particularly when exemptions have been on the books for a long time—and in the United States, we have several like these that have been in existence for a very long time when markets were very different and, quite frankly, the way we thought about markets was very different—we should examine them.

I am not as familiar—I looked at your bill, and I think it is something we would be very happy to work with you on because it is just so rarely the case that I think an exemption should continue.

Chairman KOHL. That would be great. I thank you for your comments, both of you. Mr. Barnett, perhaps the biggest merger announcement so far this year are the plans by the only two satellite radio services—Sirius and XM—to merge. Many of us are concerned that this merger appears to create a monopoly in satellite radio. Many commentators cite the XM-Sirius merger as an example of a merger between companies that would not have been attempted in the past, but now feel are worth attempting because of your, as some people say, lax attitude towards merger enforcement. How do you respond to that?

Mr. BARNETT. Well, Mr. Chairman, without commenting on the specific pending matter, the XM-Sirius matter, I would reiterate that we have diligently applied the same principles to the evidence that was collected in each of our merger investigations and made a call as to whether we believed the merger was competitive or anticompetitive, threatened harm, as cognizable under Section 7 of the Clayton Act.

Where we have found evidence to support a finding of aviolation, we have aggressively pursued that. That includes not only issues like the Mittal-Arcelor steel deal last year, but it includes Echo Star-DirecTV, which were two television direct broadcasts satellite providers that the Division aggressively challenged just a few years ago.

Chairman KOHL. All right. Again, trying to get some comment out of you on this one—and I know you cannot make a comment on a merger which is not before you but likely may be before you—can you explain how the Antitrust Division might look at this merger in the area of satellite radio and whether it is a separate market or whether satellite radio competes with terrestrial radio and other entertainment sources, especially new technologies like iPod and Internet radio, which is probably—which might be central to this merger. Just in general, do you think there are separate markets or they are all the same market?

Mr. BARNETT. Well, Mr. Chairman, I will do my best. It is frequently the case in merger review, when we are arguing with parties about what the proper conclusion is, that the definition of the relevant market is very central. Parties frequently put before us assertions that various other alternative products or services should be included in the relevant market, and we do our best to assess whether that is actually the case. And we do that through a variety of means. We look at the parties' own internal documents, marketing and sales strategies. We talk to customers. We talk to other suppliers. We can do statistical or econometric analyses to try and estimate cross-price demand elasticities or supply elasticities. And we make an assessment that whether or not—even if some consumers may view a proposed alternative as an alternative, whether enough view it as an adequate alternative to discipline the pricing of the merged parties' post-transaction, whether or not they would be able to raise price profitably even if they lost some customers.

That is a very fact-intensive analysis, and it would be difficult for me to answer that question under any circumstances in a matter in which we had just started looking at it.

Chairman KOHL. OK. Mr. Barnett, as you know, the Tunney Act requires the court to approve an antitrust consent decree to ensure it is in the public interest before it can go into effect. For several years, the Justice Department has been allowing mergers to close prior to the court's review of the settlement. This renders court review quite ineffective as the merger has already been consummated before the court reviews the settlement. The court is then left with virtually no remedy should it decide that the settlement is not in the public interest.

How is allowing parties to close mergers prior to court review consistent with the intended command of the Tunney Act?

Mr. BARNETT. Well, Mr. Chairman, as an initial matter, we are not empowered to prevent the closing of a transaction. That is something a court must order the—enter a preliminary injunction in order to prevent it. Once the HSR waiting period has expired, absent an order of the court, the parties are free to close. We are, of course, free to continue with our challenge.

We make an assessment—and it has been long standing Division policy across administrations—as to whether or not there is cause or reason to move the court for such a preliminary injunction. There can be substantial cost or, alternatively, there can be substantial lost benefits from preventing a transaction from moving forward. In particular, if you have a situation where you have a very large transaction and we have identified a potential competitive harm in a relatively small portion of that transaction, there could be huge efficiencies that will be delayed for however long the Tunney Act review takes until a closing is allowed.

By not getting in the way of that and allowing the parties to close, you can allow the realization of those efficiencies in circumstances where we have made the determination and the judgment that we believe the remedy that is on the table will adequately address the threatened harm to competition.

Chairman KOHL. All right. Mr. Barnett, I would like to turn to the issue of media consolidation. Some believe that there is nothing special about mergers and acquisitions in the media marketplace, that they should be treated just like any other mergers. For example, former Antitrust Chief Charles James said at his confirmation hearing in 2001 that the only thing that mattered in reviewing a media merger was "economic consequences of the transaction." Many of us would disagree with that. Mergers in the media are different, in our judgment, because they affect competition in the marketplace of ideas so central to our democracy. Diversity in media ownership is essential to ensuring that competing views are heard. I would think you would agree with that. Therefore, I believe that we must give mergers in the media 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 Petofsky agrees with this view.

What is your view, Mr. Barnett? And then I will ask you, Ms. Majoras. Is the conventional view of antitrust review of media mergers focused solely on economic factors and ad rates correct? Or do you agree with many that the Justice Department should also consider a media merger's impact on diversity of news and information and not limit your analysis to strictly an economic kind of consideration?

Mr. BARNETT. Well, Mr. Chairman, I could not agree with you more strongly that the marketplace of ideas is one of the core values of our political system and one of the fundamental sources of strength of our political system. And I believe that those First Amendment principles are just—it is impossible to over rate their importance. And we do look closely and take very seriously competition issues raised in the media industry. We have taken enforcement actions even recently. In the McClatchy-Knight Ridder transaction, for example, we required the divestiture of one of the daily papers in Minneapolis. We have other pending investigations within the industry because we do take it so seriously.

Your question raises some complicated issues. I would like to think that by preserving competition and an effectively free-flowing competitive market in the media industries, to the extent that there is a demand for a diversity of viewpoints in the populace, people will be able to supply a diversity of viewpoints. An effectively functioning market should effectively meet the demands of consumers.

I hesitate to say, however, that I as a Government official should be in a position of deciding that this particular viewpoint should be protected and that particular viewpoint should not be protected. And to that extent, I would be very hesitant to get into that kind of consideration, but would focus on trying to ensure that there are multiple providers in the marketplace and that a freely functioning marketplace can respond to the demand for diversity of views.

Chairman KOHL. Ms. Majoras, do you have some opinions you would offer?

Ms. MAJORAS. Thank you, Mr. Chairman. There is no question that media mergers are extremely important, and I think it is fair to say that we give—and I have talked to former Chairman Pitofsky about this extensively, and I think it is fair to say that we give them a certain type of heightened scrutiny because of their importance to our very democratic underpinnings.

Mr. Barnett is right, though, that we have a certain method for reviewing mergers that has been blessed by the court, which, of course, has an economic tone to it; but in making sure that, for example, advertisers have plenty of outlets in which to advertise, they essentially act as surrogates, so that there are plenty of avenues in the media, not only, of course, to advertise, but, of course, you have got to have some content in it to provide that content.

So I think those two view points are not so very far apart at all. And I also do—you know, I agreed with Mr. Barnett. We do have to be careful so that it does not look like Government is regulating speech. That you absolutely would not want. And the FCC, of course, has a little more leeway probably than we do to look at some more content-related issues, although for protection they have to do it really out in the open. But they have a public interest standard, of course, when they look at media mergers, mergers within their jurisdiction. And we do not have such a broad standard within which to review those mergers.

Chairman KOHL. All right. Just to go back to the Whirlpool-Maytag merger, which was approved about a year ago, I understand, shortly after that announcement it was raising prices up to 12 percent on its washing machines, and it also announced plans to cut 4,500 jobs. This all occurred within a matter of months after the merger was approved.

Does this massive layoff and the sharp price increase lead you to have any reconsideration thoughts in your mind?

Mr. BARNETT. Mr. Chairman, I would require some additional information. With respect to price increases, it is important to note that there can, for example, be increases in input costs. It would be far more relevant for us to know whether or not the operating margins of the company had increased.

In addition, we tend to think in slightly longer time frames than 1 year. It can take the market a little bit of time to respond, but if it does so reasonably quickly or is expected to do so reasonably quickly, we would still consider that not a sufficient threat to competition to bring a challenge. And so the short answer is that I would need some additional information.

Chairman KOHL. All right. Mr. Barnett, we have received allegations of anticompetitive and monopolistic conduct by DFA, the Nation's leading milk marketing cooperative. One allegation in Florida is that independent dairy co-ops could not have their milk processed in plants affiliated with DFA unless the independent cooperative paid the processor millions of dollars around the cost of processing the milk. It is alleged that this and other anticompetitive conduct destroys the ability of independent co-ops to compete and ultimately results in higher milk prices to consumers.

Mr. Barnett, we have been informed that the staff of the Antitrust Division recommended to you in September of last year that the Justice Department pursue an antitrust case against DFA, but that you allegedly have not taken any action on that recommendation.

Question: Is this true? And what is the status of that investigation?

Mr. BARNETT. Well, Mr. Chairman, we do not generally get into the specifics of internal deliberations. I will go so far as to say your information is not entirely accurate. But it is a pending investigation. We are looking at the milk processing industry, the specific issues that you raised, and I continue to be very focused on it.

Chairman KOHL. That is very good.

Well, I thank you both for being here. I think you have shed a lot of light on issues that are really important to our society and to our consumers, and I appreciate your frankness and your willingness to say what is on your mind. And I think you have made real contributions.

This hearing is concluded.

[Whereupon, at 3:45 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, DC 20530

April 27, 2007

The Honorable Herb Kohl
Chairman
Subcommittee on Antitrust, Competition Policy and
Consumer Rights
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed are the responses for the record of Thomas O. Barrett, Assistant Attorney General for the Antitrust Division, U.S. Department of Justice, to written questions received following the March 7, 2007, hearing held by the Subcommittee entitled, "Oversight of the Enforcement of Antitrust Laws."

We hope this information is helpful to you. If we can be of further assistance, please do not hesitate to contact this office.

Sincerely,

Richard A. Hertling
Acting Assistant Attorney General

cc: The Honorable Orrin G. Hatch
Ranking Member

**Answer of Assistant Attorney General Thomas Barnett
To Written Questions for the Record for Senator Joseph R. Biden, Jr.
Hearing on "Oversight of the Enforcement of the Antitrust Laws"
United States Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights**

At the hearing, you were asked about the proposed Monsanto and Delta & Pine Land Company merger currently under review by the Department. Some have expressed concern that the proposed acquisition may adversely affect robust competition in the farming industry. Without revealing any specific or otherwise confidential information about the Department's ongoing review of this matter, what factors do you believe are important to scrutinize in mergers to ensure that a vigorous competitive marketplace is maintained? And, more particularly, what factors does the department use for reviewing mergers affecting the farming industry in general, and those potentially affecting the availability of seed traits in that industry?

Merger reviews require a careful analysis of the markets involved. The Antitrust Division analyzes mergers pursuant to the Horizontal Merger Guidelines developed jointly by the Department of Justice and the Federal Trade Commission, with whom we share merger enforcement responsibility. The analysis is aimed at determining whether the merger is likely to create or increase market power, or to facilitate the exercise of market power, in any market. The Merger Guidelines define market power as the ability of a seller or coordinating group of sellers to profitably maintain prices above competitive levels for a significant period of time, or the ability of a buyer or coordinating group of buyers to depress prices below competitive levels, and thereby restrict output.

An important first step in analyzing a merger is to determine the scope of the product markets and geographic markets that would be affected by it. Once we know the size, shape, or scope of an affected market, we can then determine the various firms' market shares. Then we examine the industry in depth, utilizing data, documents and interviews with knowledgeable parties to determine the competitive effects of the proposed merger.

In many mergers involving the farming industry, the markets of potential concern often are the procurement markets for the agricultural good or commodity in question. These markets could be defined as regional or local, depending on the Division's conclusions in the particular case, for example, as to how far a producer could economically travel or ship in order to get competitive prices for the good or commodity. The Division would look at each of those markets to assess whether the proposed merger would be likely to reduce competition in a way that enables the merged company to depress the prices they offer for the agricultural good or commodity below competitive levels. With regard to the availability of seed traits in the agriculture industry, in particular, the Division would consider whether the merger would adversely affect any firm's incentive or ability to develop traits and commercial seeds with those traits. We would then assess whether, given the structure of the industry, the merger would likely result in higher prices for U.S. farmers.

**Answers of Assistant Attorney General Thomas Barnett
To Written Questions for the Record for Senator Chuck Grassley
Hearing on"Oversight of the Enforcement of the Antitrust Laws"
United States Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights**

a. Mr. Barnett, how do you respond to the allegations in a January 8, 2007 *Legal Times* article, claiming that the Justice Department's Antitrust Division is not challenging anti-competitive mergers?

The Department has a strong commitment to effective merger enforcement. The Antitrust Division consistently applies the principles set forth in the Horizontal Merger Guidelines and aggressively seeks a remedy whenever these principles and the evidence indicate a merger threatens harm to competition. In the last year, the Division has achieved tangible results in improving its ability to identify and investigate thoroughly mergers that threaten harm to competition, and to obtain effective remedies for such mergers when appropriate. In its 2006 fiscal year, the Antitrust Division filed ten merger enforcement actions in federal district court, and in response to Division investigations, an additional six transactions were restructured by the merging parties in a manner that preserves competition without the Division needing to go to court. This represents the highest level of merger enforcement activity in the last five years. Consequently, I disagree with the allegations referenced in the question.

b. What kinds of assurances can you give me that the Justice Department's Antitrust Division is doing all it can to enforce the antitrust laws?

My written testimony, submitted for the record of this hearing, demonstrates that the Antitrust Division is enforcing the antitrust laws aggressively and thoroughly. In addition to the Antitrust Division's strong merger enforcement record described above, the Division has had significant success in both civil non-merger and criminal enforcement. The Division vigilantly investigates and prosecutes instances of anticompetitive conduct when warranted, as evidenced by our recent actions in the false teeth industry (Dentsply, case filings available at www.usdoj.gov/atr/cases/indx102.htm) and in the provision of real estate services (Nat'l Assoc. of Realtors, case filings available at www.usdoj.gov/atr/cases/nar.htm). Criminal enforcement, particularly in the area of international cartel offenses, remains one of the Division's highest priorities as well. Recent criminal prosecutions have evolved out of our DRAM, Ready-Mixed Concrete, and Nationwide E-Rate investigations, among others, and the Division continues to achieve considerable results. In the last year alone, the Division obtained the second highest amount of fines in the Division's history, achieved the longest sentence for a foreign national in an international antitrust case, and made significant progress toward the first extradition of a foreign national for an antitrust offense. Already this year, we are on a record pace in jail time imposed on Division defendants. The Antitrust Division remains dedicated to continuing its robust and effective enforcement program for the benefit of American consumers.

c. What is the status of the Justice Department's review of the Smithfield Foods/Premium Standard Farms merger?

The Department is reviewing the proposed Smithfield Foods/Premium Standard Farms merger to determine whether it would likely harm competition in any affected market. While we cannot comment in detail on an ongoing investigation, it can be noted that the parties to this merger have publicly disclosed that they have received "second requests" for information from the Antitrust Division. The Antitrust Division is conducting a thorough analysis of the proposed merger. If it determines that the proposed merger would substantially lessen competition in any affected market, we will take appropriate enforcement action to prevent such harm.

d. How is the Antitrust Division going to be pro-active in its efforts to police anti-competitive activity specifically in the agriculture industry?

The Department takes concerns expressed by agricultural producers about competitive problems very seriously, and believes that protecting competition in the agricultural sector is important. Two of the Antitrust Division's litigating sections usually handle matters involving agriculture, including mergers and conduct aimed at acquiring or exercising market power, and over many years of activity in the field, these sections maintain expertise specific to many agricultural industries. They are on the lookout for anticompetitive practices in the agricultural sector of our economy. Furthermore, the Department has a dedicated Special Counsel for Agriculture, who engages in special outreach and contact with producers and the agriculture community to uncover pro-actively potential anticompetitive activity, and who works with the litigating sections to evaluate and, if appropriate, investigate complaints they learn about from that community and other sources. Finally, the Department has a longstanding practice of consulting with and sharing information and expertise with the Department of Agriculture.

e. Will the Justice Department work with the U.S. Department of Agriculture to address concerns that are raised by family farmers and independent producers about possible anti-competitive and abusive business practices?

We are committed to preventing anticompetitive mergers or conduct from harming the agricultural marketplace, and when the facts warrant it, we take appropriate enforcement action. We have had a longstanding practice of consulting and sharing expertise with the Department of Agriculture, as memorialized in the 1999 "Memorandum of Understanding between the Antitrust Division, Department of Justice and the Federal Trade Commission and the Department of Agriculture Relative to

Cooperation with respect to Monitoring Competitive Conditions in the Agricultural Marketplace." Pursuant to the Memorandum of Understanding, for many years the Department has consulted with the Department of Agriculture when appropriate regarding a number of mergers or business practices to get their views on how agricultural producers stand to be affected by the merger or practice in question, and to take advantage of USDA's knowledge and expertise in our efforts to understand the workings of often complex agricultural markets. In addition to cooperation on specific investigations, upper management of the Antitrust Division and the USDA meet to share information on agricultural issues that affect competition under our respective missions. Moreover, we have held several antitrust training sessions for USDA employees, including having an economist from USDA work on detail for several months at the Antitrust Division.

f. Does the Antitrust Division need any additional tools or resources to help it do its job?

We sincerely appreciate this Subcommittee's support in providing the Division with its current resource levels, and the Subcommittee's continued interest in its enforcement capabilities. The Division currently is fully staffed, working hard to protect American consumers through enforcement of the antitrust laws. This level of staffing is vitally necessary to the Division's mission. While the Division is facing new challenges, particularly on the international front, at this time the Division is not seeking additional resources. While the Division is engaged in a number of activities to enhance its analytical tools and ability to identify anticompetitive conduct, the Division is currently not pursuing any legislative revisions to its tools or resources.

g. Could you describe the capacity of the Justice Department to investigate and make determinations under its business review and industry guidance procedures? What is the potential impact on this capacity should the practices of additional industry sectors, such as agriculture or insurance, become eligible for such reviews?

Persons concerned about the legality under the antitrust laws of proposed business conduct may ask the Department for a statement of its current enforcement intentions with respect to that conduct pursuant to the Department's Business Review Procedure in 28 C.F.R. Section 50.6. The business review process provides the business community an important opportunity to receive guidance from the Department with respect to the scope, interpretation, and application of the antitrust laws to particular proposed conduct. Currently, all industry sectors are eligible to request business review, including agriculture and insurance, to the extent the activities for which business review is requested are subject to the antitrust laws or where there is doubt about the application of the antitrust laws. In instances where formerly regulated industries were introduced to antitrust scrutiny, historically this did not lead to an appreciable increase in business review requests from that sector. The Division does not foresee at this time any impediments to its ability to provide guidance if certain conduct in additional industries becomes subject to the antitrust laws.

h. Some countries are investigating Visa and MasterCard's practices in setting payment card interchange fees on behalf of their competing member banks. Merchants in the United States are paying some of the highest interchange fees in the world, yet the United States antitrust agencies have not taken any position relative to this practice. Would you like to comment on the competitive effects of interchange fees? Does the Justice Department Antitrust Division plan to become more engaged on the subject of interchange fees in the near future?

The approach of the Department is to challenge industry practices that inhibit competition rather than to regulate or mandate price levels. Our 1998 suit against Visa and MasterCard targeted rules and practices that inhibited competition among credit card networks. As a direct result of our suit, in 2004 Visa and MasterCard were required to rescind rules that inhibited their member banks from partnering with American Express, Discover, and other competitive networks. In the wake of that result, both American Express and Discover have partnered with Visa and MasterCard member banks to issue their payment cards. This has increased network competition.

In recent years, several countries have taken a different approach from the United States, in that they have directly regulated the level of interchange fees. In contrast to these approaches, when the Department investigates any violation of the Sherman Act, we pursue remedies that restore competition, rather than remedies such as price caps that regulate a market. This reflects our primary concern that prices be set in a competitive environment rather than at a governmentally imposed level, along with our knowledge that setting and supervising price caps are not the Department's comparative advantage.

The Department continues to keep a watchful eye on competition in this important industry, and will investigate thoroughly any evidence of violations of the antitrust laws.

Answers of Assistant Attorney General Thomas Barnett
To Written Questions for the Record for Senator Herb Kohl
Hearing on "Oversight of the Enforcement of the Antitrust Laws"
United States Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights

1. In 2004 we authored a revision to the law governing court review of antitrust settlements, the Tunney Act. The provision strengthened the law to guarantee that courts review these settlements to ensure they were in the public interest, rather than merely rubber stamping them. Among other things, our amendment changed the law to require a court to examine several public interest factors before approving a settlement, rather than the examination of these factors being discretionary.

I was very disappointed to see that the Justice Department chose to misread our amendment in the first major test of this new law, the U.S. v. SBC merger review proceeding in the U.S. District Court for the District of Columbia. In an apparent effort to minimize my amendment, the Justice Department initially filed a brief saying that my amendments "essentially codified existing case law," which of course was simply untrue. The presiding Judge, Emmit Sullivan, correctly rejected this interpretation.

(a) In more recent filings in U.S v. SBC, the Justice Department no longer argues that our amendments made no change to the law. But you still argue this incorrect and misleading position in other cases. For example, last October in U.S. v. Exelon, the Justice Department brief stated that our amendment "does not affect the substantial precedent in this and other Circuits analyzing the scope and standard of review for Tunney Act proceedings." How can you assert this position in light of the plain language of our amendments and in light of Judge Sullivan's rulings in U.S. v. SBC?

Following enactment of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, the Department carefully studied the Act, and has sought to ensure that the Act's changes to the Tunney Act are appropriately reflected in practice. Thus, for example, in the pending Tunney Act proceeding in *United States v. SBC Communications, Inc.*, Nos. 05-02102, 05-02103 (D.D.C.) ("*SBC*"), we brought the factors listed in section 5(e)(1) to the attention of the court, Plaintiff United States's Motion and Memorandum in Support of Entry of Final Judgments at 4, and then explicitly addressed each of those factors, explaining how they supported entry of the judgments. Reply of the United States to Actel's Opposition to the United States's Motion for Entry of the Final Judgments at 24-33.

The Department does not believe that the plain language of the Act's amendments and of the amended section 5(e) addresses the "standard of review for Tunney Act proceedings" as the Department understands that term. The amended language requires a court to address factors it was free to address, but not required to address, prior to the amendment. The significance of this change in language is a matter currently before Judge Sullivan in review of our proposed consent decree in *U.S. v. SBC*.

Specifically, the Department's position in *U.S. v. SBC* is that the Act's changes did not "materially affect" the scope or standard of review. Plaintiff United States' Response to Public Comments at 11, *SBC*. Our reasons for this view include at least the following: (i) courts were likely to consider the listed factors prior to the amendment; (ii) the amended language does not address how the court is to consider the listed factors, beyond making plain that the court need not hold an evidentiary hearing or permit anyone to intervene; and (iii) the amended language does not address the way the court's consideration of the listed factors is to influence its public interest determination. In addition, the Department notes that one of the co-sponsors of the legislation, Senator Hatch, then Chairman of the Committee on the Judiciary, stated that "[i]n my view, this amendment essentially codifies existing case law." 150 Cong. Rec. S3613 (daily ed. Apr. 2, 2004).

In 1974, Congress deliberately left the Tunney Act's concept of "public interest" unspecified "as a recognition that the content of the phrase . . . is a product of judicial construction in the context of particular statutes," H. R. Rep. No. 93-1963, at 11 (1974), and to allow for "compromises made for non-substantive reasons inherent in the process of settling cases," id. at 12. The Department acknowledges that in 2004 Congress intended to "effectuate the original Congressional intent in enacting the Tunney Act." The Act, § 221(a)(2). Therefore, the Department's position is consistent with congressional intent to "retain the consent judgment as a substantial antitrust enforcement tool." S. Rep. No. 93-298, at 7 (1973).

(b) Will you commit that all future Justice Department Tunney Act filings will no longer argue that our Tunney Act amendment effected no change to the law?

Antitrust Division filings have not argued that the 2004 Amendment to the Tunney Act effected no change in the law. The Department's view has consistently been as described in our answer to Question 1(a), and therefore the Department does not anticipate arguing that the 2004 Amendment effected no change in the law. The Department will take into account the concerns you have expressed at the hearing and in these questions when it expresses its views concerning the meaning and significance of those changes.

2. (a) At the hearing, you argued the fact that the Justice Department brought 16 merger cases in the last year indicated that your critics' arguments that you had a lax approach to merger enforcement was untrue. How many of these 16 merger cases involved <u>contested</u> court cases, rather than cases in which the parties agreed to a settlement and consent decree in advance of the case being filed in court?

The Justice Department reviews each merger on its own merits and undertakes a vigorous investigation of any that have the potential to raise competitive concerns. Whenever our investigation indicates that a particular merger is likely to harm competition in a specific relevant market, we promptly notify the parties of our concerns. With respect to any transaction that our investigation indicates would violate the antitrust laws, we aggressively pursue a remedy sufficient to prevent the threatened harm to competition. The Department will litigate to obtain an adequate remedy if necessary, but the decision whether to contest the remedy sought by the Department is for the parties to make. If the parties accede to the requested remedy, the Department will enter into a consent decree. Alternatively, if the parties modify their transaction to avoid the threatened harm to competition, the Department has no basis for a challenge. In either event, such a result is beneficial in providing more certain relief with fewer resources than litigation.

Of the 16 mergers challenged by the Justice Department in Fiscal Year 2006, all of them resulted in the parties to those mergers taking steps to eliminate all competitive concerns, thereby avoiding a contested court challenge. In each case, the Department presented concerns that, if not addressed, likely would have resulted in a court challenge. After receiving notice of these concerns, the merging parties took certain actions, such as a divestiture, to resolve the Justice Department's competitive concerns rather than contest the merger in District Court.

(b) How many contested merger cases (that is, cases in which there was no agreement with the merging parties as to a consent decree at the time of the filing of the lawsuit) has the Justice Department brought since losing the Oracle/Peoplesoft case in 2004? Please identify all such cases. Why have there not been more contested court cases since that time?

During the current administration, the Department has filed in court a number of cases to contest a matter where settlement eventually took place, such as First Data/Concord EFS (2003) (case filings available at www.usdoj.gov/atr/cases/first0.htm) and Dairy Farmers of America/Southern Belle (2003) (www.usdoj.gov/atr/cases/dairy0.htm); or where the merging parties later abandoned the proposed merger, such as DirecTV/Echostar (2002) (www.usdoj.gov/atr/cases/echost0.htm), General Dynamics/Newport News (2001) (www.usdoj.gov/atr/cases/indx337.htm), and SGL Carbon/Carbide Graphite (2003) (www.usdoj.gov/atr/cases/indx135a.htm). Since 2004, in each case where the Department's investigation indicated that a particular transaction threatened harm to competition, merging parties elected to take steps to resolve our competitive concerns, as explained in the response to (a) above, by the time any complaint was filed.

3. When considering merger enforcement policy, there is an important difference between the Sherman Act and the Clayton Act. The Sherman Act proscribes only mergers likely to lead to monopoly or a dangerous probability of monopoly power, while the Clayton Act makes illegal those mergers the effect of which "may be substantially to lessen competition or tend to create a monopoly." In other words, it is not necessary to prove that a merger <u>will</u> substantially lessen competition, rather a merger which <u>may</u> substantially lessen competition is illegal. Thus antitrust law is intended to prevent "incipient" as well as fully realized threats to competition. In the words of the Supreme Court, "[t]he grand design of the original section 7 [to the Clayton Act] . . . was to arrest incipient threats to competition which the Sherman Act did not ordinarily reach." <u>U.S. v. Penn-Olin Chemical Co.</u>, 378 U.S. 158, 170-171 (1964).

Critics of the current Antitrust Division, including the American Antitrust Institute, argue that you have ignored the "incipiency doctrine," and instead only challenge mergers that you can prove <u>will</u> (rather than <u>may</u>) substantially lessen competition. How do you respond? Has the Justice Department brought any merger cases in the last six years relying on the incipiency doctrine? Do you believe that mergers should be evaluated under the incipiency doctrine? Why or why not?

Section 7 of the Clayton Act provides that "no person engaged in commerce or in any activity affecting commerce ... shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." Every merger case the Department has brought in the last six years has been pursuant to that statutory requirement.

The Department has pursued 86 merger cases alleging a violation of Section 7 in the past six years. Any of those cases that did not allege a two-to-one merger to monopoly fits within the "may substantially lessen competition" language of Section 7 and thus falls within the "incipiency doctrine" definition. In the last two years alone, of the twenty merger cases, five were cases that did not involve a two-to-one merger. Thus, I would disagree with any commentators who allege we are not adhering to the statutory standards in our merger enforcement program.

The Department evaluates mergers pursuant to the statutory standard contained in Section 7 of the Clayton Act, including the "may substantially lessen competition" language of that statute, has done so in the past, and will continue to do so in the future.

4. (a) The Justice Department's enforcement of cases involving monopolization and unilateral anti-competitive conduct–practices such as predatory purchasing, refusals to deal, tying, exclusive dealing, and bundling – is a very important area of antitrust enforcement. Statistics show a decline in enforcement in this area. The number of non-merger civil investigations has declined by over a third during the last four years as compared to the last four years of the Clinton administration. The number of monopoly cases brought by the Justice Department has seen similar sharp declines–to a low of only three last year. How do you explain these statistics? Do these statistics indicate that the Antitrust Division has decided to adopt a less aggressive posture with respect to civil, non-merger antitrust enforcement?

The Antitrust Division has not made any decision to adopt a less aggressive posture with respect to civil non-merger antitrust enforcement. I agree that the Department's enforcement of cases involving monopolization and unilateral anticompetitive conduct is extremely important. The Antitrust Division endeavors to apply consistent, objective standards in order to maintain aggressive enforcement of civil non-merger matters. With respect to the statistics you cite, I would note that it is difficult to draw many conclusions from simply the number of investigations. Nevertheless, the number of civil non-merger investigations involving monopolization and unilateral anticompetitive conduct decreased by nearly half during the last two years of the Clinton Administration, and since that time enforcement matters in this area have stayed at consistent levels, for both the remainder of the previous administration and throughout the current administration.

In particular, with reference to the enforcement categories you have cited, in Fiscal Year 1999 the number of investigations involving refusals to deal dropped by half, and the number of investigations involving tying decreased from 10 to only 2. Since that time, the number of investigations involving refusals to deal has been greater in every year except FY2006, and investigations involving tying also has increased. For example, there were three times as many investigations into tying in FY2004 as there were in FY1999. Enforcement matters concerning monopolization, attempted monopolization, and conspiracy to monopolize have also stayed at levels consistent with the last years of the Clinton Administration. Regardless of these statistics, I can assure you that enforcement in this area is important to competition and will continue to be maintained.

(b) In your written testimony, you argue that "determining when unilateral conduct is unlawful under Section 2 [of the Sherman Act] has proven difficult because the aggressive, unilateral behavior typically at issue in Section 2 cases often resembles the healthy, aggressive competition that the antitrust laws seek to promote. The antitrust laws should encourage vigorous competition–even by companies with a large share of the market." Do these comments indicate that the Justice Department has decided to relax its enforcement of violations of Section 2 of the Sherman Act because of these "difficulties"? Shouldn't we be more concerned with "aggressive, unilateral behavior" when it is undertaken by companies with dominant market positions?

The Department has not decided to "relax its enforcement of violations of Section 2 of the Sherman Act." The Department takes very seriously the potential for aggressive, unilateral behavior to lessen competition. The courts, commentators, and antitrust enforcers that have served in many administrations have recognized that the central difficulty in analyzing unilateral conduct is distinguishing aggressively competitive behavior from exclusionary or predatory conduct that harms competition. Indeed, Judge Richard Posner described this difficulty as "the biggest substantive issue facing antitrust."

The Supreme Court stated in *Copperweld*, 467 U.S. 752, 768 (1984), and repeated in *Spectrum Sports*, 506 U.S. 447, 458-59 (1993), that it "is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects." As such, the consensus among the courts and commentators is that a rule that discourages vigorous competition, even by companies with dominant market positions, would not be good for competition. Even though aggressive competitive behavior may weaken competitors, the Supreme Court emphasized in *Matsushita*, 475 U.S. 574, 594 (1986), and again in *Trinko*, 540 U.S. 398, 414 (2004), that mistaken condemnations of legitimate conduct under the antitrust laws is especially costly to competition, because it would "chill the very conduct the antitrust laws are designed to protect."

One of the leading antitrust commentators has stated that "[n]otwithstanding a century of litigation, the scope and meaning of exclusionary conduct under the Sherman Act remain poorly defined." Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. Chi. L. Rev. 147, 147-48 (2005). Because the contours of the law are not very well defined in determining when aggressively competitive behavior by companies with a large share of the market should be illegal, the Antitrust Division, in conjunction with the FTC, is holding hearings to help advance our own thinking about unilateral conduct. These hearings will improve our enforcement efforts under Section 2 of the Sherman Act. However, we are not in any way relaxing our enforcement during the pendency of these hearings or otherwise. We remain vigilant in investigating and enforcing violations of Section 2 of the Sherman Act.

5. In the Spring 2006 Antitrust Division Update, you write that "[a]s Assistant Attorney General, my goal for the Division is to get to the right answers as quickly as possible with the least burdens necessary to make responsible enforcement decisions. To be clear, efficient enforcement is more than reducing second request production volumes and closing investigations promptly. Equally important, efficiency includes identifying violations of the antitrust laws and pursuing them to an expeditious and successful resolution." Why do you believe that reducing the "burdens" on business and "closing investigations promptly" is "equally important" as enforcing violations of the antitrust laws? Shouldn't enforcing the antitrust laws be your paramount goal?

Because enforcing the antitrust laws is our paramount goal, increasing the efficiency of review is essential to thorough and aggressive antitrust enforcement. My goal to "get to the right answers as quickly as possible with the least burdens necessary to make responsible enforcement decisions" is a goal I share with former Assistant Attorney General Joel Klein, who before this Committee in 1998 explained that a "significant challenge to antitrust enforcers involves how to keep up with the influx of premerger filings, how to effectively review them in a timely fashion without imposing substantial unnecessary cost on businesses or sacrificing consumer interests." Efficient review of both merger and civil non-merger matters does not involve inconsistent goals, but is a single goal aimed at increasing the Division's enforcement capacity. To achieve this goal, the Division should avoid wasting resources on matters that are unlikely to involve harm to competition while ensuring that the necessary resources are available to investigate and successfully resolve matters that actually threaten harm to competition. In addition, to the extent that reducing the burdens on merging parties is a byproduct of this approach, efficient review also lowers the costs of enforcement to the economy, which in turn benefits consumers, businesses, and the American taxpayers.

6. Our subcommittee has heard many concerns from U.S. companies with global operations about being treated unfairly by other nations' antitrust enforcement agencies. These companies assert that complying with conflicting antitrust review processes is very expensive, burdensome and time consuming. They are also concerned with conflicting results among international antitrust authorities, particularly between the EC and the United States. There are several prominent recent examples that raise concerns, including Microsoft facing numerous antitrust investigations in Europe, and the EC blocking the GE-Honeywell merger in 2002 after the U.S. Justice Department approved the deal. Complaints have also been raised about unfair treatment given to U.S. companies by foreign antitrust authorities in order to protect competing businesses in the foreign nations.

(a) I am very concerned about the burdens placed on U.S. companies from international antitrust authorities. What have you done to achieve greater coordination and harmonization between U.S. and foreign antitrust enforcement agencies? Is there anything that we in Congress can do?

The Antitrust Division shares the concern that American companies be treated fairly abroad, and that foreign enforcers do not use antitrust law as a means for protecting their local industries. The Division has worked for years to encourage other nations to base their antitrust enforcement on sound economic analysis and evenhandedness. To promote these principles, the Division has worked hard to strengthen its bilateral relationships with foreign antitrust authorities and has been very active in two major international organizations: the International Competition Network (ICN) and the Organization for Economic Cooperation and Development (OECD).

The ICN—which in five years has grown from 15 founding members into a global network of 100 members from 88 jurisdictions—provides an opportunity for senior antitrust officials and non-governmental advisors from developed and developing countries to work together to achieve practical improvements in international antitrust enforcement. Through its 8 Guiding Principles and 13 Recommended Practices for merger notification and review procedures, the Merger Working Group, which is chaired by the Division, has brought much needed procedural coherence to multijurisdictional merger review. By last count, 40 jurisdictions have made or proposed changes that would bring their merger regimes into closer conformity with the Recommended Practices. At the ICN's most recent annual conference held in Cape Town, South Africa in May 2006, members launched a new working group on unilateral conduct. As for future work, ICN is expected to begin work on convergence on substantive merger policies under the Division's leadership in May, 2007, and an initial report on this subject is expected in 2008. In both the merger and unilateral conduct areas, the Division is strongly committed to promoting convergence based on sound antitrust principles.

The Division has also been active for many years in the OECD, which provides a setting where its members seek answers to common problems, identify best practices, and coordinate antitrust policies. The OECD's Competition Committee and the Committee's two working groups—one for which I currently serve as Chair—are important venues for promoting sound convergence with respect to both antitrust policy and process.

The Division also remains strongly committed to strengthening its working relationships with foreign antitrust agencies. It promotes convergence at the bilateral level in two principal ways. First, it cooperates with its foreign counterparts on individual enforcement matters. Although there have been a few high-profile, well publicized cases in which the United States and other enforcers have reached divergent results, there has been considerable convergence in recent years. Indeed, despite certain differences in our respective antitrust laws, the Division has tended to reach the same result as its counterparts when it has become fully engaged with them on the analysis of a particular enforcement matter working from a common set of facts.

Second, the Antitrust Division promotes convergence at the bilateral level through consultations on a wide range of antitrust policy matters. The Division (together with the FTC) meets regularly with counterparts from the EC, Canada, Japan, Mexico and South Korea and has close informal ties with the antitrust authorities of many other countries. The Division participates in informal working groups with foreign antitrust agencies on merger, monopolization and intellectual property matters. The working groups hold meetings and videoconferences to compare approaches and to bring our policies into greater conformity. The Merger Working Group has also laid important groundwork for future convergence on substantive merger issues through its work analyzing the merger guidelines of various jurisdictions.

Although these are important issues, we are not proposing any specific legislative program at this time.

(b) Are you satisfied by the manner in which the Justice Department's comity agreements with foreign antitrust authorities are being implemented? Do you think these comity agreements are effective to resolve inconsistencies in international antitrust enforcement, or do you believe they should be strengthened?

The U.S. antitrust enforcement agencies consider international comity in enforcing the antitrust laws. All of the cooperation efforts detailed above help promote comity. In addition, eight U.S. bilateral antitrust cooperation agreements provide for the consideration of comity. Typically, these agreements require that each party, consistent with its own laws and important interests, give careful consideration to the other party's important interests throughout all phases of enforcement. Many of the agreements list the specific factors the parties should take into account in applying comity to particular cases. The Antitrust Division also has agreed to consider the important interests of other nations in accordance with the OECD recommendation on antitrust cooperation.

With regard to comity, it is critical to keep in mind that we have reached consistent results in the vast number of antitrust matters that we and our counterparts have simultaneously reviewed. Divergences are rare; nevertheless, they are costly when they do happen. That is why encouraging convergence bilaterally and multilaterally on sound antitrust principles is a major priority of the Antitrust Division and one reason why we place such a high premium on the value of case-specific cooperation.

When it comes to strengthening comity mechanisms, we need to be careful to preserve the integrity of our own processes in cases affecting U.S. commerce. Other nations understandably have similar sovereignty concerns in matters affecting their own economies. Notwithstanding these limitations, we remain open to considering appropriate ways to help reduce the risk of inconsistent enforcement outcomes across jurisdictions.

7. In recent years, we've heard complaints from U.S. high tech companies that foreign antitrust authorities are unfairly restricting the use of their intellectual property. An example is Microsoft's concerns regarding a recent EC decision resulting in what it argues to be improper compulsory licensing of several of its patents. What is your view of this concern? Are U.S. high tech companies correct to be concerned? And, if you believe that these concerns are well founded, what actions is the Justice Department taking to address this situation with foreign antitrust authorities?

Forced sharing of intellectual property can reduce innovation and harm consumers. As the Supreme Court has stated, "[c]ompelling ... firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in ... economically beneficial facilities." *Verizon v. Trinko*, 540 U.S. 398, 407-08 (2004). Accordingly, such remedies should only be imposed after serious consideration, precisely because of the concern expressed by the Supreme Court.

As described more fully in response to question 6, the Antitrust Division has made international cooperation and promoting policy convergence on sound legal and economic antitrust enforcement standards a priority, including in the very important area involving the interface between intellectual property and competition policy. The Division does so through active engagement in multilateral organizations, such as OECD and ICN, and through cooperation with its foreign counterparts on individual enforcement matters and antitrust policy issues. One important vehicle for convergence has been informal, staff-level working groups between the Division and its foreign counterparts. The working groups hold meetings and videoconferences to compare approaches and to bring our policies into greater conformity. The Division has participated in informal working groups with Canada, European Commission, Japan, Korea, Mexico, and Taiwan on issues regarding intellectual property and antitrust. On particular enforcement matters, Division staff routinely engage in discussions with their foreign counterparts. Further, where potential differences in approach seem possible, senior management of the Division have engaged, and will continue to engage, their counterparts in the foreign agency to address the concerns.

8. (a) Each year for the last decade, consumers have suffered from continuing annual cable rate increases, averaging between two and three times the rate of inflation. These rate increases are occurring when the prices consumers pay for most other telecommunications services–such as cell phone service, internet access, and long distance phone calls–have actually declined. Does this show that there is a failure of competition in the cable television market? And, if so, what is the role of antitrust enforcement to bring more competition to the video marketplace?

The Department has long recognized the importance of promoting the development of and preserving competition in the provision of video programming. Although incumbent cable providers are subject to competition from direct broadcast satellite providers, other sources of competition have the potential to produce lower prices, better quality services and more innovation to consumers. As an enforcement agency, the Department has aggressively investigated proposed mergers and potentially anticompetitive conduct in this industry and has brought enforcement actions where warranted, including actions challenging proposed transactions between DirecTV and Echostar (2002) (case filings available at www.usdoj.gov/atr/cases/echost0.htm), and between Primestar and NewsCorp/MCI (1998) (www.usdoj.gov/atr/cases/indx41.htm). In addition, as part of the Department's competition advocacy, we 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 competition. For example, in May of 2006 the Department encouraged the FCC to take action to mitigate unreasonable delays in the award of competitive franchises for video services in the context of the FCC's implementation of the Cable Television Consumer Protection and Competition Act (filing available at www.usdoj.gov/atr/public/comments/216098.htm). Many industry observers believe that reducing these delays will lead to increased price competition. For example, following Verizon's entry in Keller, Texas, the incumbent cable operator reportedly reduced its bundled rates for video and high speed Internet by 25 percent. The Department believes that clear and focused advocacy such as this will be helpful in bringing down rates for cable and telecommunications services.

(b) In recent years, we have received numerous complaints from wireline cable competitors–what are commonly known as "overbuilders." These are companies that enter a market and build a new cable system to go head-to-head with the incumbent cable company in that locality. We've heard allegations that these overbuilders 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 programming only in the areas where these upstart competitors operate. In the past your predecessors have indicated that the Antitrust Division was going to look into to these practices. Does the Antitrust Division currently have any investigations open regarding these allegations? What is your assessment of predatory practices in the cable TV industry?

Allegations of predatory conduct have to be evaluated on a case-by-case basis because there are numerous relevant facts that could pertain to whether an investigation is warranted. Legal cases that have looked at predatory pricing allegations—including cases brought by the Department—have provided a framework for evaluating these claims and established the factual predicates for challenging such actions. The Division maintains an interest in ensuring that all companies comply with the antitrust laws. We carefully consider concerns and review information received from industry participants, and if our review leads us to believe that an antitrust violation may have occurred we conduct an appropriate inquiry and take whatever enforcement action may be warranted.

9. Many merchants are very concerned with what they believe are excessively high credit card interchange fees. They allege that these fees have increased over the last few years even though the costs of card issuance have not increased. What is the Justice Department's view with respect to the interchange fee issue? Have you received evidence that the large credit companies are abusing their market power?

The Department's primary concern in this industry, as in all industries over which it has jurisdiction, is that prices are set in a competitive environment. The Department works to preserve competition in all dimensions of the payment cards industry, both among the payments networks and among banks, and thoroughly investigates any credible evidence of Sherman Act violations. In addition, the Department works to preserve competition in other markets that may directly or indirectly affect the price the merchant pays for credit card transactions, such as credit card processing and credit card issuing.

The Department filed suit against Visa and MasterCard in 1998 because certain of their rules and practices inhibited competition among credit card networks. As a direct result of our suit, in 2004 Visa and MasterCard were required to rescind rules that inhibited their member banks from partnering with American Express, Discover, and other competitive networks. In the wake of that result, both American Express and Discover have partnered with Visa and MasterCard member banks to issue their payment cards, which has increased network competition. Our suit also alleged that cross-ownership of card portfolios by Visa and MasterCard board banks ("dual governance") inhibited competition between those networks. Since that time, MasterCard has changed its ownership structure to become a publicly held company, and Visa has announced plans to do so. These governance changes have alleviated the dual governance concerns that the Department alleged in its complaint.

The Department continues to keep a watchful eye on competition in this important industry, and will investigate thoroughly any evidence of Sherman Act violations or any other violations of the antitrust laws.

10 (a). The Antitrust Division currently is investigating Smithfield's proposed acquisition of Premium Standard, involving two of the nation's largest hog purchasers and pork processors. We have heard concerns about the impact this acquisition will have on hog producers, particularly in North Carolina and the Midwest, and whether the deal will leave producers with sufficient competition for their hogs. Will you consider the impact of this proposed merger on hog farmers in analyzing the competitive effects of this merger?

(b) More generally, we have heard numerous concerns from farmers and agricultural producers regarding disparities in bargaining power when dealing with processors of agricultural commodities. What is the Antitrust Division's approach to monopsony in agricultural markets? What enforcement actions have you taken to prevent monopsony abuses from harming farmers and agricultural producers?

The Division is committed to preventing anticompetitive mergers or conduct from harming the agricultural marketplace. The Division has pursued monopsony cases as appropriate, including cases in the agricultural industry, such as its challenge to the Cargill/Continental Grain merger (the case filing for this matter is available at www.usdoj.gov/atr/cases/indx159.htm). Generally, the Division analyzes the potential anticompetitive exercise of market power on the buyer side in the same manner as on the seller side. For mergers, our starting point is the Department of Justice/Federal Trade Commission Horizontal Merger Guidelines. Similar analysis goes into evaluating joint ventures and other collaborative conduct. Monopolization or attempted monopolization would also be analyzed in similar fashion on the buyer side as on the seller side.

With regard to the Smithfield/Premium Standard Farms merger, the Department shares your concern that mergers not reduce competition in this important industry, and you can be assured that the Department will take whatever enforcement action may be warranted to protect competition.

Answers of Assistant Attorney General Thomas Barnett
To Written Questions for the Record for Chairman Patrick Leahy
Hearing on "Oversight of the Enforcement of the Antitrust Laws"
United States Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights

1. In October 2006, the Justice Department approved the merger of AT&T and BellSouth without imposing any conditions, despite bipartisan letters from the United States Senate and United States House of Representatives urging the Department not to act prematurely. The United States District Court for the District of Columbia is still considering a challenge that the conditions the Justice Department did impose on the previous mega-mergers in the telecommunications sector were inadequate to protect competition and the public interest. How did the possibility that any conditions imposed on the merger by the Justice Department would be challenged and found inadequate to protect the public interest affect the Department's decision not to impose conditions in the AT&T/BellSouth merger, thereby avoiding court review?

With regard to requests to delay our decision on the proposed merger of AT&T and BellSouth until after the Tunney Act review of the Verizon/MCI and AT&T/SBC proposed consent decrees, the premerger laws limit our available options. Because the Hart-Scott-Rodino Act permits the parties to a merger to consummate their transaction thirty days after substantially complying with requests for additional information and documentary material, the Department cannot delay the parties from merging without seeking an injunction in federal district court. Consequently, the Department must determine in a timely manner whether it has a basis to seek a court injunction.

In the course of its investigation into the potential competitive effects of the AT&T and BellSouth proposed merger, the Department reviewed significant quantities of information and documents obtained from the merging parties and other industry participants, including more than five million pages of documents. After carefully analyzing this information, the Department determined that the proposed acquisition was unlikely to violate the antitrust laws. Therefore, the Department had no basis to ask a court to enjoin the transaction, and the possibility of Tunney Act review played no role in that outcome. Under our policy of issuing statements in appropriate cases concerning the closing of investigations, the Division published an extensive explanation of the conclusions of the investigation of the AT&T and BellSouth proposed merger, limited by the Division's obligation to protect the confidentiality of certain information obtained in its investigations. This statement, issued on October 11, 2006, and available at http://www.usdoj.gov/atr/public/press_releases/2006/218904.htm, explains the Department's analysis of the competitive implications of the transaction, and its rationale for closing its investigation without imposing conditions on the proposed merger.

2. You stated in response to a question from Senator Kohl that "the Antitrust Division has a long history of promoting the view that exemptions [from the antitrust laws] should be rarely granted and, when granted, narrowly construed." You further responded that you personally "expressly encouraged" the Antitrust Modernization Commission to "recommend that Congress re-examine existing immunities and exemptions from the antitrust laws to see whether they are still warranted under current conditions."

(a) Does the Administration support repeal of the antitrust exemption for the business of insurance that is enshrined in the McCarran-Ferguson Act?

The antitrust laws are the chief legal protector of the free-market principles on which the American economy is based. Experience has shown that competition among businesses, each attempting to be successful in selling its products and services, leads to better quality products and services, lower prices, and higher levels of innovation. The antitrust laws ensure that businesses will not stifle this competition to the detriment of consumer welfare. These principles apply to those who offer professional services and financial products just as they do to traditional manufacturers and merchants.

Accordingly, the Department has historically opposed efforts to create sector-specific exemptions to the antitrust laws. The Department believes such exemptions can be justified only in rare instances, when the fundamental free-market values underlying the antitrust laws are compellingly outweighed by a clearly paramount and clearly incompatible public policy objective.

With respect to your specific question, I am not aware of any positions the Administration has taken on recent efforts to repeal of the antitrust exemption in the McCarran-Ferguson Act. The Division would be happy to work with you and your staff on this issue.

(b) Allegations have been made that property insurers have colluded to deny claims along the Gulf Coast in the aftermath of Hurricane Katrina. What has the Department of Justice done to investigate such claims?

The Antitrust Division has actively participated in the Department of Justice Hurricane Katrina Fraud Task Force, which is led by the Department's Criminal Division. The Antitrust Division's involvement includes programs to detect and deter collusive conduct in the post-Katrina marketplace, and is integrated into the Division's criminal enforcement activities of the Atlanta and Dallas Field Offices. The Department is aware of allegations that property insurers have colluded to deny claims in the aftermath of Hurricane Katrina, and is committed to investigating collusive behavior and bringing enforcement actions whenever such behavior violates the antitrust laws.

Answers of Assistant Attorney General Thomas Barnett
To Written Questions for the Record for Chairman Patrick Leahy
Hearing on "Oversight of the Enforcement of the Antitrust Laws"
United States Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights

1. You both highlight in the testimony presented to the Committee that you have made a priority of promoting "antitrust policy convergence" with the international community. This is an issue that was also stressed in the Department of Justice's and Federal Trade Commission's testimony during the last oversight hearing in September 2002. Then-Assistant Attorney General Charles James testified that "[i]ncreased globalization is one of the dramatic changes taking place in our economy that is creating new challenges for antitrust enforcement." He promised that, after years of talk about convergence, "[n]ow the Antitrust Division is taking aggressive steps to turn this talk into action." Similarly, then-FTC Chairman Muris testified that "[b]ecause competition increasingly takes place in a worldwide market, cooperation with competition agencies in the world's major economies is a key component of our enforcement program."

(a) What concrete progress has been made in antitrust policy convergence since 2002?

The Antitrust Division has made it a priority to promote international convergence on sound legal and economic antitrust enforcement standards, and through the U.S. antitrust agencies' bilateral and multilateral efforts significant progress has been made towards greater antitrust convergence.

For example, the International Competition Network (ICN), which the Division and the Federal Trade Commission (FTC) helped to launch in 2001 and which now includes 100 members from 88 jurisdictions, provides an opportunity for senior antitrust officials and non-governmental advisors from developed and developing countries to work together to achieve practical improvements in international antitrust enforcement. Through its 8 Guiding Principles and 13 Recommended Practices for merger notification and review procedures, the ICN's Merger Working Group—which is chaired by the Division—has brought much needed procedural coherence to multi-jurisdictional merger review. The Merger Working Group pays close attention to the manner in which these Guiding Principles and Recommended Practices have been implemented by member agencies.

By last count, 40 jurisdictions have made or proposed changes that would bring their merger regimes into closer conformity with the Recommended Practices. The Merger Working Group has also laid important groundwork for future convergence on substantive merger issues through its work analyzing the merger guidelines of various jurisdictions. In particular, the practical, user-friendly Merger Guidelines workbook that was adopted in May 2006 provides both new and established antitrust agencies with detailed insights into the basic framework used in the substantive assessment of mergers.

In addition, the European Commission has adopted horizontal merger guidelines that incorporate concepts—such as the role of efficiencies—that are similar to principles used by the U.S. agencies. In contrast to prior practice, the EC now has a Chief Economist and numerous well-qualified staff economists, and continues to invigorate its use of economic analysis in its approach to antitrust enforcement. The Division believes that one of the significant drivers behind these developments has been the frank exchange of ideas that has occurred by virtue of the cooperation and coordination between the United States and the EC on merger enforcement. The US-EU Best Practices for Merger Reviews also provide insight into the way in which the agencies cooperate on merger matters, and are available at www.usdoj.gov/atr/public/international/docs/200405.htm.

The Organization for Economic Cooperation and Development (OECD) is another multilateral organization that provides a setting where its members can seek answers to common problems, identify best practices, and coordinate antitrust policies. In March 2005, the OECD Council of Ministers adopted a recommendation relating to merger review that buttresses the ICN's important work in this area. And in October 2005, the Committee approved a set of best practices on information sharing among antitrust authorities in cartel investigations, which strengthens the international consensus on the value and methods of meaningful law enforcement cooperation against cartels.

In addition, the OECD's longstanding recommendation on antitrust cooperation has also been instrumental in fostering cooperation among its thirty members on individual enforcement matters. The Recommendation provides a framework for cooperation between antitrust agencies on law enforcement matters, including notification, exchange of non-confidential information, coordination and comity (the Recommendation of the Council Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade is available at webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C(95)130).

In the cartel area, an increasing number of countries—including the major economies of Canada, Japan, and the United Kingdom—have come to recognize that criminal sanctions are a critical tool for deterring and punishing cartels. Many governments have benefited from the lessons we learned with our successful amnesty program by devising programs of their own. In February 2002, for example, the EC issued a revised amnesty program (recently amended), which improved transparency and predictability, and created the opportunity for full immunity after an investigation has begun. This program has already proven to be a great success. More recently, in 2006 Japan introduced its first antimonopoly leniency program, providing a complete exemption from administrative fines and criminal prosecution for the first company to come forward, and reduced administrative fines for up to two other applicants.

In addition, the Division promotes convergence at the bilateral level through consultations on a wide range of antitrust policy matters. The Antitrust Division (along with the FTC) meets regularly with counterparts from the EC, Canada, Japan, Mexico and South Korea, and has close informal ties with the antitrust authorities of many other countries. The Division participates in informal working group meetings and videoconferences with foreign antitrust agencies on merger, monopolization and intellectual property matters. All of these efforts enable enforcers from different jurisdictions to compare approaches and to bring policies into greater conformity.

(b) What are the biggest obstacles to convergence that remain?

Despite the progress that has been made towards greater antitrust convergence, differences in the outcomes of particular antitrust enforcement matters may occur. Even if enforcers continue to move towards convergence on the economic principles that underlie sound antitrust policy, there will remain notable differences between and among the significant enforcement regimes worldwide. There are differences in how enforcement agencies are structured and how they work with other prosecutorial agencies in the jurisdiction. There are differences between jurisdictions' foundational antitrust statutes, and in the procedural rules that govern antitrust prosecutions. There are also differences in enforcement priorities, driven in part by the length of time since a jurisdiction adopted a market economy and by the level of experience its agencies have in antitrust enforcement.

In order to minimize the risk of divergent outcomes in particular investigations, the Division cooperates with its foreign counterparts on individual enforcement matters, primarily through bilateral cooperation agreements. The United States is party to eight such cooperation agreements, with Australia, Brazil, Canada, the EC, Germany, Israel, Mexico, and Japan (copies of the agreements are available at www.usdoj.gov/atr/public/international/int_arrangements.htm). Cartel cooperation also occurs through Mutual Legal Assistance Treaties. Although there have been a few high-profile, well publicized cases in which the United States and other enforcers have reached divergent results, there has been considerable convergence in recent years. Indeed, despite certain differences in our respective antitrust laws, the Division has tended to reach the same result as its counterparts when it has become fully engaged with them on the analysis of a particular enforcement matter working from a common set of facts.

(c) In what specific ways have, or may, different competition enforcement policies in foreign jurisdictions affected business practices in the United States?

Although relatively few in number, there have been instances in which specific antitrust investigations in the United States have reached different outcomes than in other jurisdictions based on substantially similar facts. In some circumstances, the remedy that must be adopted to address one jurisdiction's enforcement concerns may affect the firms' commercial practices in another jurisdiction; thus, even though the merger would go forward, the merging parties' business may be affected even in jurisdictions where no antitrust enforcement action was taken. In rare circumstances, where no remedy is available that would address a particular jurisdiction's concerns and that enforcer opts to block the transaction, it is possible that a merger would not go forward even in jurisdictions that did not choose to take any enforcement action. Similar differences in outcomes are also possible in non-merger investigations.

(d) What issues are implicated by the extra-territorial reach of foreign competition laws on United States law? Is such extra-territorial reach a concern for the antitrust enforcement agencies and, if so, what steps are you taking to address it?

The risk that decisions of antitrust enforcers in other jurisdictions may affect business practices—and consumers—in the United States is a concern, and the Antitrust Division has taken a number of steps to address it. As an initial matter, the United States antitrust laws confer broad U.S. jurisdiction over conduct that occurs outside the U.S. but that is meant to affect, and does affect, U.S. commerce. In a globalized economy, that makes a great deal of sense. In the same way, other jurisdictions that take antitrust concerns seriously employ a similar jurisdictional test to foreign conduct affecting their own economies.

The U.S. antitrust enforcement agencies consider international comity in enforcing the antitrust laws. All of the cooperation efforts detailed above help promote comity. In addition, U.S. bilateral antitrust cooperation agreements explicitly provide for the consideration of comity. Typically, these agreements require that each party, consistent with its own laws and important interests, give careful consideration to the other party's important interests throughout all phases of enforcement. Many of the agreements list the specific factors the parties should take into account in applying comity to particular cases. The Division has also agreed to consider the important interests of other nations in accordance with the OECD recommendation on antitrust cooperation.

In addition, the Antitrust Enforcement Guidelines for International Guidelines for International Operations ("International Guidelines"), which were issued jointly by the Department of Justice and the FTC, elaborate on the Antitrust Division's approach to comity. Specifically, they provide that the Antitrust Division will consider whether the "significant interests of any foreign sovereign would be affected" when determining whether to assert jurisdiction to investigate a matter or bring a case, or to seek remedies in a given case. The International Guidelines state that the Agencies will take into account "all relevant factors," including the relative significance to the alleged violation of conduct within the United States compared to conduct abroad, the degree of conflict with foreign law, and the extent to which the enforcement activities of another country with respect to the same persons, including remedies, may be affected. Several speeches by Division officials have also addressed comity issues. See, for example, the remarks of former Assistant Attorney General R. Hewitt Pate before the Fordham Corporate Law Institute in 2004, "Current Issues in International Antitrust Enforcement," explaining that comity is a realistic goal and one that will become more important as antitrust regimes proliferate, and that an "antitrust system in which each agency simply lines up to take its whack at the piñata" is not workable.

Answers of Assistant Attorney General Thomas Barnett
To Written Questions for the Record for Senator Arlen Specter
Hearing on "Oversight of the Enforcement of the Antitrust Laws"
United States Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights

1. Health Care

It sometimes appears as if your two agencies are working at cross purposes in the health care industry. The Antitrust Division continues to approve mergers that strengthen the market power of health plans and insurers while the FTC continues to prosecute groups of doctors that try to counter that market power. The situation seems somewhat untenable.

a. Do you have any suggestions for what can be done about this situation?

I do not believe that the Antitrust Division and the FTC are working at cross-purposes in the health care industry. We are both enforcing the antitrust laws, and both agencies have pursued merger enforcement when appropriate. In 2005 the Division sued UnitedHealth and PacifiCare because their proposed merger threatened to raise prices and reduce the quality of health insurance in Tucson, Arizona, and to lower the reimbursement rates of physicians in Tucson and Boulder, Colorado. We have also been active in a variety of other health care markets, including physician services. The Division sued the Federation of Physicians and Dentists and three doctors to stop unlawful activities involving coordinating the fee negotiations of Cincinnati-area OB-GYNs with health plans.

The Federal Trade Commission and the Antitrust Division have a long-standing process for allocating our shared antitrust enforcement authority between ourselves so as to avoid duplication of enforcement effort, although health care is a sector in which both agencies are active depending on the particular markets involved. The Division and the FTC apply common antitrust principles consistently across healthcare markets, and oppose the acquisition of market power by both health plans and physicians under the same standards set forth in the agencies' Horizontal Merger Guidelines. Both agencies closely scrutinize such transactions and bring challenges where warranted, and each case turns on the facts of the particular market.

For instance, in 2004, the Division closed its investigation of UnitedHealth's acquisition of Oxford because the facts did not show that the merger would give the combined firm market or monopsony power in the markets in which they competed (A more thorough explanation of the Division's conclusions is available at www.usdoj.gov/atr/public/press_releases/2004/204676.pdf). That same year, the Division also announced that it would not challenge Anthem's acquisition of WellPoint, even though they were two of the nation's largest health plans, since the facts did not show that the merger would give the combined firm market or monopsony power in any market in which they competed (an explanation of the Division's conclusions are available at www.usdoj.gov/atr/public/press_releases/2004/202738.pdf).

The Division and the FTC apply these same principles to physician conduct. While some doctors characterize their activities as "countering" health plans' market power, the types of anticompetitive joint selling among competing physicians that the agencies challenge have the effect of depressing provider availability and raising costs to health plans, which in turn raises the price to consumers. We hope that consistent, judicious application of the antitrust laws to health care markets, including both health plans and physicians, will result in less conduct that violates the antitrust laws, to the benefit of consumers.

2. McCarran-Ferguson Repeal

I have been told that the Justice Department would likely be the agency that would enforce the antitrust laws with respect to the insurance industry if we succeed in repealing the McCarran-Ferguson antitrust exemption. Assuming the full operation of the state action doctrine, which would preserve areas in which the states regulate, is there any reason why the antitrust laws, which apply to virtually every other industry in America, should not apply to the insurance industry?

The antitrust laws are the chief legal protector of the free-market principles on which the American economy is based. Experience has shown that competition among businesses, each attempting to be successful in selling its products and services, leads to better quality products and services, lower prices, and higher levels of innovation. The antitrust laws ensure that businesses will not stifle this competition to the detriment of consumer welfare. These principles apply to those who offer professional services and financial products just as they do to traditional manufacturers and merchants.

Accordingly, the Department has historically opposed efforts to create sector-specific exemptions to the antitrust laws. The Department believes such exemptions can be justified only in rare instances, when the fundamental free-market values underlying the antitrust laws are compellingly outweighed by a paramount and incompatible public policy objective.

Some commentators suggest that the rationales for the continued existence of the antitrust exemption in the McCarran-Ferguson Act appear worthy of reconsideration. Prior to 1944, regulation of the business of insurance was seen as the exclusive province of the states. In that year, the Supreme Court held in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944), that the insurance business was within the regulatory power of Congress under the Commerce Clause, and thus was subject to the antitrust laws. This decision was perceived to threaten state authority to regulate and tax the business of insurance. The McCarran-Ferguson Act was designed to return the legal climate to that which existed prior to *South-Eastern Underwriters* by specifically delegating to the states the authority to continue to regulate and tax the business of insurance. It also created a broad antitrust exemption based on state regulation. This antitrust exemption applies where three basic requirements are met: (1) the challenged activity must be part of the "business of insurance," (2) that business must be regulated by state law, and (3) the activity must not constitute boycott, coercion, or intimidation.

Some suggest that the context that justified the broad insurance antitrust exemption in the McCarran-Ferguson Act when it was enacted in 1945 has since changed. For example, to the extent that the exemption was designed to enable the states to continue to regulate the business of insurance, it may no longer be necessary to achieve this objective. The "state action" defense, which had been announced by the Supreme Court in *Parker v. Brown* in 1943, but was undeveloped in 1945 when the McCarran-Ferguson Act was enacted, has now been the subject of many Supreme Court opinions. As you indicate, this defense allows a state effectively to immunize what the antitrust laws otherwise may proscribe by clearly articulating and affirmatively expressing a policy to displace competition, and by actively supervising any private conduct that might be involved.

Moreover, the application of the antitrust laws to potentially procompetitive collective activity has become far more sophisticated during the 62 years since the McCarran-Ferguson Act was enacted. Some forms of joint activity that might have been prohibited under earlier, more restrictive doctrines are now clearly permissible, or at very least analyzed under a rule of reason that takes appropriate account of the circumstances and efficient operation of a particular industry. Thus, there may be less reason for concern that overly restrictive antitrust rulings would impair the insurance industry's efficiency.

In considering any antitrust exemption, the flexible nature of the antitrust laws as interpreted in such cases as *General Dynamics*, 415 U.S. 486 (1974), *GTE Sylvania*, 433 U.S. 36 (1977), *Broadcast Music*, 441 U.S. 1 (1979), and *Northwest Wholesale Stationers*, 472 U.S. 284 (1985), should be recognized. Those suggesting that particular procompetitive behavior would lead to scrutiny under the antitrust laws and should therefore be exempted from their application should also consider the economically sound competitive analysis that is used today to circumscribe per se rules and fully analyze other conduct under the rule of reason.

Congress has occasionally recognized a need for clarification of a proper antitrust standard or adjustment of antitrust remedies, but the flexibility of the antitrust laws and their importance to the economy generally weigh against antitrust exemptions. The Division would be happy to work with you and your staff on this issue.

3. <u>Credit Cards</u>

It is my understanding that the two largest credit card companies, Visa and MasterCard, impose stringent rules that prevent the banks that issue their cards

from competing with one another. For example, Visa and MasterCard, which the courts have found possess substantial market power, require any merchant that accepts a Visa or MasterCard credit card to accept all Visa and MasterCard credit cards—regardless of the fee that the issuing bank charges. It seems to me, and others have similarly commented, that these rules prevent banks from competing with each other on the fees they charge, which keeps those fees—so-called "interchange fees"—artificially high. It seems to me that Visa and MasterCard may be abusing their market power by imposing such rules, and may be violating the Sherman Act.

a. I understand that the Justice Department has conducted a number of investigations and brought several antitrust suits against MasterCard and Visa over the years, so I'd be interested in hearing your views on whether the MasterCard and Visa rules might reduce competition and violate the antitrust laws?

The Justice Department works to preserve competition in all dimensions of the payment cards industry, both among the payments networks and among banks, and thoroughly investigates any credible evidence of Sherman Act violations. In addition, the Department works to preserve competition in other markets that may directly or indirectly affect the price the merchant pays for credit card transactions, such as credit card processing and credit card issuing.

The Justice Department filed suit against Visa and MasterCard in 1998 in part because certain of their rules inhibited network competition, and restricted banks' competitive options in their competition for customers. As a direct result of our suit, in 2004 Visa and MasterCard were required to rescind rules that inhibited their member banks from partnering with American Express, Discover, and other competitive networks. In the wake of that, both American Express and Discover have partnered with Visa and MasterCard member banks to issue their payment cards.

Regarding the specific issue of rules that Visa and MasterCard have in place that mandate acceptance of all credit cards bearing the Visa or MasterCard brand regardless of the issuing bank, it should be noted that American Express and Discover impose similar rules with regard to their credit cards. Merchants are not allowed, with regard to any of those four networks, to selectively accept cards based on the issuing bank, the co-brand partner, or the type of credit card.

Competition in the credit payments industry occurs at several levels. Payments networks, such as Visa, MasterCard, American Express, and Discover, compete with each other for the business of banks and merchants. Issuing banks, such as Citibank and Wells Fargo, compete with each other for the business of selling credit cards to potential cardholders. Acquiring banks, such as Bank of America Merchant Services or Chase Paymentech, compete with each other for merchant contracts in the processing of transactions initiated by cardholders. And, of course, merchants compete with each other for the business of selling goods and services, including through the decision of whether to accept certain cards, or any cards at all.

There are a number of prices involved in payment cards. Payment networks generally charge a separate "switch" fee to both the issuing and acquiring banks on each side of the transaction. Payment networks also determine an "interchange" fee, usually a percentage of each transaction, transferred from the acquiring bank to the issuing bank. Acquiring banks typically account for the cost of the switch and interchange fees in determining the final transaction fee that they charge merchants. Merchants must account for the cost of handling a sale by credit card as part of their cost of doing business, and ultimately may pass a portion of the cost through to customers as part of the price of their goods and services.

A factor in the analysis of competition in this industry is that issuing banks do not individually determine the interchange fee. Each payment network determines the level of the interchange fee. In order to assure cardholders that their credit card will be honored by any merchant that claims to accept that particular network brand, the payment network will typically enforce a rule that all merchants who accept its network must do so regardless of which bank issued the credit card. The networks determine a common interchange fee for all member banks in order to preserve this assurance and in order to preserve wide acceptance of the network brand across many merchants. If issuing banks were to set their own interchange fees, then individual banks might be tempted to charge fees high enough that some merchants would not wish to accept that bank's credit card, or possibly not accept the payment network brand at all. This type of behavior would inhibit universal acceptance of the payment network's brand, which would increase confusion as to which cards of a particular brand a merchant will accept.

Finally, it is important to note that a merchant fee that is perceived to be high is not necessarily indicative of excessive market power on the part of credit card networks. For instance, merchants have generally paid a higher price to accept American Express cards in recent years than they have paid to accept Visa or MasterCard, though the latter are larger and are often considered to have more market power. Though the "technical" costs of card issuance have not necessarily increased in recent years, card issuers compete to attract consumers with benefits such as promotions, rewards programs, and rebates. As this type of competition increases, the "real" costs of issuing cards may increase. The costs of this competition may be funded by increases in credit card interchange rates. While it is not clear that this type of competition is driving interchange rate increases in the United States, the Department continues to keep a watchful eye on competition in this important industry, and will investigate thoroughly any evidence of violations of the antitrust laws.

Responses to Post-Hearing Questions
for FTC Chairman Deborah Majoras

Antitrust Oversight Hearing on March 7, 2007
Subcommittee on Antitrust, Competition Policy and Consumer Rights

QUESTIONS FROM CHAIRMAN LEAHY:

You both highlight in the testimony presented to the Committee that you have made a priority of promoting "antitrust policy convergence" with the international community. This is an issue that was also stressed in the Department of Justice's and Federal Trade Commission's testimony during the last oversight hearing in September 2002. Then-Assistant Attorney General Charles James testified that "[i]ncreased globalization is one of the dramatic changes taking place in our economy that is creating new challenges for antitrust enforcement." He promised that, after years of talk about convergence, "[n]ow the Antitrust Division is taking aggressive steps to turn this talk into action." Similarly, then-FTC Chairman Muris testified that "[b]ecause competition increasingly takes place in a worldwide market, cooperation with competition agencies in the world's major economies is a key component of our enforcement program."

(a) What concrete progress has been made in antitrust policy convergence since 2002?

(b) What are the biggest obstacles to convergence that remain?

(c) In what specific ways have, or may, different competition enforcement policies in foreign jurisdictions affected business practices in the United States?

(d) What issues are implicated by the extra-territorial reach of foreign competition laws on United States law? Is such extra-territorial reach a concern for the antitrust enforcement agencies and, if so, what steps are you taking to address it?

The FTC, along with DOJ's Antitrust Division, has worked to promote convergence toward sound antitrust policy and enforcement among the world's increasing number of antitrust agencies. In January 2007, I combined the staff in various offices to establish the Office of International Affairs to give additional strength and prominence to our efforts.

(a) What concrete progress has been made in antitrust policy convergence since 2002?

Following the *GE/Honeywell* case, the U.S. antitrust agencies and the European Commission established working groups to pursue convergence on merger review issues, including on review procedures and the analysis of conglomerate mergers, and have consulted on numerous policy initiatives in all areas of antitrust policy. Examples of progress in convergence since 2002 include:

1. In 2002, the FTC, DOJ and European Commission issued "Best Practices on

Cooperation in Merger Investigations,"[1] which sets forth steps the agencies follow when they concurrently review proposed mergers and provides guidance to business and the bar on facilitating coordination between the reviewing agencies.

2. In 2004, the EC changed the substantive test for mergers from the dominance test, which occasionally led to different analyses in trans-Atlantic investigations, to a standard that is virtually identical with the substantial lessening of competition test in Section 7 of the Clayton Act.

3. In 2004, the EC adopted horizontal merger guidelines that, in most regards, provide for the same analysis as under the DOJ-FTC horizontal merger guidelines.

4. The EC's and U.S. agencies' policies on merger remedies have grown closer, building on the EC's 2001 remedies notice, which as issued after close consultation with the FTC and DOJ.

5. The EC created the office of Chief Competition Economist, reporting to the Director General for Competition, to incorporate more economic analysis in all areas of EC competition policy enforcement. Economists from this office work closely with FTC and DOJ economists on significant cross-border investigations.

6. In 2004, the EC issued Technology Transfer Block Exemption Guidelines, which provide that the Commission will evaluate most intellectual property license agreements under a rule of reason, moving EC enforcement policy closer to American antitrust principles, as embodied in 1995 DOJ-FTC guidelines on IP licensing and antitrust.

7. Canada's recent policy statements on merger remedies, regulated conduct, and the treatment of information under the Competition Act that provide for policies that closely parallel the U.S. approaches to these subjects.

8. Japan has revised its merger guidelines of 2004 and 2007 move its framework of analysis closer to the DOJ-FTC horizontal merger guidelines.

9. During the past few years, over 35 jurisdictions have changed their merger review systems to conform more closely to the International Competition Network's Recommended Practices for Merger Notification and Review Procedures, including by changing notification thresholds to ensure a connection between the merger and the reviewing jurisdiction (e.g., Brazil, Estonia, Korea), replacing market share thresholds with thresholds based on objective criteria such as sales or assets (e.g., Belgium, Colombia, Romania), and increasing the flexibility of

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1 Http://www.ftc.gov/opa/2002/10/mergerbestpractices.htm.

notification timing (e.g., EC, Denmark, Poland). These reforms have been praised for reducing unnecessary costs and burdens in the review of multi-jurisdictional mergers, as well as facilitating coordination among reviewing agencies. The FTC chaired the ICN group that developed the Recommended Practices, as well as Guiding Principles for Merger Notification and Review Procedures that call for, among other things, transparency, procedural fairness, and non-discrimination based on nationality.

10. Over the past years, the U.S. agencies also have instituted reforms that increase our conformity with polices and practices toward international best practice. For example, we have reformed our merger review system to conform more closely to the ICN recommended practices, including through the FTC merger process reforms, the FTC/DOJ merger Commentary, issuing more published explanations of decisions to close second stage investigations, and raising and indexing our premerger notification thresholds.

The FTC continues to work toward convergence through its strong network of bilateral relationships and its leadership in multilateral organizations. Bilaterally, we meet regularly with the staff and heads of foreign antitrust agencies. In addition to our regular meetings with the EC, Japan, and Canada, senior FTC and DOJ officials and I have conducted and continue to participate high-level meetings in China in connection with their draft Anti-Monopoly Law and the new draft guidelines for the review of acquisitions by foreign firms. We also conduct an active technical assistance program around the world, funded principally by AID, in which we assist young antitrust agencies to apply new competition laws in a sound manner.

The FTC is a leader in the ICN. It co-chairs the new working group on unilateral conduct, which will seek to increase convergence in the analysis of monopolization and the conduct of dominant firms. The FTC heads the ICN group that is promoting further implementation of the Recommended Practices, and will be active in an expected new project, led by the Justice Department, on convergence in substantive merger analysis. The FTC plays an active role in the OECD Competition Committee and other international competition fora such as APEC and UNCTAD.

The results of the FTC's work toward international convergence do not always result in a concrete document, and it may not be possible to prove that a compatible outcome in a multi-jurisdictional investigation was attributable to a particular meeting or project. However, although I recognize that there have been major cases in which competition authorities treated a single transaction or practice dissimilarly, there are many more cases in which, as a result of cooperation and increasingly similar analyses, firms benefit from sound and compatible antitrust treatment from antitrust agencies around the world. Despite fears of a serious US-EC rift in the wake of the *GE/Honeywell* matter, there has not been a single merger case in which the U.S. agencies and the EC reached different outcomes in the over five years since that decision, while the US agencies and the EC have reached consistent outcomes in numerous matters.[2]

(b) What are the biggest obstacles to convergence that remain?

Given that over 100 nations with different legal systems, levels of economic development, experience with market economies, and cultures now have antitrust laws, most of which are relatively new, differences in laws and their implementation are inevitable notwithstanding the best of efforts to converge. In some cases, convergence is impeded by different degrees of confidence in the ability of markets to self-correct and work for the benefit of consumers. A lesser degree of confidence in markets can lead to a more interventionist antitrust enforcement policy than the U.S. agencies follow. Similarly, many antitrust authorities strike the balance between the risks of over- and under-enforcement to weigh the risks of under-enforcement more heavily than the U.S. agencies, which are careful to avoid deterring procompetitive conduct. In addition, many antitrust authorities do not rely as heavily as the United States agencies on economic analysis, or do not have the resources or expertise to apply sophisticated economic tools.

While there has been substantial convergence in anti-cartel enforcement and mergers, there is less commonality of approach toward antitrust enforcement involving single firm conduct. This is perhaps the most challenging of areas for antitrust policy, given the fine line between aggressive procompetitive conduct and unlawful exclusionary conduct. The FTC and DOJ are conducting hearings to inform their own policies in this area.

Many jurisdictions enforce antitrust or similar laws against "unfair" practices in situations in which the United States agencies would not act because the firm does not have market power or the practice injures competitors but not competition. Many foreign competition agencies find dominance at levels below U.S. standards for monopoly power, and have a more expansive view of what constitutes illegal conduct by dominant firms – for example, aggressive pricing and marketing policies. The U.S. agencies are working to reduce differences in this area both bilaterally, including in our dialogue with the European Commission regarding their Article 82 review, and multilaterally, particularly in the ICN. The EC appears to be moving toward an analysis that is based more on economic effects than on market structure. Achieving significantly greater convergence in this area is probably a long-term process. The U.S. agencies are making the investments that we hope will bear fruit as agencies gain more experience enforcing their laws and working with international counterparts.

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[2] Recent cases in which the FTC has cooperated closely with the EC and other foreign agencies include: Linde/BOC (*see* FTC press release at http://www.ftc.gov/opa/2006/07/lindeBOC.htm, noting cooperation with the EC), Procter & Gamble/Gillette (*see* FTC press release at http://www.ftc.gov/opa/2005/09/pggillette.htm, noting cooperation with the EC, Canadian, and Mexican competition agencies) and Boston Scientific/Guidant (*see* FTC press release at http://www.ftc.gov/opa/2006/04/bostonscigui.htm, noting cooperation with the EC, the Canadian Competition Bureau, and the Japan Fair Trade Commission), and EC press release at http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/06/491.

Lack of convergence can also arise from the application by some foreign antitrust agencies or governments of factors beyond what the U.S. agencies consider competition policy. These can include protecting small businesses, protecting local employment, and creating "national champions." Last week, I participated in a program at the International Competition Conference in connection with European Competition Day on the topic of national champions, where I took the opportunity to advocate that competition agencies stick to competition analysis, and pointed out the drawbacks of government policies to promote national champions.

(c) In what specific ways have, or may, different competition enforcement policies in foreign jurisdictions affected business practices in the United States?

The United States business community is in a better position than the agencies to respond to this question, but I offer the following based on the agency's experience and perceptions.

Given globalization of business and the proliferation of antitrust laws, it is inevitable that foreign competition policies will affect U.S. firms. We recognize the right of foreign agencies to enforce their competition laws against U.S. firms based on the "effects doctrine," just as we apply U.S. rules to conduct by foreign firms that affects U.S. commerce and consumers. For examples, the U.S. agencies routinely review acquisitions by foreign firms, and require divestitures, including of foreign assets, as a condition of clearance.

The proliferation of competition laws, to over one hundred worldwide, poses challenges for businesses. For example, the increase in merger review regimes, to over seventy-five worldwide, imposes procedural costs and burdens, including multiple filings to agencies with different filing deadlines, information requirements, and timetables for review, as well as potentially onerous translation and authentication rules. The ICN's work in this area, led by the FTC, has contributed significantly to mitigating these costs and burdens. The multiplicity of regimes with different substantive tests also risks divergent analyses and conflicting outcomes although, with the benefit of cooperation and comity, this has occurred rarely to date.

To the extent that competition rules affecting multinational firms differ, it is possible, particularly where markets are local, that firms can calibrate their local activities to conform to different national rules. However, in transnational markets, firms may choose to adopt practices that conform to the rules of many or all of the jurisdictions in which they do business. This risks sacrificing some conduct that we would consider procompetitive in the United States to comply with more restrictive foreign rules.

I believe that the competition enforcement policies of our major trading partners are mostly well-aligned with those of the U.S. agencies, such that foreign competition policies do not significantly distort business practices in the United States. However, I am aware that differences remain, such as more restrictive views by some foreign agencies of the conduct permitted by dominant firms. The FTC therefore continues to work toward increased convergence toward antitrust enforcement principles based on economics and the encouragement of procompetitive conduct.

(d) What issues are implicated by the extra-territorial reach of foreign competition laws on United States law? Is such extra-territorial reach a concern for the antitrust enforcement agencies and, if so, what steps are you taking to address it?

See response to question (c), above. In addition, the U.S. agencies operate under a network of formal and informal cooperation agreements[3] and arrangements with our major trading partners that are designed both to promote cooperation and to minimize and manage conflict. Pursuant to the agreements, the FTC and other agencies notify one another of enforcement matters that affect each other's important interests. The agreements provide a framework for investigative assistance, and for coordinating parallel investigations. They set forth parameters to apply comity factors to take into account the other party's interests, and most include positive comity provisions. The agreements also provide consultation mechanism for disputes, although there has rarely been a need to invoke them.

[3] *See* http://www.ftc.gov/bc/international/coopagree.htm.

QUESTIONS FROM CHAIRMAN KOHL

1. In the last 15 years there has been a tremendous amount of consolidation in the oil industry – the GAO counts 2600 mergers and acquisitions in this industry since 1990 alone. During this time, the FTC has approved most of the oil industry mergers it has reviewed, including the gigantic ones like Exxon/Mobil, Chevron/Texaco and Conoco/Phillips. While each one of these mergers may not have seemed problematic when reviewed, taken as a whole these mergers have greatly increased concentration in the industry.

Many wonder whether new rules or merger guidelines are necessary because of the special circumstances in the oil industry. For example, it is not easy to increase capacity to meet growing demand because of environmental and other restrictions to building new refineries. In addition, consumers cannot respond to higher prices by buying substitute products – people must buy gas to drive to work, and must buy heating oil or natural gas to heat their homes in the winter.

Shouldn't the joint Justice Department/FTC merger guidelines be revised to give extra scrutiny to mergers in the oil industry because of these special conditions?

Although it is true that there have been many mergers and acquisitions in the petroleum industry since 1990, including most of the larger mergers that were consummated in the late 1990s, this does not necessarily mean that the industry has become highly concentrated. Most of the 2600 transaction cited by GAO were acquisitions of production assets, an area in which concentration remains low. Despite moderate increases in concentration at some production levels over the last two decades, particularly since the mid-1990s, most sectors of the petroleum industry at the national, regional, or state level generally remain unconcentrated or moderately concentrated. As measured by the Herfindahl-Hirschman Index,[4] refining concentration in PADDs II through V[5] remains moderate. Although the concentration for refining in PADD I had increased to 2713 by January of 2006, significant additional competition in this area is provided by Gulf Coast shipments and imports which are not factored into the PADD I HHI numbers. Wholesale and brand-level retail concentration at the state level remains unconcentrated or moderate (that is, below 1800) in most cases.[6] In addition, the growth of independent (non-integrated) marketers and hypermarkets has increased competition at the wholesale and retail

[4] The Commission and the Department of Justice measure market concentration by means of the Herfindahl-Hirschman Index (HHI), which is calculated by summing the squares of the market shares of all firms in the market. Under the DOJ/FTC Horizontal Merger Guidelines, markets with HHIs between 1000 and 1800 are deemed "moderately concentrated," while markets with HHIs exceeding 1800 are deemed "highly concentrated."

[5] "PADD" stands for "Petroleum Administration for Defense District." PADD I consists of the East Coast. PADD II consists of the Midwest. PADD III includes the Gulf Coast. PADD IV consists of the Rocky Mountain region. PADD V is made up of the far Western states and includes Alaska and Hawaii.

[6] The correct definition of a market in an antitrust case is a detailed, fact-intensive inquiry that involves both product and geographic components. We must ascertain for which product (or products) the transaction may harm competition, and we also must determine the geographic area over which any anticompetitive effects will be felt. In our analysis of petroleum mergers, national, state, or PADD-wide "markets" rarely correspond to properly defined geographic markets.

levels in many areas.

I believe it would be a mistake to adjust the DOJ/FTC Horizontal Merger Guidelines to require heightened scrutiny of petroleum industry mergers and acquisitions. The antitrust laws are general statutes designed to apply across all industries. They are flexible and adaptable to changes in industry structures and economic learning over time. Applying the same laws and enforcement procedures to all sectors of the economy has served consumers well for over one hundred years. Of course, each industry has unique features, but the Commission and the Antitrust Division are experienced in adapting their investigations to take those features into account. The ease of entry, the exposure to foreign competitors, the pace of technological change, and many other factors are considered in the course of decisions to investigate or prosecute in any industry. After accounting for these factors, the underlying antitrust violations of conspiracies in restraint of trade or unilateral exclusionary conduct, or in the case of mergers, an acquisition whose effect "may be substantially to lessen competition, or to tend to create a monopoly," are common to all industries and require consistent treatment.

In fact, the Commission already gives extra scrutiny to the petroleum industry, due to its importance to the national economy and consumers' pocketbooks. Data released by the Commission show that we have brought merger cases in this industry at lower concentration levels than for cases brought in other industries.[7] These data show that the current Guidelines are sufficient for the Commission to identify, and prosecute, anticompetitive acquisitions in the petroleum industry. It is unnecessary to modify the Guidelines as they apply to this particular industry in order for the Commission to effectively enforce the antitrust laws.

It is difficult to predict all of the consequences of changing enforcement guidelines for one industry. However, it is quite likely that starting down that path will bring calls for special treatment for other industries as well; indeed, calls to change the antitrust laws or Guidelines as they are applied to an individual industry are almost always calls to weaken enforcement, and to allow mergers to proceed that we would regard as anticompetitive. As the Commission has often noted, the antitrust laws are flexible enough to take account of industry variations, such as those you describe, and to protect consumers across all sectors of the economy. At the end of the day, if antitrust enforcement is balkanized, with each industry being subject to a different standard, the Guidelines will become useless, and consumers and business interests will lack useful guidance.

2. Last year, we all saw alarming gas price increases, and gas prices reached record levels of over $3 per gallon in many places around the country last summer. While gas prices receded last Fall, they are rising again. I wrote to you last year asking that you investigate allegations of anti-competitive behavior causing gas prices to rise. What is the status of this investigation today? And what can antitrust enforcement do should gas prices continue to rise?

[7] Horizontal Merger Investigations Data, Fiscal Years 1996-2005 (Jan. 25, 2007), available at http://www.ftc.gov/os/2007/01/P035603horizmergerinvestigationdata1996-2005.pdf.

I share your concern about gasoline price spikes, and we continue to examine them in detail. You may recall that, on May 22, 2006, the Commission delivered to Congress a report on whether gasoline prices had been manipulated, for example, through tightening of refining capacity, and whether gasoline price gouging occurred after Hurricane Katrina.[8] Examining multiple levels of the petroleum industry – including refining and bulk distribution – the Commission investigated various means by which oil companies might have manipulated the supply of gasoline in order to increase prices. We found no evidence that the companies were engaging in such behavior. As for post-Katrina price gouging, we identified 15 instances in which gasoline refiners, wholesalers, or retailers met the definition of "gouging" laid down by Congress in the appropriations statute that mandated this part of the investigation.[9] In all but one such instance, however, local or regional competitive circumstances appeared to explain the price increases imposed by these firms.[10]

On April 25, 2006 – while the investigation described above was in progress – the President called on the Commission to work with the Departments of Justice and Energy to conduct further inquiry as to manipulation of gasoline markets. The Commission received similar requests from then-Chairman DeWine and yourself, as well as others in Congress. In response, FTC staff, with assistance from the Departments of Justice and Energy, began an examination of gasoline prices and industry conditions throughout the United States last year and the many usual and unusual factors that affected prices. Staff is continuing its work on this matter and plans to report its findings to me soon.

I note that the antitrust laws do not prevent all price increases. Indeed, for an economy to function efficiently, prices must be free to rise and fall as supply and demand factors fluctuate. To the extent that prices rise because demand is strong or there are problems in the supply chain, the antitrust laws cannot, and should not, prevent such increases. The antitrust laws prevent price increases caused by collusive behavior between competitors or by unilateral exclusionary conduct by a firm with market power. Commission staff is constantly on the lookout for any evidence of price manipulation through illegal activities.

In addition to our formal investigative work in the petroleum industry, the Commission monitors gasoline and diesel fuel price movements continuously in 20 wholesale regions and approximately 360 retail areas across the nation to identify conduct in petroleum markets that may violate the antitrust laws. Commission attorneys and economists examine each unusual price movement to assess whether it might result from any unlawful anticompetitive conduct.

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[8] Federal Trade Commission, *Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases* (2006), *available at* http://www.ftc.gov/reports/060518PublicGasolinePricesInvestigationReportFinal.pdf.

[9] Section 632 of the Science, State, Justice, Commerce, and Related Agencies Appropriations Act of 2006, Pub. L. No. 109-108, § 632, 119 Stat. 2290 (Nov. 22, 2005).

[10] Some thoughtful reports also have come out of recent efforts by State AGs to examine gasoline prices. *See, e.g.*, Goss, Morse & Thompson, *Report of the Attorney General's Task Force on Motor Fuel Pricing in Nebraska* (Jan. 2006), *available at* http://www.ago.state.ne.us/content/gas_gouging.pdf.

Our ongoing detection efforts complement state and local investigations and oversight of practices in the petroleum industry, including any investigations conducted under the authority of state antitrust or consumer protection laws or pursuant to state price gouging statutes that are triggered when emergency situations develop. The Commission will take swift and decisive action if scrutiny of price movements reveals the use of illegal anticompetitive practices.

3. We have heard many concerns from U.S. companies with global operations about being treated unfairly by other nations' antitrust enforcement agencies. These companies assert that complying with conflicting antitrust review processes is very expensive, burdensome and time consuming. They are also concerned with conflicting results among international antitrust authorities, particularly between the EC and the United States. There are several prominent recent examples that raise concerns, including Microsoft facing numerous antitrust investigations in Europe, and the EC blocking the GE-Honeywell merger in 2002 after the U.S. Justice Department approved. Complaints have also been raised about unfair treatment given to U.S. companies by foreign antitrust authorities in order to protect competing businesses in the foreign nations.

I am very concerned about the burdens placed on U.S. companies from international antitrust authorities. What have you done to achieve greater co-ordination and harmonization between U.S. and foreign antitrust enforcement agencies? Is there anything that we in Congress can do?

The Federal Trade Commission recognizes these concerns, and is a leader in international initiatives to address them. I recently combined the staff in various offices to form the Office of International Affairs to provide increased strength and prominence to the FTC's international competition and consumer protection programs. Promoting convergence toward best practices is a primary goal of the FTC's international antitrust program. While we regret the divergence of outcomes in the two matters to which the question refers, we have, as indicated in our response to Senator Leahy (see response to question (a)), achieved greater convergence with the EC in several policy areas, and have reached consistent outcomes in numerous cases every year.

In recent years, the number of nations with antitrust laws has grown from approximately twenty, many of which did not actively enforce the laws, to over one hundred. Well-designed and implemented antitrust laws can benefit both the local economy and firms doing business internationally. Sound competition policy can support the development of free markets and provide a level playing field for new entrants. However, a multiplicity of antitrust rules also creates the potential for duplication and conflict. Given the number and diversity of jurisdictions with new antitrust laws, some disharmony is inevitable, although significant substantive conflict among agency decisions is rare, and virtually limited to the examples cites. We are concerned about the types of problems referenced in your question, and place a high priority on working to eliminate them by supporting the development of sound competition policy and working toward international convergence both in the analysis of specific cases subject to multijurisdictional review and on antitrust enforcement policies.

1. Effective enforcement coordination: Following *GE/Honeywell,* the U.S. antitrust agencies and the European Commission redoubled their efforts to coordinate their reviews of mergers subject to parallel review. In 2002, the FTC, DOJ, and European Commission issued "Best Practices on Cooperation in Merger Investigations,"[11] which sets forth steps the agencies follow when they concurrently review proposed mergers and provides guidance to business and the bar on facilitating coordination between the reviewing agencies. During the past five years, the FTC has consulted with the European Commission in 50 merger investigations, resulting in the coordination of compatible remedies in 17 of them (most recently, for example, in connection with the *Linde/BOC* merger in the industrial gases industry[12]). Since the conflicting *GE/Honeywell* decisions over five years ago, there have been no instances of conflicting merger outcomes, and numerous cases on which the U.S. agencies and the EC cooperated successfully to achieve consistent analyses and outcomes. More generally, the U.S. agencies cooperate with agencies around the world through formal and informal agreements and arrangements on mutual review of cases to achieve consistent outcomes and minimize enforcement conflicts.

2. International policy convergence: We work closely with counterpart agencies around the world bilaterally and in multilateral organizations to promote convergence. As discussed in my response to Chairman Leahy (attached), the agency's work with the European Commission to minimize differences has contributed to the EC's reforming its substantive merger review test to one that closely resembles the Clayton Act test, and to EC guidelines on merger remedies and technology transfer that move significantly in the direction of U.S. law and policy. We are working with the EC on the issues in its current Discussion Paper on Article 82 enforcement, which would move the EC closer to the U.S. approach to analyzing single firm conduct, and on the EC's draft guidelines on the analysis of non-horizontal mergers. We maintain strong relations and ongoing dialogue with other major counterparts, including the Canadian Competition Bureau on many antitrust guidelines they have issued in recent years, the Japan Fair Trade Commission, including on the recent amendments to their merger guidelines, and the Korean Fair Trade Commission, with which we are negotiating a cooperation agreement.

Multilaterally, in the International Competition Network, which includes almost every antitrust agency in the world, the FTC chairs the Merger Notification and Procedures subgroup, which produced internationally-agreed Guiding Principles and Recommended Practices to streamline multi-jurisdictional merger review. The principles include non-discrimination on the basis of nationality. Over forty jurisdictions have made or plan to make changes to their merger review systems to bring them into greater conformity with these standards, including by changing notification thresholds to ensure an appreciable nexus with the transaction and to base their thresholds on objective criteria. These reforms have reduced costs and burdens on parties engaged in mergers subject to multijurisdictional review. The FTC also co-heads the ICN's new working group on unilateral conduct, the area of antitrust policy on which there is currently the least international consensus. We are working with a large group of ICN members and private

[11] Http://www.ftc.gov/opa/2002/10/mergerbestpractices.htm.

[12] *See* FTC press release at: http://www.ftc.gov/opa/2006/07/lindeBOC.htm; EC press release at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/737.

sector advisors from the U.S. and abroad to build the basis for convergence toward sound policies in this area. We also play an active role the OECD Competition Committee and the competition bodies of APEC and UNCTAD.

3. Technical assistance. The FTC, along with the Department of Justice, conducts a program of technical assistance to assist younger agencies in understanding and soundly implementing new competition laws. The program includes assisting with the development of framework laws and the establishment of new agencies, training competition agency personnel in substantive legal principles, analysis, and investigative techniques, and education directed at supporting institutions including other government agencies, universities, business groups, consumer associations, and the press. We also provide comments to dozens of agencies on proposed competition laws and amendments, and host scores of officials from foreign agencies, who meet with our staff and observe how our agency operates.

The Antitrust Modernization Commission recently issued its final report, which includes recommendations for legislative amendments concerning the International Antitrust Enforcement Assistance Act and funding of the agencies' technical assistance program. We are studying these and other recommendations addressing international antitrust, and would be happy to discuss these with you.

4. Under current law, the Federal Trade Commission is prevented from taking action to prevent anti-competitive conduct in the telecommunications sector because of the common carrier exemption. This exemption divests the FTC from jurisdiction over common carriers, including telecommunications common carriers. Many concerned with antitrust enforcement believe this common carrier exemption should be repealed, in order to strengthen antitrust enforcement over this industry. Do you believe the FTC's common carrier exemption should be repealed with respect to the telecommunications industry? How does this common carrier exemption hinder the FTC's enforcement efforts? What would be the benefits from the repeal of the common carrier exemption?

The Commission has taken the position that the FTC's common carrier exemption should be repealed with respect to the telecommunications industry. The exemption is a relic from a period when telecommunication services were subject to close economic regulation by the Federal Communications Commission (FCC). In recent decades, Congress and the FCC have done away with most of the regime of economic regulation that once applied to the telecommunications carriers, and numerous providers of telecommunications service compete for consumers' business. Furthermore, telecommunications firms have taken the opportunity to expand into many lines of business, such as the offering of Internet access services, that do not constitute common carrier activities. In addition, convergence of technologies has blurred the lines between traditional telecommunications and other goods and services. In light of these market changes and new business activities, the limitations on the FTC's jurisdiction are no longer justified.

As with other industries, FTC oversight of telecommunications firms' business activities is important to ensure that consumers reap the full benefits of a fair and open marketplace. The expertise and tools that the FTC brings to bear are relevant and appropriate to the telecommunications industry and its expanded business activities.

The most urgent problem has been that the exemption stands as a serious impediment to the agency's consumer protection enforcement efforts. Because of the exemption, consumers of many telecommunications services do not receive the benefit of FTC enforcement of the FTC Act's prohibitions against deceptive and unfair practices. The common carrier exemption frustrates effective consumer protection with respect to a wide array of activities in the telecommunications industry, including advertising, and billing practices. Further, as telecommunications carriers expand into other businesses and as traditionally distinct businesses converge, the common carrier exemption frustrates the FTC's ability to stop deceptive and unfair acts and practices with respect to interconnected communications, information, entertainment, and payment services.

As a practical matter, the continuing exemption unnecessarily causes FTC resources to be diverted to determining the reach of the exemption. For example, although common carriage has been outside the FTC's authority, the Commission considers the FTC Act applicable to non-common carrier activities of telecommunications firms. Continuing disputes over the breadth of the FTC Act's common carrier exemption hamper the FTC's oversight of the non-common carrier activities. These disputes increase the costs of pursuing an enforcement action, or may cause the FTC to narrow an enforcement action - for example, by excluding some participants in a scheme - to avoid protracted jurisdictional battles and undue delay in securing a remedy.

QUESTIONS FROM RANKING MEMBER SPECTER

1. Patent Settlements

Why is it not important to take into account the strength of patent claims asserted by the patent holder when considering the competitive effects of a settlement agreement that resolves Hatch-Waxman infringement litigation? It seems to me that if the patent claims being asserted are strong, delayed entry might be justified. And, a settlement payment might permit a generic to settle where the litigation is a bet-the farm, must win undertaking or it could bridge a reasonable disagreement over the strengths of the patent claim. The point is, there may be circumstances in which such a settlement agreement is not anticompetitive, correct?

The Commission's concern about settlements in which a drug patent holder pays the generic challenger to drop the patent challenge and stay off the market does not rest on the premise that the strength of the patent is unimportant or irrelevant to evaluating competitive effects. On the contrary, the problem with exclusion payment settlements is that the patent holder is buying more protection from competition than the patent standing alone affords. That is why the patent holder is paying the generic – to induce its would-be competitor to accept an entry date that is later than the generic would otherwise accept after weighing its prospects for success in continued litigation. The payment is thus used to bolster the strength of the patent. Indeed, the weaker the drug patent holder's prospects of blocking generic entry by the strength of its patent alone, the more likely the patent holder will resort to paying the generic to give up its challenge.

Some have suggested that the only way account for the strength of the patent when assessing a settlement is through some form of direct inquiry into the relative merits of parties' positions. The Commission's approach, however, which looks to the behavior of the litigants, properly focuses the competitive assessment on the circumstances at the time of the settlement (as antitrust law demands), and acknowledges both the uncertainty inherent in patent litigation and the fact that the litigants themselves have the most information with which to assess the likely outcome at that point. Indeed, given the inherent difficulty in predicting the outcome of a never-completed patent case, along with other concerns, courts have declined to undertake a direct assessment of the strength of the patent, even when there has already been a district court decision in the underlying patent case. *See In re Tamoxifen Citrate Antitrust Litigation*, 429 F.3d 370, 387-88 (2d Cir. 2005), *amended*, 466 F.3d 187 (2006), *petition for cert. filed*, http://www.supremecourtus.gov/docket/06-830.htm (Dec. 13, 2006) (No. 06-830).

That a payment may facilitate settlement if parties disagree over the strength of the patent does not suggest that the settlement is benign. When parties settle a Hatch-Waxman patent case without an exclusion payment, their competing interests should operate to ensure that the deal they negotiate fairly reflects the merits of the patent case. But if the parties settle with a payment to the generic to stay out of the market, their negotiation drastically changes. The generic firm profits by not competing, and the brand name company pays the generic and still makes more profit than it would if the generic came to market. In other words, both companies will be better off by avoiding competition than by competing – while consumers lose the prospect of competition and the resulting savings. That is true even when parties disagree on the strength of the patent. Finally, as the Commission's January 2007 testimony discusses, if exclusion payments are not permitted, litigants can and do find other ways to settle their patent disputes.

Can you explain why you believe the Solicitor General's brief in opposition to your certiorari petition in *Schering-Plough* was wrong?

The Solicitor General's brief argued that the Supreme Court should not review the *Schering* case to address what all agreed was an important antitrust issue, but instead should wait for a better vehicle to resolve the question presented. There are several reasons why the Commission thought that the case warranted review, including the following.

The Eleventh Circuit's ruling places settlements of Hatch-Waxman patent litigation nearly beyond the reach of antitrust enforcement. While it was suggested that the decision could be interpreted somewhat narrowly, it is clear that both courts and the industry are reading the decision as establishing an extremely lenient rule.

There is a conflict between the Eleventh Circuit's decision and the policy choices of Congress set forth in the Hatch-Waxman Act. That law sought to encourage challenges to weak patents and provided procedures for early litigation of such challenges, in order to speed generic drugs to market. The Commission disagrees with the court's view that exclusion payment settlements are a natural by-product of this unique patent challenge process and does not believe that the Hatch-Waxman Act may create unique justifications for reverse payments. The Commission has maintained that a law that was designed to facilitate generic entry, should not be turned into a justification for payments designed to keep generics out of the hands of consumers.

In its brief, the FTC argued that the critical importance of this antitrust issue to our nation's health-care costs counseled against waiting. As was discussed in the Commission's testimony before the Senate Judiciary Committee in January of this year, the pharmaceutical industry has reacted to the court decisions and resumed settlements combining compensation to the generic challenger with a restriction on generic entry, with the potential for billions of dollars in higher drug costs every year. It is apparent from recent settlements filed with the FTC that paying the generic challenger to settle has quickly become common practice in the drug industry.

2. <u>Health Care</u>

It sometimes appears as if your two agencies are working at cross purposes in the health care industry. The Antitrust Division continues to approve mergers that strengthen the market power of health plans and insurers while the FTC continues to prosecute groups of doctors that try to counter that market power. The situation seems somewhat untenable.

Do you have any suggestions for what can be done about this situation?

I do not believe that the FTC and the Antitrust Division are working at cross purposes. On the contrary, both agencies are committed to serving consumers by protecting and promoting competition in health care markets, at all levels of the industry. As part of this commitment, the agencies together undertook a series of hearings on a wide range of competition issues in health care, the results of which are detailed in a 2004 report, "Improving Health Care: A Dose of Competition." Among other things, these joint hearings examined competition issues involving health insurers and physicians.

As you know, the agencies allocate enforcement responsibility through a clearance process that strives to make the most effective use of the two agencies' resources. For the past several years, the Division has taken the lead on matters involving health insurers. The Division has investigated several mergers of health insurers and ordered divestitures in some instances.

For its part, the FTC has taken action where physician groups have engaged in naked price fixing, sometimes backed up by collective refusals to deal, in order to extract higher fees from health plans. Such conduct raises the cost of health care and harms individual consumers and others who pay for physician services, including employers, both public and private, as well as government benefit programs that rely on selective contracting with providers.

Although the question suggests that FTC physician price-fixing cases have targeted doctors trying to counter insurer market power, in fact, the joint pricing the agency has challenged was typically not limited to only the largest health plans with which the doctors dealt. Moreover, the size of a market participant, by itself, does not necessarily signify market power. In any event, experience does not support the notion that allowing otherwise competing providers to get together in a unified block to bargain with large insurers leads to lower costs, better service, or other efficiencies or benefits to consumers. There is, however, ample support for the proposition that, in the absence of a suppliers' cartel, the competition among individual providers to enter into contracts with insurers and other third-party payers benefits consumers. In my view, the FTC's actions challenging price fixing by competing, independent physicians make good economic sense and are good for consumers.

Can you also comment on how well the health care enforcement policy statements are working, since we are hoping you will use those as a model for the insurance industry once we repeal the McCarran-Ferguson antitrust exemption?

I believe that the 1996 Statements of Antitrust Enforcement Policy in Health Care are generally working quite well. I am told that members of the bar and the public have found them helpful in understanding how the agencies approach particular issues of recurring interest concerning conduct by health care providers. In general, such policy statements can be a helpful way to address uncertainty that might have the potential to chill procompetitive behavior. Furthermore, clarifying how the agencies understand and interpret the case law and apply it in particular settings can promote compliance.

The FTC and the Department of Justice have also issued antitrust guidelines that are broadly applicable to agreements among horizontal competitors across industries, and thus are relevant to the insurance industry (except to the extent conduct is protected by an antitrust exemption or immunity). The Antitrust Guidelines for Collaborations Among Competitors, adopted in 2000, address a wide range of horizontal agreements among competitors, including joint ventures, strategic alliances, and other competitor collaborations. The guidelines describe an analytical framework to assist businesses in assessing the likelihood of an antitrust challenge to a collaboration with one or more competitors. Like the Health Care Statements, these guidelines help businesses assess the antitrust implications of collaborations with rivals, thereby encouraging procompetitive arrangements and deterring agreements likely to harm competition and consumers.

3. Oil

I commend the extensive work that the FTC has done in petroleum and other energy markets. You have testified that, after a number of investigations, you found little evidence of intentional market manipulation. My question for you is whether you find the type of information exchanges and interdependent commercial arrangements that routinely occur in the downstream markets at all troubling?

As you know, the Commission has conducted a number of important investigations of petroleum markets in recent years, including the Midwest Gasoline Price Investigation[13] and the Western States Gasoline Investigation.[14] In these and other investigations, the potential anticompetitive effect of information exchanges has been an important part of the staff's analysis.[15] In addition, in every merger investigation, Commission staff is alert to any information that may suggest collusive activity between oil companies. To date, the Commission has not brought a case against downstream product exchanges or other interdependent commercial arrangements because the information collected in our investigations did not indicate that such arrangements were anticompetitive.

Some background information may be helpful for purposes of this discussion. Petroleum is largely a fungible product. Although there are different recognized grades of oil – with cleaner

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13 Midwest Gasoline Price Investigation, Final Report of the Federal Trade Commission (Mar. 29, 2001), *available at* http://www.ftc.gov/os/2001/03/mwgasrpt.htm.

14 FTC Press Release, *FTC Closes Western States Gasoline Investigation* (May 7, 2001), *available at* http://www.ftc.gov/opa/2001/05/westerngas.htm.

15 *See, e.g.*, complaints in *TC Group LLC, Riverstone Holdings LLC, Carlyle/Riverstone Global Energy and Power Fund II, L.P., and Carlyle/Riverstone Global Energy and Power Fund III*, L.P., Dkt. No. 4183 (complaint and consent order Jan. 24, 2007, final consent order Mar. 14, 2007), *available at* http://www.ftc.gov/os/caselist/0610197/index.htm; *Chevron Corp. and Unocal Corp.*, Dkt. No. C-4144 (complaint issued June 6, 2005, final consent order July 27, 2005), *available at* http://www.ftc.gov/os/caselist/0510125/0510125.htm; *Valero L.P., and Kaneb Services LLC*, Dkt. No. C-4141 (complaint issued June 14, 2005, final consent order July 26, 2005), *available at* http://www.ftc.gov/os/caselist/0510022/0510022.htm.

and lighter crude receiving a price premium – many refineries can process more than one grade of crude oil. For this reason, the crude oil market is considered a world market, and production from one part of the world can be substituted for production from another part. Refined petroleum products of like grade can similarly be substituted for each other.

Supply and demand conditions in the crude oil and refined products markets can change rapidly, and oil companies sometimes find themselves "short" or "long" on product in one market or another. When this happens, the companies may engage in bartered exchange agreements, or contractual buy/sell agreements in lieu of exchange agreements, to trade product in markets in which they temporarily have too much for product in markets in which they may not have enough.

There are several reasons why companies might engage in exchange agreements. Transportation costs can be minimized because a company does not have to ship the product it owns to the market that is experiencing a shortage; the crude oil or refined products it receives in the exchange in the other market will meet that need instead. Reduced shipping means a reduction in environmental problems from potential spills. Further environmental benefits may occur if crude oil is swapped in order to provide refineries with a source of oil that is better suited to any particular refinery's configuration. Swapping can also alleviate supply disruptions that may temporarily disrupt supply/demand forces in a particular market.

Another type of commercial arrangement that oil companies may engage in is the sharing of downstream facilities, such as terminals or pipelines. Sharing may be efficient if it allows the companies to capture economies of scale that would otherwise be lost because neither company needs an efficient-sized facility.

The antitrust concern with exchange agreements and arrangements to share downstream facilities is that they may be used to exchange information sufficient to facilitate coordination and the detection of deviations from cartel arrangements. The Commission takes these concerns seriously. Nevertheless, the antitrust laws do not flatly prohibit all such arrangements. Because these commercial arrangements may be an efficient means of reducing costs or rationalizing markets, the antitrust laws dictate a rule of reason analysis to determine whether any particular arrangement, on balance, has anticompetitive effects. The evaluation of these kinds of arrangements is a fact-intensive process that requires extensive factual, legal, and economic analysis before a judgment can be made.

4. NFL

Chairman Majoras, I understand that Mr. Barnett has recused himself from issues involving the National Football League since the League is a former client of his, so I'd like to ask your opinion on this. The NFL member teams, which collectively exercise significant market power, have jointly agreed to limit the sale of the rights to televise their games through an exclusive agreement with DirecTV and by selling certain other rights exclusively through their own network, the NFL Channel. It is my understanding that the

NFL's arrangements with cable and satellite providers, including the arrangement with DirecTV and regarding the NFL Network, are not protected from antitrust scrutiny by the Sports Broadcasting Act. I know that you are probably hesitant to condemn such arrangements without conducting a full investigation, but I am interested to know whether the FTC has ever considered conducting such an inquiry with regard to the joint practices of the member teams of the NFL, specifically with respect to their sale of television rights?

The Sports Broadcasting Act grants a narrow exemption from the antitrust laws to sports leagues, including professional football, to transfer telecasting rights collectively. One limitation of this exemption is that the exemption will not apply to an agreement or arrangement where a league places any geographic restriction on where the games are telecast, except that the league may restrict the telecasting of a game into the market of the home team. To the extent that a league places other geographic restrictions on the telecasts, the entire arrangement likely would be outside the narrow exemption offered by the Sports Broadcasting Act.

Nevertheless, the failure to qualify for the exemption does not, by itself, mean that the arrangement is unlawful under the antitrust laws. Due to the potential efficiencies attendant to some exclusive dealing contracts, they are analyzed under the rule of reason, whereby the procompetitive benefits are balanced against any potential anticompetitive effects. Any investigation of this type of contract would have to consider such questions as whether the contracts result in an expansion of the relevant product (presumably out of market NFL games) to additional consumers, whether some new type of product is being produced that could not be produced by each team individually (perhaps some consumers want to buy a package consisting of all games and choose which game to watch each week depending on current won/loss records or the teams), and whether any individual team could replicate these products. Commission staff keeps alert for any indications of anticompetitive effects of such arrangements, and we will, of course, consider any complaints that we receive.

5. <u>Net Neutrality/Telecommunications</u>
As you know, the members of Congress have been considering whether legislation is necessary to protect consumers as the telecommunications market, and especially the internet market, transforms from a near monopoly in many markets to a somewhat competitive market. It is my understanding that, in many markets, consumers have either one or two companies from which to choose to get access to the internet. You have specifically indicated that you do not believe Congress should enact legislation in this area. Does that mean you believe a market in which there is one, or at most two viable competitors, is a competitive market?

To date, I have not taken a position on whether Congress should legislate in this area. I have, however, urged caution and careful study in considering whether and how to regulate, and last year put forward a proposed framework for considering the issue. Recognizing the importance of this issue to consumers and consistent with my belief in a studied approach to it, I announced the formation of the FTC's Internet Access Task Force. The Task Force has been meeting with interested persons on all sides of the numerous issues in the debate, and in February 2007, the Commission hosted a public workshop on broadband connectivity competition policy. The workshop brought together experts from business, government, and the technology sector, consumer advocates, and academics to explore competition and consumer protection issues relating to broadband Internet access, including so-called "network neutrality." One of the workshop panels explored the current and future state of competition in the market for broadband Internet access, including the role that wireless, satellite, and other competitors play in this market. The Task Force expects to issue a report of the workshop later this year.

Regardless of whether new legislation is adopted, the antitrust laws apply to companies in Internet-related industries, and the FTC will continue to enforce them. As an antitrust law enforcement agency, the Commission analyzes competition in the context of specific facts, including details of the particular product and geographic markets involved. The product market for broadband Internet access, for example, appears to have significantly different characteristics in different localities. A meaningful competition analysis also would have to address the potential for new entry, either with existing technologies or with new technologies under development, as well as the likely time line for such new entry. For example, whether a locale in which one or two competitors provide a particular product is competitive necessarily depends substantially both on what products are part of the relevant product market, and on the reasons for the lack of additional competitors and the opportunities for additional entry.

QUESTIONS FROM SENATOR GRASSLEY

(a) What is the status of the Commission study on the practice of "authorized generics" that I requested almost 2 years ago with Chairman Leahy and Senator Rockefeller? When can we expect to obtain that study?

The Commission has designed a study to examine the short- and long-term effects of authorized generic drugs on competition in the pharmaceutical marketplace. In the short term, the entry of an authorized generic may benefit consumers by creating additional competition that reduces generic drug prices. Many generic manufacturers assert, however, that in the long term, consumers will be harmed because an expectation of competition from an authorized generic will decrease the incentives of generic manufacturers to enter by challenging patents held by branded manufacturers. Subject to approval under the Paperwork Reduction Act ("PRA"), the study proposed by the FTC will gather data and documents relevant to assessing both sets of competitive effects.

Because information must be gathered from numerous drug manufacturers, the PRA requires certain steps before issuing the information requests. Last year, the Commission started the process by announcing its proposed study through a notice published in the Federal Register. The notice requested public comments regarding the proposed information requests. Thirteen public comments were filed. Most were supportive of the study's goals, but several stressed the need to better focus the information requests in order to avoid imposing unnecessary burdens on responding businesses.

Commission staff has reviewed the comments carefully, and I believe that the Commission soon will authorize publication, pursuant to the PRA, of a second Federal Register notice that will respond to the initial round of comments, explain revisions to the information requests, and give the public 30 days to submit additional comments. At the same time, the Commission must present a justification for the proposed study, along with the information requests and responses to comments, for review by the Office of Management and Budget. The Commission may issue its information requests 60 days later, unless OMB lodges objections.

It is difficult to project precisely how long it will take to complete the study after information requests have been issued. To a large extent, timing will depend on the promptness of compliance and the difficulties that emerge in working with the data. Prior FTC studies of this nature have been completed roughly 14-15 months after issuance of the information requests. If this study turns out to follow a similar path, it would be completed in 2008, probably in the late summer. I will look for ways to expedite the matter as much as possible.

(b) Could you describe the capacity of the Federal Trade Commission to investigate and make determinations under its industry guidance procedures? What is the potential impact on this capacity should the practices of additional industry sectors, such as agriculture or insurance, become eligible for such reviews?

The Federal Trade Commission responds to requests for business guidance in several different ways including Commission advisory opinions and staff advisory opinions and letters. The Commission may issue an Advisory Opinion when "(1) [t]he matter involves a substantial or novel question of fact or law and there is no clear Commission or court precedent; or (2) [t]he subject matter of the request and consequent publication of Commission advice is of significant public interest." 16 CFR § 1.1 (a). A Commission Advisory Opinion requires a vote of the Commission. The Commission has also authorized its staff "to consider all requests for advice and to render advice, where practicable, in those circumstances in which a Commission opinion would not be warranted." 16 CFR § 1.1 (b). Under the rule, the staff does not answer hypothetical questions and "a request for advice will ordinarily be considered inappropriate where (1) [t]he same or substantially the same course of action is under investigation or is or has been the subject of a current proceeding involving the Commission or another governmental agency, or (2) [a]n informed opinion cannot be made or could be made only after extensive investigation, clinical study, testing, or collateral inquiry." 16 CFR § 1.1 (b).

Most of the FTC's Advisory Opinions on antitrust issues (from both the Commission and the staff) involve the area of health care. This reflects the fact that this industry has been shifting to new forms of organization, resulting in particular legal uncertainties. During FY 1997-2006, the FTC issued 39 Advisory Opinions involving health care. In addition to its health care Advisory Opinions, the FTC has provided Advisory Opinions and staff opinion letters involving other industries. These have involved such varied industries as replacement mechanical parts, real estate sales, dietary supplements, fashion products, and mass-media advertising.

The FTC has been able to respond to all requests for Advisory Opinions where the issuance of such an opinion is appropriate. If the FTC's jurisdiction is expanded to include industries for which statutes current limit jurisdiction, the FTC expects that it will continue to have the capacity to respond to these requests in a timely fashion.

(c) Some countries are investigating Visa and MasterCard's practices in setting payment card interchange fees on behalf of their competing member banks. Merchants in the United States are paying some of the highest interchange fees in the world, yet the United States antitrust agencies have not taken any position relative to this practice. Would you like to comment on the competitive effects of interchange fees? Does the FTC plan to become more engaged on the subject of interchange fees in the near future?

The FTC has not studied Visa or MasterCard interchange fees or any competitive effects of these fees. Historically, banking issues and firms have been within the particular expertise of the Antitrust Division. Recently, for example, DOJ litigated an antitrust case against Visa and Mastercard: *United States v. VISA U.S.A. Inc.*[16] In this case, DOJ alleged that Visa's and MasterCard's exclusionary rules, which prohibited their member banks from issuing credit and

[16] 163 F. Supp.2d 322 (S.D.N.Y. 2001), *aff'd*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 543 U.S. 811 (2004).

charge cards on rival networks (particularly the American Express and Discover networks), were anticompetitive. On appeal, the Second Circuit affirmed the district court decision, concluding that the exclusionary rules "harm competition by 'reducing overall card output and available card features,' as well as by decreasing network services output and stunting price competition." Although this matter did not specifically involve interchange fees, given the expertise gained by the Antitrust Division in litigating this matter, I believe the FTC would continue to defer to the Division on the subject of competitive issues involving Visa's and MasterCard's interchange fees.

SUBMISSIONS FOR THE RECORD

Written Testimony of
Albert A. Foer, President
The American Antitrust Institute
To the Senate Antitrust Subcommittee
March 7, 2007

Chairman Kohl, Members of the Antitrust Subcommittee,

Thank you for this opportunity to present some views of the American Antitrust Institute ("AAI") as you conduct oversight hearings of the two federal antitrust agencies. The AAI is an independent non-profit education, research, and advocacy organization.[1]

As a "watchdog" in this field, we have observed the ebb and flow of antitrust activity at the federal level for over nine years. Were it not for our faith in the historic resilience of antitrust, we would be pessimistic, indeed.

Let us be clear that our pessimism does not lie with the capabilities or professionalism of our current antitrust enforcers. We believe them to be high quality individuals, worthy of individual respect. The problem is that they, along with much of our judiciary, have in varying degrees been captured – captured by a laissez faire world view that is disinclined to observe market failures, tends to assume benign motives of the largest corporations, and is congenitally prejudiced against government's ability to play an affirmative role to protect the public. In short, the neoclassical mindset has captured antitrust and reduced its potential vitality and significance to a hard core.

We should also be clear to say that within the hard core and very occasionally outside of the core, many of the activities of the agencies are being carried out with vigor and excellence. The DOJ continues to investigate horizontal collusion and to bring important anti-cartel cases whose positive impact on the economy is substantial. Its leniency program should be celebrated as one of the great success stories in antitrust history. Its current efforts to reform the real estate residential brokerage industry are particularly valuable.

The FTC, whose Commissioners are collectively among the most talented and experienced in history, often enforces the law with creativity and vigor, as exemplified in its handling of patent, standard-setting, and pharmaceutical cases. Its public hearings and reports on a variety of issues are valuable in providing illumination to educate courts, Congress, and public policy markers.. The FTC should be applauded for its revival of the administrative litigation process which gives it a unique forum to address the antitrust cases with the most complex economic and policy issues.

The two agencies are also to be commended for the ways in which they have worked cooperatively, e.g., on the real estate industry and in some of their joint hearings.

[1] Background is available at www.antitrustinstitute.org. The author is grateful to members of the AAI Advisory Board for their assistance in preparing this document.

Both agencies have given careful attention to administrative improvements. Both agencies have contributed importantly to the development of the International Competition Network as an effective means—and truly creative mechanism-- for bringing the world's antitrust authorities closer together.

But the painful reality is that the level of enforcement in some respects has diminished in a fashion harmful to both competition and consumers. In particular:

- Neither agency has challenged a merger in a federal court trial in over 3 years, an almost unprecedented period of non-litigation. The ability to litigate is essential to the ability to enforce, and this period of non-enforcement can only embolden parties to propose competitively dubious mergers;

- Merger enforcement standards generally are more permissive in many industries, frequently permitting consolidation to as few as 2 or 3 players in a market;

- The agencies are focusing not so much on enforcement as on procedural "innovations" to permit parties in mergers to resolve concerns without enforceable consents and on occasion without a seemingly warranted Second Request investigation;

- Civil enforcement at the Antitrust Division, since the elimination of the Civil Enforcement Task Force, has diminished if not been entirely eclipsed. After six years of the prior Administration (which had created the Civil Enforcement Section that no longer exists), significant cases had been brought against American Airlines, Visa, Mastercard, and Microsoft.

The results of the lack of enforcement are felt by all U.S. consumers in their daily lives. As markets for gasoline, food products, consumer goods, and health care products have consolidated, consumers are now paying more for essential products. Congress should think of diminished competition as an antitrust tax for consumers.

We strongly believe in the important mission of the federal antitrust enforcement agencies. The subcommittee plays a vital role in providing oversight on the enforcement priorities and direction. We unequivocally hope that the subcommittee will focus on antitrust enforcement and Congress will increase the funding of each of the agencies, so that they might do more than they are doing. At the same time, we believe that Congress should insist that the agencies play a larger role in the domestic economy.

<u>The Agencies Should Be Opposing Concentration Of The Economy</u>

Antitrust law was created by Congress and supported on a bipartisan basis for 116 years because it is supposed to protect the public from the abuse of centralized economic power. So focused are our antitrust agencies on what they call "competitive effects" and "efficiency," they no longer really seem to care about concentration of economic power. We believe that Congress wanted antitrust to maintain more than a small handful of rivals in any particular industry. It wanted consumers to have a wider range of choices. It wanted a wider range of rivals kicking each other to come up with better ideas about how to keep ahead of the competition. It wanted to hold open the opportunity for smaller competitors and newcomers to succeed on a level playing field, so that the economy would be open and dynamic and so that the American dream could be satisfied by a larger portion of the population. And it wanted to prevent an increase of the political power that inevitably comes with concentrated economic power.

We do not call for a reactionary return to mindless condemnation of mergers resulting in slight increases in concentration that have little likelihood of affecting consumer choice, quality or prices. However, the pendulum has swing too far in the direction of concentration—not as a result of natural processes but as a result of federal non-enforcement.

Policy Has Encouraged Mergers To Higher Levels Of Concentration

What we have today are Federal Horizontal Merger Guidelines that essentially say that mergers from five major competitors to four will be considered dangerous, a generally reasonable position. In fact, however, only mergers from three major competitors to two are likely to be challenged (though this does not mean they necessarily will be challenged[2]), and even mergers to monopoly, as XM-Sirius would be if satellite radio is found to be a relevant antitrust market, are now put forward by knowledgeable counsel with hope that they will be permitted to slip through. We are well into another merger wave right now, and everyone knows that this is the right time to try to push forward a merger that could be antitrust-provocative, because a subsequent Administration would likely apply a tougher standard. But today's consolidation is a stiff price to pay, because a merger is forever and cannot be un-done in the future.

Why does concentration matter and what should its role be in antitrust analysis? The AAI has thought carefully about the role of concentration and three years ago, after extensive internal discussions, developed a detailed statement that is attached. We believe that it better reflects the intent of Congress and the current state of economic knowledge than the policies being followed today. To summarize the principal points that we made three years ago, which we contend are still relevant:

> Concentration. Recent pronouncements by the government may indicate a movement away from negative presumptions about the effects of exceptionally large mergers in highly concentrated markets. The AAI Statement says that the anti-mergers laws, relevant Supreme Court decisions, and sound public policy considerations all mandate that concentration should continue to play an important role in merger enforcement. Large increases in concentration to very high levels of market concentration should lead to a rebuttable presumption that a merger is likely to lead to anticompetitive conduct.

[2] See the AAI White Paper on the Whirlpool/Maytag merger, http://www.antitrustinstitute.org/Archives/477.ashx., which was permitted to be consummated and the Brocade/McData merger that the FTC recently allowed to go through without remedy or public comment, http://www.theregister.co.uk/2007/01/24/ftc_brocdata_approval/.

Incipiency. Mergers should be evaluated under the incipiency doctrine, a relatively strict legal standard established by the Clayton Act. Although the Sherman Act blocks only those mergers likely to lead to monopoly power or the dangerous probability of monopoly power, the Clayton Act is designed to block mergers the effect of which "may be substantially to lessen competition or to tend to create a monopoly." This means that increases in concentration should be prohibited even if they might not be quite large enough or assuredly anticompetitive to constitute a Sherman Act violation. Recent enforcement policy by the government virtually ignores Congress' incipiency doctrine. Nor have the agencies brought any actions relying on the incipiency doctrine.

Efficiency. National merger policy today rests upon the assumption that mergers usually produce important efficiencies. Yet, respected economic research has found that many, perhaps most, mergers do not lead to significant reductions in cost or to increased innovation. Many, perhaps most, of the predicted efficiencies from mergers have failed to materialize. The AAI Statement urges that in specific investigations, claims of efficiency benefits arising from a merger should be viewed more skeptically, and should be accompanied by empirical evidence demonstrating how these benefits will be achieved and how they will directly benefit consumers.

Potential Competition. Potential entrants can reduce the likelihood of anticompetitive effects from a merger, particularly where efficient small-scale entry by multiple firms is possible. On the other hand, mergers between an incumbent and a potential entrant can cause anticompetitive harm. Accordingly, competitive concerns may arise from mergers that remove significant potential entry, both perceived and likely actual potential entrants. This is a particular concern in high technology markets, where significant competition may occur well before products are sold to consumers. Potential entry should be a more important element in the analysis of the competitive effects of a merger than it has been in recent years.

Here is just one example. Because the agencies have taken a narrow view of the scope of Section 7, they have permitted massive consolidation in the gasoline industry through a series of mergers of most of the major oil companies.[3] The agencies proclaim that they have brought several enforcement actions. But when carefully reviewed they simply have required divestitures where there were clear competitive overlaps in a merger. A greater consideration of both the incipiency doctrine and potential competition effects may have led to far more significant enforcement which may have forestalled this massive consolidation of the gasoline industry. There should be little doubt that consumers pay a high price for this massive consolidation.

[3] Concerning competition in the petroleum industry, see two recent Working Papers by the AAI's Diana Moss at http://www.antitrustinstitute.org/Archives/oil_1.ashx and http://www.antitrustinstitute.org/Archives/oil_2.ashx.

We believe that the correct oversight response would be for Congress to reassert that it expects the agencies to play a more forceful role in evaluating and stopping mergers to high levels of concentration.

Merger Enforcement Has Diminished

Overall the level of merger enforcement has diminished significantly over the past six years. [4] Although this may be partially due to the change in HSR reporting levels and the number of reportable filings, there is a very discernable reduction in the number of Second Requests and enforcement actions.

Since 2004-- the year of DOJ's defeat in *Oracle/Peoplesoft* and the FTC defeat in *Arch Coal*-- neither agency has been to trial in a federal court merger case. This appears to be an unprecedented period of non-litigation by the agencies. The agencies might suggest that they never go to court because no one is willing to litigate with them, but the total lack of litigation and the modest number of consents might suggest that there is a problem of under-enforcement. Have the agencies been snake-bitten? Congress must tell the agencies that they are expected to lose some of their cases—and will not be punished-- if they are doing their job with the appropriate thoughtfulness, courage and energy.

We also have a concern over institutional expertise. One of the reasons the agencies in the past Administration were able to bring a greater number of enforcement actions was that they had the experience of litigating numerous merger cases, Thus, they were able to successfully challenge mergers in critical industries such as Northrup/Grumman, MCI/Worldcom, Microsoft/Intuit, Staples/Office Depot, Drug

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[4] To compare the level of merger enforcement at the FTC and DOJ we looked at the number of Second Requests issued and the number of enforcement actions brought from 1998-2005, as reported in the annual HSR Reports filed with Congress. This enabled us to look at a 4-year period in both the Clinton and Bush II Administrations. There are many reasons for variations in the level in enforcement, most importantly that the United States was in a merger wave toward the end of the 1990s, and HSR thresholds were amended to reduce filing obligations in 2000.

From 1998-2001 the DOJ issued 245 Second Requests, and brought enforcement actions in 177 matters of 72.2% of the investigations. From 2002-2005 they issued 82 Second Requests, approximately 33.5% of the number issued from 1998-2001. Of these 82 Second Requests, 38 or 46% resulted in enforcement actions, a significantly lower percentage than in the earlier period.

From 1998-2001, the FTC issued 161 Second Requests, and brought enforcement actions in 118 matters of 73.3% of the investigations. From 2002-2005 they issued 87 Second Requests, approximately 54.0% of the number issued from 1998-2001. Of these 87 Second Requests, 74 or 85.1% resulted in enforcement actions.

From 1998-2001, there were 15,901 HSR filings and 404 Second Requests or second requests were issued in 2.5% of the HSR filings. From 2002-2005, there were 5137 HSR filings (32.3% of the earlier period). There were 169 Second Requests or Second Requests were issued in 3.3% of the HSR filings. So even though filings have been reduced by over 2/3rds, reflecting fewer mergers and a much reduced portion of mergers having to be filed, the agencies issued Second Requests only in about 1/3rd more matters (as a percentage of HSR filings).

Wholesalers and Heinz/Beech-Nut. By willing to aggressively litigate cases, the agencies protected markets from unnecessary consolidation, built institutional litigation expertise and helped develop merger law. Experience teaches that the ability to litigate is crucial in demonstrating to companies that the law will be enforced.

The Agencies Engage In Procedural "Innovations" That Are Contrary To The Intent Of Congress And The Interests Of Consumers

The merger review process can be costly and time consuming. Merger reviews must be completed within a short period of time and making an assessment of the competitive impact of a merger can be a complex process with many demands for information. Moreover, given the boom of information secured in today's information-friendly, document-intensive economy, even simple document requests can result in massive productions.

Appropriately, both agencies have made efforts to reduce the burdens of the merger review process. The agencies continue to improve and refine the Second Request process as evidenced by the FTC and DOJ issuance of Second Request guidelines and the joint DOJ-FTC effort to conduct an internal review and implement reforms of the merger review process in order to eliminate unnecessary burden, remove costly duplication.

However, in three important respects we believe the Agencies have gone too far in streamlining the process and have ignored Congressional intent in both the HSR and Tunney Acts: (1) resolving matters without issuance of a Second Request, (2) resolving mergers without securing an enforceable consent order; and (3) failing to comply with the obligations of the Tunney Act.

Skipping The Second Request

We recognize that companies may often have important reasons for consummating a transaction within a certain period of time. Sometimes these concerns will put the companies in a position where they ask the agencies simply to enter a consent order based on a limited investigation or even without a Second Request. In these cases it may appear tempting from the agencies' perspective to resolve the case quickly.

Given the ever-increasing complexities of the parties, markets and transactions we believe these procedural shortcuts can be very risky and are contrary to the Congressional intent for the merger review process. The purpose of the Hart-Scott-Rodino Act is twofold: (1) to obtain information about potential anticompetitive effects, and (2) to maintain the status quo until a decision of whether to seek injunctive relief is made.[5] And while the initial pre-merger notice prepared by the parties contains a limited amount of

[5] American Bar Association, The Merger Review Process: A Step-by-Step Guide to Federal Merger Review 117 (2d ed. 2001).

information,[6] the Second Request allows the enforcement agencies to gather additional factual information to investigate any potentially anticompetitive effects.[7]

The Second Request benefits consumers by providing a powerful investigative tool to challenge mergers at their incipiency, and thereby reduce the need for lengthy post-acquisition litigation and divestiture periods. Congress enacted HSR in 1976 in response to the government's inability to conduct complete investigations and to obtain adequate relief because the transactions were so complex that they were "difficult at best, and frequently impossible to 'unscramble' after consummation."[8]

Whether an Agency decides not to issue a Second Request is not a public event. However, based on limited information, we believe both agencies have resolved matters in the past year without the issuance of a Second Request: the FTC's evaluation of the Boston Scientific/Guidant merger and the Antitrust Division's evaluation of the United Healthcare/Pacificare merger. Although both cases resulted in a consent order, we are concerned that by conducting an abbreviated investigation without the benefit of a Second Request the agencies may have missed competitively important issues. We note that after the United/Pacificare merger was consummated, a private antitrust suit was filed alleging the parties engaged in illegal gun-jumping during the merger investigation. With a full investigation this and other anticompetitive conduct may have been uncovered by the Division.

We are also concerned about the efforts of parties in some cases to avoid Second Requests by multiple refilings of the HSR filing. This may be an effort to convince the agency to avoid a Second Request by conducting a slightly longer "informal" investigation. Again, we think this can be a perilous approach, since it is only through the use of compulsory process that the Agencies can make a full assessment of the competitive issues posed by a merger. We have illustrated this point in our comments to the FTC in the Express Scripts/Caremark merger, a merger of two of the three largest Pharmacy Benefit Managers in the U.S.[9]

Finally, we anticipate there will be continued efforts, perhaps led by the upcoming report of the Antitrust Modernization Commission, to refine the Second Request process in ways that will make it more difficult for the agencies to do the work Congress intended. As the Committee evaluates any such proposals, it should keep in mind that only relatively large mergers are reported to the agencies and only approximately 2-3 percent of these result in full-scale investigations. Most mergers are competitively harmless, but the ones that are very large deserve closer scrutiny than many receive. We would urge Congress to press for the agencies to increase the ratio of Second Requests to HSR filings.

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[6] 16 C.F.R. § 803 append. (2005).
[7] *Id.* at §803.20.
[8] H.R. Rep. No. 94-1373, 94th Cong., 2d Sess. 8 (1976), as reprinted in 1976 U.S.C.C.A.N. 2572, 2640-41.
[9] See the AAI's White Paper on this merger at http://www.antitrustinstitute.org/Archives/express_scripts.ashx.

Resolving Mergers Without Consent Decrees

Merger enforcement is increasingly a regulatory process. Mergers are typically resolved by having the parties agree to restructure the transaction either by divesting a business, some assets, or agreeing to some type of behavioral relief. As mergers and markets have become more complex, the nature of the relief in these cases has become similarly complex. For example, enforcement decrees in the pharmaceutical industry often can be over 50 pages long and may involve the use of trustees to assure the success of the order.

One can readily see why an enforceable order is vital to assuring that a merger remedy will be effective. Yet in some cases the Antitrust Division resolves mergers without securing an enforceable consent order. Not only does this potentially hamper the Division's ability to successfully ensure that relief is effective, but it also permits escape from the transparency requirements of the Tunney Act. The Division's practice in this area can not benefit consumers.

The Division Must Abide By The Tunney Act

The 2004 Amendment of the Tunney Act (the "2004 Amendment") sought to reverse the impression of the Courts that their role was limited to "rubber stamping" consent decrees and provide for a meaningful role for public input in the review of proposed remedies. The Tunney Act (the "Act") was originally passed in 1974 to end the practice of courts "rubber stamping" antitrust consent decrees that destroyed competition and harmed consumers.[10] The legislative history of the original Act moreover reflects the sentiments of Senator Tunney, among others, that the trial courts must exercise their "independent judgment in antitrust consent decrees – and not merely act as a rubberstamp upon out-of-court settlements."[11] In direct response to recent cases, which had disregarded this statute and its legislative intent, and had showed signs of a return to judicial "rubber stamping," Congress amended the Act in 2004.[12] Congress specified the purpose of the amendment:

(a) to effectuate the legislative intent of the Tunney Act and
(b) to restore the ability of courts to give real scrutiny to antirust consent decrees.[13]

Under the plain language of the amended Tunney Act, Congress *requires*, rather than *permits*, the court to examine a number of enumerated factors bearing on the competitive impact of the settlement, and mandates a review of the impact of a proposed consent decree upon competition in the relevant market or markets.[14] Congress further acknowledged that the leading case law of the D.C. Circuit Court of Appeals (i.e. the

[10] See *U.S. v. American Telephone and Telegraph*, 552 F. Supp. 131, 148 (D.D.C. 1982) (*citing* S. Rep. No. 93-298, 93d Cong., 1st Sess. 5 (1973)).
[11] Hearings on S. 782 and S. 1088, 93d Cong. 452 (1973) (Senator Tunney).
[12] 150 Cong. Rec. S3610, 108th Cong., 2d Sess. 3610 (April 2, 2004) (Senator Kohl).
[13] *See* 150 Cong. Rec., S3617 (April 2, 2004) (Statement of Sen. Kohl).
[14] *See id.* at § 16(e)(1) (*emphasis added*).

Microsoft case), which interpreted the Act in a manner which made meaningful review of consent decrees virtually impossible, misconstrued the legislative intent of the statute.[15]

Unfortunately, the Justice Department has taken a very narrow view of these amendments, in particular in the Court's review of Verizon's acquisition of MCI (Verizon-MCI) and SBC's acquisition of AT&T (SBC-ATT). DOJ suggested a very limited role for court review. And while the DOJ correctly set forth the *"requires"* language of the statute in the competitive impact statement, they later erroneously assert that the statute *"permits"* a court to consider specifically enumerated factors.[16] No reasonable interpretation of the amended Tunney Act or the legislative history should dissuade a court from actively and independently determining whether a consent decree is in the public interest – the only check on potential government abuses. To hold otherwise would create a new antitrust "fallacy," which would abrogate the power and obligation of independent court review and revert back to the days of rubber stamping any consent decree filed by the government.

We also note that the DOJ permits settled mergers (i.e., those that are permitted subject to conditions) to go forward without awaiting the completion of a Tunney Act review. We believe this position is inconsistent with the Act and is intended to put too great a burden on the court, which if it were to reject the settlement would be forced to "unscramble the eggs" – the very problem that the HSR Act was intended to avoid.

We are pleased to note that Judge Sullivan in the Federal District Court down the street from here appears to be reviewing the two telecommunications mergers with a serious intent to determine whether they are in the public interest. Whatever the outcome, the subcommittee should review his ultimate decision with care to see if this type of detailed review is what is intended.

Civil Enforcement Needs Considerably More Attention at the Antitrust Division

One of the benefits of two federal enforcement agencies is that the public can compare the efforts and achievements of the two agencies. Although in most respects the two agencies' accomplishments are comparable, there is one area in which there is a significant disparity: the lack of civil enforcement at the Antitrust Division. At the FTC there have been numerous civil enforcement actions involving patents, standard setting, health care providers, pharmaceutical manufacturers and high tech markets. Some of these cases have been litigated in FTC administrative proceedings, other cases have been brought in federal district court. Some cases, such as the enforcement action against Unocal, resulted in benefits to consumers worth hundreds of millions of dollars annually.

In the past Administration, the Antitrust Division's civil enforcement was much more active, bringing cases against Microsoft, Visa, MasterCard, American Airlines, Pilkington, Dentsply, NASDAQ, and others. These cases not only brought important

[15] 150 Cong. Rec. S3610, 108th Cong., 2d Sess. 3610 (April 2, 2004) (Senator Kohl)

[16] *See* Competitive Impact Statement, filed on November 16, 2005.

benefits to millions of consumers, they also clarified the law in numerous areas critical to today's high tech economy.

Near the beginning of this Administration, the Division eliminated its Civil Nonmerger Enforcement task force, assigning the tasks to the various other enforcement sections on an industry-by-industry basis.[17] Since then there has been minimal civil enforcement, compared to either the level at the FTC or the level during the prior Administration. We question whether the reorganization has harmed the Division's abilities to fulfill its responsibilities in civil enforcement.

Single-Firm Conduct Must Not Escape Close Scrutiny

Monopoly has always been one of the principal evils targeted by the antitrust laws. The FTC's standard-setting cases (*Rambus, Unocal*) are excellent, but they tend to stand out in their isolation. Today, particularly at the DOJ, there seems to be a question about whether it is more important to protect the public against abuses of dominance in the market or to protect the ability of a dominant firm to compete aggressively. It is not clear where the agencies come out on this, but the rhetoric often seems to have shifted in favor of the latter. While some degree of balance is required, we hope that the joint hearings on single-firm conduct will clarify that protection against abuse of dominance is the dominant enforcement value. Based on various statements from the DOJ, domestically and in the context of criticisms of the European Commission's somewhat more pro-enforcement positions (not to mention its efforts to bully the Europeans into adopting its own views on how to deal with Microsoft), we are not confident that this will be the outcome. We urge Congress to continue to press the agencies to take a vigorous stand against anticompetitive behavior by dominant firms.

One of the important developments in our economy has been the growth of retailers with enormous buying power, changing the traditional power relationship between suppliers and distributors upon which much of antitrust has been based. Wal-Mart is the leading example of a distributor who dominates an entire supply chain in an unprecedented way. In addition, there is continuing and growing concern within the agricultural community of the effects of Buyer Power on independent farmers and ranchers, as the commodity-buying sector has become more concentrated.

We believe that the agencies have essentially ignored these important developments and have mechanistically applied a perspective that monopsony is the exact mirror image of monopoly. Following the government's lead, the Supreme Court adopted this view in its recent *Weyerhaeuser* decision. We believe that this is shortsighted and ignores differences between the exercise of Buyer Power and the exercise of Seller Power, which should be the subject of agency investigation. If the agencies will not look seriously at this, then this subcommittee should take it upon itself

[17] The FTC has a section dedicated to civil enforcement. The Civil Nonmerger Enforcement Section at the Division was created in 1994.

to develop the empirical information necessary to evaluate the significance of the shift of power from manufacturers to retailers.[18]

The Balance Between Intellectual Property Rights and Antitrust Needs to be Restored

Since the creation of the Federal Circuit as a specialized court for intellectual property, there has been a shift in the traditional balance between intellectual property rights (IPR) and antitrust, in favor of IPR. The DOJ seems to have taken the lead in promoting this shift, whereas the FTC appears to be the defender of the traditional balance. Following joint hearings in 2002, the FTC published an excellent report on shortcomings in the patent system. A second report, to be published jointly with DOJ, was supposed to follow, providing guidance for the interrelationship between patents and antitrust – but internal differences have delayed publication lo these many years.[19] We urge the subcommittee to assert the case for balance and to urge the agencies to file separate reports if they cannot agree.

An example of the importance of promoting competition even in the presence of IPR is the acquisition by Monsanto of Delta and Pine Land, now pending before the DOJ.[20]

Private Enforcement Must Be Supported As A Critical Complement to Public Enforcement

Private enforcement is critically important to the American system of antitrust.[21] Through their amicus brief program, the government enforcers seem to take a generally dim view of private enforcement of the antitrust laws; the Solicitor General, usually speaking for the agencies, seemingly inevitably comes down in favor of the defendants' positions. We do not object to the agencies providing guidance to the courts, but we find ourselves consistently in disagreement with the guidance the Solicitor General provides.

[18] Appropriate questions to be answered are set forth in AAI Working Paper 06-07: Albert A. Foer, Mr. Magoo Visits Wal-Mart: Finding the Right Lens for Antitrust.
http://www.antitrustinstitute.org/Archives/559.ashx

[19] A manifestation of the differences between the two agencies on IPR was their disagreement on whether the Supreme Court should grant certiorari to the *Schering Plough* opinion.

[20] See the AAI White Paper on this pending merger at http://www.antitrustinstitute.org/Archives/553.ashx.

[21] It is often estimated that over 90% of antitrust enforcement is through private litigation. An Interim Report of the AAI Private Enforcement Project, encompassing 29 out of an intended 40 case studies and a report summarizing the interim findings, was presented to the Antitrust Modernization Commission. The report was written by Professors Robert H. Lande and Joshua P. Davis. Case studies were prepared by a variety of lawyers, academics, and law students. The study documents recoveries totalling $14.2 - 15.9 billion in cash and suggests that many of the criticisms of private antitrust enforcement may be overstated. http://www.antitrustinstitute.org/Archives/550.ashx.

A good example is the pending *Leegin* case, in which the government is arguing in favor of overturning the per se rule against resale price maintenance, a venerable rule of antitrust that has been repeatedly supported by Congress.[22]

On or about April 2, the subcommittee will be receiving the final report of the Antitrust Modernization Commission (AMC). Based on preliminary votes, it appears that the AMC will be recommending to Congress reform legislation involving indirect purchaser class actions, joint and several liability, and repeal of the Robinson-Patman Act. We have provided memoranda to the AMC pointing out the dangers inherent in the first two areas.[23] The proposed reform relating to the *Illinois Brick* case and its aftermath would gut private enforcement and leave defendants with the benefits of their illegal actions. The modifications to joint and several liability appear to be technical but they would undermine the incentives to settle a case and would have a major impact on the court system. Repeal of Robinson-Patman, which was advocated by Chairman Majoras, could leave important areas of anticompetitive behavior unpoliced. We do not say that Robinson-Patman is a perfect law, but we believe that parts of it should be preserved and that, in any event, it should not be repealed without a much more careful review than was given by the AMC. We call these matters to your attention now, because if the subcommittee still believes in private enforcement, which we strongly support, it will have to face these issues squarely.

We thank the subcommittee for receiving this written testimony. Attached you will find the AAI Statement on Concentration in Horizontal Mergers.

[22] The AAI's amicus brief supporting the per se rule and providing a history of Congressional support, is at http://www.antitrustinstitute.org/Archives/leeg07.ashx.

[23] AAI Working Group Calls on AMC to Withdraw Recommendation on Indirect Purchaser Class Actions, http://www.antitrustinstitute.org/Archives/AdvancedSearch.aspx; Joint and Several Liability: AAI Working Group Says AMC Proposal Would Have Radical Impact, http://www.antitrustinstitute.org/Archives/amc07.ashx.

STATEMENT OF THE AMERICAN ANTITRUST INSTITUTE

ON

HORIZONTAL MERGER ANALYSIS AND THE ROLE OF CONCENTRATION IN THE MERGER GUIDELINES

February 10, 2004
Albert A. Foer, President

Introduction

Market concentration has often played a controversial role in merger law and policy. In the past, some have argued that "big is bad" and the government must use its antitrust tools to stop all trends toward concentration. On the opposite extreme, others have argued that concentration is never a problem as long as government is not creating or supporting entry barriers, because new competitors are always waiting in the wings, forcing even an apparent monopolist to behave in a competitive manner. Although debates about antitrust have moved beyond these older views, merger enforcement today has been criticized for giving concentration either too little or too much weight. A "post-Chicago" position on the proper role of seller concentration[24] and related issues in horizontal merger analysis that relies heavily on recent advances in empirical economic analysis has not yet clearly crystallized. The American Antitrust Institute[25] offers this Statement, based on extensive conversations and debate within the AAI Advisory Board, as a contribution toward crystallization. While the document attempts to reflect a consensus, it cannot and should not be expected that every member of the Advisory Board necessarily agrees with every word or even with all of the general positions taken.

1. Concerns with Mergers.

[24] We have not focused in this statement on concentration at the buyer level, which will be the subject of an AAI conference on June 22, 2004, exploring ways in which buyer power may differ from seller power.

[25] The AAI is an independent education, research, and advocacy organization, described on the Internet at www.antitrustinstitute.org. The drafting of this document has been a nine-month iterative process featuring very heavy input by a drafting committee of seven and repeated circulations to the full Advisory Board for comment. The author and the Board of Directors bear responsibility for the final version.

(a.) Horizontal mergers can raise competitive concerns for a number of reasons. A merger may create opportunities and incentives for unilateral price increases, express collusion or tacit coordination and strategic behavior that artificially disadvantages rivals or suppliers. These effects may lead to higher prices, which are harmful because they transfer income away from consumers and undermine allocative efficiency. They may also lead to higher costs, including the possible creation of so-called x-inefficiency.

(b.) Mergers can also reduce competition along other dimensions, including quality, service, the development of new and better products and other areas that significantly affect consumer choice. In an industry with differentiated products, a horizontal merger may also lead to a reduction in the variety of products, which can also harm consumers.

(c.) Economic research indicates that monopoly slows the pace of innovation. Incumbents may ignore or discourage the development of new products and technologies, particularly radical innovations, and both market and technological uncertainties make it likely that innovations will be forthcoming more rapidly when there are multiple, independent sources of initiative. Enhanced opportunities for express or tacit collusion associated with higher levels of concentration can lead to a reduction in the incentives for innovation and may channel investment by fringe firms or prospective entrants away from projects that would compete against the leading firms.

2. **Concentration.**

(a.) Since the Supreme Court's decisions in cases like *Philadelphia National Bank*, the level of market concentration has played a central role in merger analysis. However, the economics literature of that era that related measures of concentration to profits has been criticized for its over-reliance on questionable measures of profits and its failure to account for factors other than anticompetitive behavior that could explain the correlation between profits and concentration across industries.

(b.) The consensus conclusion from more recent studies using more sophisticated research tools is that increased concentration, at high levels, is associated with higher prices, and is therefore a suitable proxy, at least in the first instance, for an expectation of market power. In particular, as an empirical matter, high seller concentration in a properly defined market with significant barriers to entry is associated with higher prices, all other things being equal, and increases in concentration, particularly substantial ones in markets that are already highly concentrated, may precipitate large price increases.

(c.) Even if one is not persuaded by the economic literature alone, where the literature is inconclusive (as is often the case) it is appropriate to take into account the underlying policies of the antitrust laws, as manifested in legislative history and more than a century of judicial explication, reflecting a preference for open markets and more than a handful of competitors, all other things being equal; and a trust in openness, diversity, and forces of competition.

3. **Presumptions Regarding Concentration.**

(a.) Neither economic theory nor empirical economic research supports a single "bright line" level of concentration that separates anticompetitive from benign mergers in all or even most industries. Nonetheless, empirical results are generally consistent with current merger law: namely, that in general a substantial increase in an already high level of seller concentration creates a *rebuttable* presumption that a merger transaction is likely to have anticompetitive effects. These empirical results also support the appropriateness of a flexible sliding scale approach. That is, the higher the degree of concentration and the larger the magnitude of increase in concentration, the stronger the rebuttal evidence that should be required to overcome the presumption of consumer harm.

(b.) As an empirical matter, small mergers producing a low level of concentration generally are unlikely to be associated with consumer harm. In this regard, cases like *Von's Grocery Company* obviously no longer reflect appropriate merger policy, despite the statute's incipiency mandate. Even though the Guidelines' statements that low-concentration mergers within their safe harbor are "unlikely" to have anticompetitive effects and "ordinarily" require no further analysis are correct, increased guidance could be provided by specifying those rare circumstances where a challenge might nevertheless be appropriate. These exceptions should be made explicit and transparent, and should be limited to situations involving an industry with a history of collusion, or mergers that involve the elimination of a maverick or a weakening of a maverick's behavioral incentives.

(c.) Another reason why presumptions drawn from high concentration should be rebuttable is the fact that market definition is an imperfect procedure and, as a related point, certain common market definition procedures create the potential for systematic errors in defining markets. Procedures deserving reconsideration include: the use of the prevailing price as the pricing benchmark for the *ssnip* test ["small but significant and nontransitory increase in price"] for measuring cross-elasticity of demand; the use of critical loss analysis; and the principle that the agencies will adopt the smallest market definition that satisfies the *ssnip* test. The smallest market principle should be deleted from the Guidelines entirely. The validity of the use of the prevailing price in the *ssnip* test and critical loss analysis should not be assumed, but rather should be carefully evaluated in every merger investigation.[26]

(d.) Though empirical research admittedly does not support a single "bright line" level of concentration or market share for determining when mergers are anticompetitive, the public identification of rebuttable threshold presumptions has served as a useful policy guide, channeling enforcement discretion and yielding an important degree of predictability for business planning. Recognizing that predictability is limited by the inherent vagaries of market definition and the difficulties of forecasting such factors as future market entry and competitive effects, merger analysis should be not so much a scientific endeavor as an administrable process of applying educated judgment to careful fact-finding within a commonly accepted, albeit ultimately imprecise, methodological framework.

4. Incipiency.

(a.) Merger enforcement, while emphasizing microeconomic analysis, must be carried out in light of the intent behind the antimerger statutes, and it is clear that Congress intended this enforcement to embody an incipiency doctrine. While the Sherman Act blocks mergers likely to lead to monopoly power or the dangerous probability of monopoly power, the Clayton Act is designed to block mergers the effect of which "may be substantially to lessen competition or to tend to create a monopoly." This means that increases in concentration should be prohibited even if the anticompetitive effects might not be quite large enough or certain enough to constitute Sherman Act violations.

(b.) This statutory language and the intent behind the Clayton Act as well as Supreme Court precedent, also require a degree of careful, economically informed prediction on the part of enforcers and the courts. Under the circumstances, errors of both over-enforcement and under-enforcement are inevitable, and the underlying facts and economics will often be inconclusive. The incipiency doctrine means that in close cases decision makers should resolve doubts on the side of blocking mergers that might lead to a reasonable probability of market power.

(c.) Preserving multiple competitors is likely to be an efficient administrative rule in otherwise close cases because mergers, once

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[26] The AAI will conduct a symposium on "Combining Horizontal and Vertical Analysis in Antitrust: Implications of the Work of Robert L. Steiner" on June 21, 2004. This will explore whether the role of retailers gross margin is given adequate consideration in market definition and other merger-related issues that arise in the consumer goods sector.

consummated, are rarely undone. Enforcement policy almost never gets a chance to undo a merger that should not have taken place, but there almost surely will be future opportunities to permit consolidation in the industry in question.

(d.) In the absence of an "incipiency" policy, firms in an industry that might be contemplating consolidation may be induced into merging prematurely. When other large firms in an industry are merging, the firm that waits runs the risk of its later merger becoming the proposed merger that finally triggers agency opposition --even though in principle it is no worse or different from those mergers that preceded and thus got in under the wire. Enforcement decisions ought to take into consideration the likely strategic responses to a consummated merger by rivals and potential rivals.

5. **Coordinated Effects.**

(a.) At one time, the analysis of coordinated effects in mergers relied too heavily on the level and change in concentration. Expanding the analysis to include other factors has refined the analysis and made it more reliable. Further refinement of this analysis, including analysis of the pre- and post-merger competitive role of mavericks and other merger-induced changes in the likelihood of coordination, would improve predictions of likely merger effects.

(b.) This is not to say that coordinated effects prediction in the merger context should be identical with analysis of cartel incentives in a price-fixing context. The purpose of merger intervention is to prevent a situation that *may* be conducive to coordination from occurring in the future, not to demonstrate that coordination will inevitably occur.

(c.) With respect to potential coordinated effects, heightened concern has historically arisen around the point at which there will no longer be at least five strong competitors or when a dominant firm may enhance its price leadership role through a merger. We see no reason to revise this general benchmark at this time.

6. **Unilateral Effects.**

(a.) With respect to unilateral effects, the market shares of the merging firms can sometimes be used as a rough proxy of the closeness of substitution between the brands of the merging firms. However, market shares are at best a rough indicator of substitution and generally are inferior to careful factual and empirical analysis, including estimates of cross-elasticities.

(b.) The apparent minimization of unilateral effects analysis by the current federal enforcement agencies represents a step backwards. Unilateral effects analysis has a substantial history in industrial organization economics and represents a rigorous analytic approach. While there may be some basis for concern about over-reliance on simulation models in their current state of development, as a particular method of demonstrating the magnitude of unilateral effects, there is no good basis for skepticism of unilateral effects analysis itself.

(c.) With respect to unilateral effects, heightened concern has historically arisen around the point at which the leading firm's market share is at least 35%. We see no reason to change this benchmark level at this time.

7. Burden Shifting.

(a.) When high market shares and concentration resulting from merger create a presumption of consumer harm, the burden should shift onto merger proponents to demonstrate one or more of the following factors[27]:

(1.) Other reasons exist that demonstrate the inadequacy of measured market shares as a predictor of future competition;

(2.) Sufficient new entry or fringe expansion is likely to occur within a reasonable time to reverse or deter the probable competitive consequences of the merger;

(3.) The premerger degree of rivalry in the market is likely to be sustained or increased and the incentives of the merged firm to compete with incumbents are unlikely to be reduced;

(4.) The merger will permit cognizable efficiencies yielding potential benefits that outweigh the harms threatened by the transaction and thereby eliminate the likelihood of consumer harm.

(b.) If one or more of the above is established, the burden should shift to the government or other plaintiff to show that the merger would likely generate a net anticompetitive effect, taking into account all relevant evidence.

8. Contestable Markets.

[27] Merger case law and the Horizontal Merger Guidelines also properly recognize a narrow failing firm defense.

There is reason to doubt the empirical significance of the strongest version of the 'contestable market' theory, which holds that potential entry can cause even a monopolist benefiting from significant economies of scale to price competitively. This theory wrongly assumes both that entry requires no significant sunk costs (i.e., the entrant's expenditures on inputs can be fully recovered if entry fails) and that the monopolist's price response to entry is delayed.

9. **Potential Entry.**

(a.) Despite the very limited applicability of the pure contestable market model to real world settings, the more general potential entry concept nonetheless is an important element in the analysis of the likely competitive effects of a merger. On the one hand, potential entrants can reduce the likelihood of anticompetitive effects from a merger, particularly where efficient small scale entry by multiple firms is possible and where entry can be secret or sponsored by large buyers. On the other hand, mergers between an incumbent and a potential entrant can cause anticompetitive harm. Accordingly, competitive concerns may arise from mergers that remove significant potential entry, both perceived and likely actual potential entrants. This is a particular concern in high technology markets, where significant competition may occur well before products are sold to consumers.

(b.) Because of the competitive importance of potential entry in many industries, merger policy should place more emphasis on preventing mergers that reduce potential competition. This is an area where the case law has moved too far in the direction of laissez-faire. Federal and state enforcement agencies should undertake greater efforts to bring appropriate enforcement actions, refine the analysis and educate the courts.

10. **Efficiency from Mergers.**

(a.) National merger policy since 1981 has rested on the assumption that most mergers generate important efficiencies and therefore significantly contribute to consumer welfare. This is reflected in the fact that, typically, only 2-3% of mergers large enough to require federal pre-notification are pursued to the second request level of investigation. Yet, respected economic research has found that many, perhaps most, mergers do not lead to significant reductions in cost, although a small proportion of horizontal mergers have led to very significant efficiencies. Many of the predicted efficiencies of mergers have failed to materialize.

(b.) The practical importance of this research is that it is time to re-examine the underlying assumption that allows such a high proportion of significant horizontal mergers to be consummated.

(c.) In the meantime, in specific investigations, claims of efficiency benefits arising from a merger should be viewed skeptically. This is particularly true of theoretical arguments for gains arising from consolidated management and marketing. Moreover, the empirical evidence supporting claims of efficiency gains should be based on the specific cost structure and technology of the firms, and should be accompanied by further evidence that demonstrates how these cost reductions will benefit consumers.

(d.) To be cognizable, efficiencies must be non-speculative, merger-specific, and provide substantial direct benefit to customers. Only efficiencies net of any higher costs caused by the merger represent potential consumer benefits. Claimed benefits that will only arise in the long run are often more uncertain and for that reason should be given less weight.

(e.) Because a high proportion of mergers fail to provide the benefits that were predicted by their proponents and because there are large costs for society when anticompetitive mergers occur, Congress should provide federal antitrust enforcers additional resources to permit more detailed scrutiny of more proposed mergers than is possible today. Enforcers should be encouraged to scrutinize more mergers that might currently be deemed marginal.

11. Research Topics.

Recognition of the failure of so many mergers to produce their predicted benefits suggests that more research be devoted to examination of:

(a.) consummated mergers to evaluate whether or not they led to significant savings and/or price increases;

(b.) proposed mergers that were stopped or restructured as a result of antitrust intervention in order to evaluate the effectiveness of the government's intervention, including the sufficiency of remedies utilized;

(c.) the effects of merger enforcement on innovation, including both the extent to which innovation concerns played a role in past enforcement decisions, and the extent to which merger enforcement and non-enforcement has affected various types of innovation; and

(d.) merger dynamics in network industries, where predictions of merger-enhanced tipping effects may deter entry by potential competitors.

12. Transparency and Evolution.

Greater transparency on the part of the government is a necessary foundation for the beneficial evolution of antitrust policy. Although the government has recently made positive strides toward increased transparency, there remains a need for more detailed explanations of the agencies' reasoning with respect to actions taken (and, in certain instances, not taken); for projects like the joint FTC/DOJ compilation of data on completed investigations; and for other initiatives that will facilitate research by the government and by academics. The history of antitrust should not be characterized as pendulum-like, but rather as an on-going dialogue, continually evolving toward a better understanding of markets and competition within the context of a politically-determined legal framework.

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Testimony

of the

The American Homeowners Grassroots Alliance

Submitted to the

Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights

Hearing on

Oversight of the Enforcement of the Antitrust Laws

March 7, 2007

The American Homeowners Grassroots Alliance (AHGA) commends the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights for holding this hearing on Oversight of the Enforcement of the Antitrust Laws. AHGA is an independent consumer advocacy organization which focuses on policy issues that have a significant economic impact on homeowners and home ownership. AHGA strongly supports the important mission of the federal antitrust enforcement agencies and the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights.

In reviewing the enforcement of our antitrust laws the subcommittee plays a critical role in assessing antitrust enforcement effectiveness and priorities. While we believe that both the Federal Trade Commission and the Department of Justice's Antitrust Division are doing an outstanding job of protecting consumers' interests, given their resources and constraints on the scope of their efforts, we believe that additional funding for both of these agencies and a broader mandate for action is important to enable them to fully protect the interests of homeowners and other consumers.

The aggressive and successful efforts of both of these agencies to address antitrust violations in the real estate services sector are very much appreciated by American homeowners. In particular, we salute DoJ's Antitrust Division for filing suit in September, 2005 against the National Association of Realtors (NAR) to prevent the implementation of proposed industry rules that would restrict competition from real estate brokers who use the Internet to serve American homeowners. Because 80% of home buyers use the Internet in their home searches today, the rule, if implemented, would have greatly disadvantaged those home sellers who use Internet-based real estate brokers that often offer real estate services at a fraction of the cost of traditional full service brokers. The savings can be substantial - in some cases a home seller can list their home in the local MLS through a discount broker for as little as $200. This is a significant savings compared to the traditional 5-6% commission on the home's selling price (the median priced U.S. home now sells for more than $200,000).

NAR's proposed Virtual Office Website (VOW) rules include an "opt-out" provision that would allow traditional full commission real estate brokers to prevent Internet-based competitors from providing the same listing information over the Internet that other brokers can provide from their offices. This would greatly diminish the effectiveness of Internet-based competitors' business models and help preserve higher commission rates. DoJ also challenged NAR's membership rule denying MLS listing access to brokers offering referral services, which can in some cases facilitate partial rebates of commissions to home buyers as well as increasing the Internet exposure of sellers' homes. The lawsuit is proceeding.

As a result of the joint efforts of the FTC and DoJ, several state real estate commissions have lifted bans on commission rebates to home buyers. A study by the Consumer Federation of America revealed that a large share of state real estate commissions are dominated by traditional full service real estate brokers, who are using their influence to preserve high real estate commissions, despite the commission's responsibility to protect the interests of consumers. These rebates, which can amount to as much as 2% of a home's selling price are an excellent inducement to home buyers and can be very helpful to sellers in the currently weak residential real estate market. The FTC and DoJ have also sponsored public workshops to educate the public of abuses in the real estate services area.

The Federal Trade Commission has taken the lead in addressing anti-competitive practices of local multiple listing services (MLSs). In 2006 the FTC brought eight enforcement actions against MLS's that limited the dissemination of the types of real estate listings used by Internet-based discount real estate brokers. This diminished the value of those types of listings to sellers by limiting their exposure on the Internet, to the disadvantage of prospective buyers as well. Thanks to the FTC's aggressive defense of the rights of homeowners seven of those MLS's have withdrawn the objectionable rules. The FTC is currently proceeding with the remaining case against Michigan-based Realcomp II.

Both the FTC and DoJ have undertaken wide-ranging and effective competition and antitrust initiatives across their respective spectrums of responsibility. Nevertheless, there remain other problem areas affecting American homeowners that are either outside the scope of the agency's authority, or beyond the capability of their thinly-stretched resources.

Although state antirebate regulations have been withdrawn by state real estate commissions under pressure from DoJ and FTC, some state legislatures have enacted the identical proposals into law. Proposed "minimum service" regulations requiring home sellers to pay for real estate services they neither want nor need have also been withdrawn by state real estate commissions under pressure from DoJ and FTC. These regulations raise the home seller's cost and undermine the Internet-based business model. As in the case of antirebate laws, some of these withdrawn regulations have been enacted into law by state legislatures.

Neither the FTC nor the DoJ are currently empowered to address these state laws, which have been authored and/or promoted by state real estate associations. These laws are no different than the regulations that the agencies have been addressing most effectively, and they are costing American Homeowners millions of dollars every year. We urge the Subcommittee on Antitrust, Competition Policy and Consumer Rights to hold additional hearings on this problem and consider ways to address these anticompetitive state laws which the FTC and/or DoJ have been able to eliminate in their regulatory form.

There are several other areas of real estate services that also deserve the subcommittee's scrutiny and the scrutiny of DoJ and FTC. Last year the House

Financial Services Committee held hearings on real estate title insurance industry practices. Title insurance is very expensive, and only 2-4% of premiums collected are paid out. The current primary title insurance industry business model involves the payment of substantial, and usually undisclosed, referral fees to mortgage brokers or other real estate service providers. Surprisingly, until very recently there was no Internet-based or other vehicle for consumers to buy title insurance directly from insurers, and we believe that title insurance is still not available directly from insurers in most of the country. If you went to the websites of major title insurance companies there was no mechanism for a home buyer to elicit a price for title insurance from them. This is particularly curious given the availability of such direct business-to-consumer vehicles on the Internet for other real estate services as well as many other consumer services and products.

Another anticompetitive real estate services practice is "dual agency". Home buyers and sellers have inherently opposing interests. Home buyers want the lowest price and the most favorable terms from their perspective, and home sellers want the highest price and most favorable other terms from their perspective. Historically most real estate brokers exclusively represented home sellers. Both the broker and agent who represented the seller, and the broker and agent who worked with the buyer were all paid by the seller and owed a fiduciary duty to the seller. The buyer was not represented by any agent or broker.

This imbalance changed with the advent of "exclusive buyer agency" in the 1990's. These brokers and agents represented only buyers, never sellers. As a result home buyers using an exclusive buyer agent/broker were able to achieve equality in the process. Like the seller, the buyer now had a broker and agent adviser who owed their fiduciary duty only to the buyer.

Unfortunately the growing practice of exclusive buyer agency was undermined by state real estate associations who successfully sought changes in state laws and/or regulations to allow the same broker, and in some cases the same agent, to simultaneously represent both the buyer and seller of the same home. This is akin to a single law firm representing opposing parties in a civil lawsuit, and calls into question the ability of the real estate broker and/or agent to carry out all of their fiduciary responsibilities to both parties. We urge the subcommittee to study these state laws to determine whether they are anticompetitive and to undertake remedial action if appropriate.

There are related compliance problems with state real estate consumer disclosure regulations, which are intended to help make home buyers and sellers aware of potential conflicts of interest in dual agency and other areas. Although these regulations require that home buyers be told whom the agent represents, less than one-third of real estate agents comply, according to the National Association of Realtors' 2005 Profile of Home Buyers and Sellers. We believe that as a result many home buyers mistakenly assume that the real estate agent and broker they are working with will be exclusively representing their interests and providing the full range of real estate services, under all circumstances. This undermines competition; for without that information about the agent's and broker's ability to represent them under all circumstances, a home buyer is unable fully gauge a critical factor in deciding upon representation.

NAR's general counsel Laurie Janik was quoted in the real estate trade publication Realty Times that "These statistics say that people are being sloppy. They need to take agency disclosure requirements seriously; it is a critical element of consumer protection. I don't think it is good for practitioners or consumers that the trend line is going down. We aren't going in the right direction -- compliance is worsening." NAR's 2005 Legal Scan, an annual compilation of the thousands of lawsuits related to real estate transactions, also confirmed the problem – 24% of the lawsuits related to home purchases and sales were over disclosure issues. Despite the widespread knowledge of declining compliance with state disclosure regulations, few state real estate associations, state real estate commissions, or state legislatures have undertaken aggressive steps to reverse the decline. Since this problem directly impacts competition, we suggest that the subcommittee and the antitrust agencies undertake further study of this issue.

We appreciate the subcommittee's interest in assuring that the interests of American homeowners and other consumers are protected from anticonsumer practices, and wish the subcommittee, the FTC and the DoJ continued success in their efforts.

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DEPARTMENT OF JUSTICE

STATEMENT

OF

THOMAS O. BARNETT
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

OVERSIGHT OF THE UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST DIVISION

PRESENTED

MARCH 7, 2007

Good afternoon, Mr. Chairman and members of the Subcommittee. It is a pleasure for me to appear before you today on behalf of the Department of Justice and the dedicated professionals of its Antitrust Division. I appreciate this opportunity to highlight the Division's accomplishments, answer your questions about our work, and listen to your thoughts about what I believe has been our sound and vigorous enforcement of the antitrust laws.

As this Subcommittee fully appreciates, competition is the cornerstone of our Nation's economic foundation. Antitrust enforcement promotes and protects a robust free-market economy, by helping ensure that anticompetitive agreements, conduct, and mergers do not distort market outcomes. It has helped American consumers obtain more innovative, high-quality goods and services at lower prices; and it has strengthened the competitiveness of American businesses in the global marketplace. Antitrust enforcement has enjoyed substantial bipartisan support through the years, and we appreciate this Subcommittee's active interest in—and strong support of—our law enforcement mission.

Last month I marked one year since my confirmation as Assistant Attorney General of the Antitrust Division, and I am pleased to report that this past year was full of outstanding accomplishments in the Division. In many areas we have achieved record levels of enforcement, benefiting American consumers and businesses. The first part of my testimony today will review recent developments in the Division's three core enforcement programs: criminal, merger, and civil non-merger. Following that I will describe some ongoing competition policy initiatives at the Antitrust Division aimed at benefiting consumers and businesses and strengthening the foundation for effective antitrust enforcement, both here and around the world.

The Antitrust Division pursues its mission through an enforcement hierarchy that emphasizes pursuing illegal cartels, anticompetitive mergers, and preventing civil non-merger conduct that unreasonably restrains competition or leads to the unlawful creation or abuse of monopoly power. Within each area, the Division strives to identify and pursue vigorously violations of the antitrust laws, to increase transparency so that private parties can better predict our enforcement actions, and to reduce the time and cost associated with our investigations. The Division's criminal program detects, punishes, and deters price fixing, bid rigging, market allocations, and other cartel behavior—the kinds of conduct that the Supreme Court recently described as the "supreme evil of antitrust." The Division's merger review program prevents anticompetitive mergers, acquisitions, and other combinations that can lead to higher prices, lower quality and fewer choices for consumers. Finally, our civil non-merger program prevents unreasonable restraints of trade or the unlawful creation or abuse of monopoly.

Cartel Enforcement

The detection, prosecution, and deterrence of cartel offenses—such as price fixing, bid rigging and market allocation—continue to be the highest priority of the Antitrust Division. There is no plausible procompetitive rationale for this behavior. The Division places particular emphasis on combating international cartels that target U.S. markets because of the breadth and magnitude of the harm they inflict on American businesses and consumers. This enforcement strategy has succeeded in cracking dozens of international cartels, securing convictions and jail sentences against culpable U.S. and foreign executives, and obtaining record-breaking corporate fines.

The Division has made significant strides in the prosecution of individuals involved in cartel offenses. In this regard, the Division thanks the Subcommittee for its efforts in increasing the criminal fines and statutory maximum sentences for Sherman Act offenses in 2004 as well as in making antitrust offenses a predicate crime for wiretapping authority last year. The most effective way to deter and punish cartel activity is to hold the most culpable individuals accountable by seeking jail sentences. Antitrust offenders are being sent to jail with increasing frequency and for longer periods. This Subcommittee's efforts will help us continue this important trend that benefits American consumers and businesses.

The Division achieved significant victories in its cartel enforcement efforts over the last year. The Division obtained the second highest amount of fines in the Division's history, achieved the longest sentence for a foreign national in an international antitrust case, and made significant progress toward its first extradition of a foreign national for an antitrust offense. Already this year, we are on a record pace in jail time imposed on Antitrust Division defendants.

During Fiscal Year 2006, the Division obtained over $473 million in criminal fines from 20 corporations and 20 individuals. The Fiscal Year also yielded 5,383 jail days imposed for price fixing, bid rigging, fraud, and related anticompetitive behavior. The current Fiscal Year is off to a strong start, with 18 individuals sentenced to a total of 12,890 days in jail in less than half a year.

Some of our recent criminal prosecutions include the following:

Dynamic Random Access Memory—The Division's continuing high-profile investigation of the DRAM cartel has yielded total fines of more than $732 million, and courts imposed 2,760 days of jail time for individual defendants. In FY 2006, the Division obtained an $84 million fine against Japanese manufacturer Elpida Memory Inc., and secured guilty pleas from four executives of Korean manufacturer Hynix Semiconductor Inc. and four executives of Korean manufacturer Samsung Electronics Co., Ltd. More recently, on February 14, 2007, a Korean national and current president of Samsung's U.S.-based subsidiary was sentenced to pay a criminal fine of $250,000 and to serve 10 months in jail—the longest sentence for a foreign national in an international antitrust case. Over the full course of the investigation, this matter has yielded charges against four companies and 18 individuals, of which 11 are foreign nationals who have served or agreed to serve time in U.S. prisons.

Ready-Mixed Concrete—Five companies and 10 executives have been convicted of, or pled guilty to, conspiring to fix prices in the ready-mixed concrete industry in the U.S. Midwest. The Division, with its investigation continuing, already has obtained almost $35 million in fines, including a $29.2 million dollar fine against Irving Materials, Inc., an Indiana ready-mixed concrete producer -- the largest fine ever obtained in a domestic cartel investigation. Additionally, each of the 10 executives who have been sentenced will serve between five and 27 months of incarceration.

Nationwide E-Rate Investigation—The Division actively is pursuing a nationwide investigation of bid rigging and fraud in the E-Rate program. Congress created the E-Rate program to help needy schools and libraries connect to the Internet. In February 2006, Premio Inc. pled guilty to charges of bid rigging and fraud regarding the E-Rate program, and in May 2006, the Division indicted two individuals and two companies on fraud and money laundering charges related to E-Rate work in Michigan. In total, the Division thus far has charged 14 individuals and 12 companies in connection with the schemes to defraud the E-Rate program and schools. Defendants have been sentenced to more than 4,000 days in prison and have agreed to pay criminal fines and restitution totaling approximately $40 million.

Other markets where the Antitrust Division has brought recent criminal prosecutions include: wholesale plumbing supplies; painted aluminum products; magazine paper; parcel tanker shipping; freight forwarding; natural gas pipeline construction; foam-filled marine fenders and buoys; spun yarn, used to manufacture items such as athletic socks and printed T-shirts; acrylonitrile-butadiene rubber, used in hoses, belting, cable, o-rings, seals, adhesives, and sealants; and chemicals, such as hydrogen peroxide, with industrial applications in the electronics, energy production, mining, cosmetics, food processing, textiles and pulp and paper manufacturing industries, and sodium perborates, used in detergents.

We are determined to bring antitrust violators to justice; and we also want the level of our enforcement activity, including the fines and sentences, to send a powerful and unmistakable deterrent message to those in our country and around the world who would victimize American consumers and the American marketplace.

Merger Enforcement

Merger enforcement continues to be one of the Antitrust Division's core priorities. The Department is committed to challenging mergers that the evidence developed in a thorough investigation evaluated pursuant to rigorous economic analysis demonstrates will harm U.S. consumers and businesses. Indeed, the numbers tell the story. The Division filed 10 merger enforcement actions in district court in Fiscal Year 2006, and an additional six transactions were restructured by the parties in response to a Division investigation. This marks the highest level of merger enforcement activity since the end of 2001—a time when the Department was reviewing twice as many mergers during the merger wave of that era.

The Division has obtained divestitures or other relief to prevent harm to competition from mergers in numerous industries, including newspapers, dairies, telecommunications, and banking, among others. Additionally, in April 2006, the Division also obtained a settlement in which QUALCOMM Inc. and Flarion Inc. agreed to pay $1.8 million in civil penalties for violating premerger waiting period requirements.

A number of our most significant merger actions include the following:

Mittal Steel/Arcelor—In 2006, the Mittal Steel Company launched a hostile $33 billion takeover of Arcelor S.A., a transaction that would combine the world's two largest steel producers. The Division was able to determine during the initial Hart-Scott-Rodino (HSR) waiting period that the transaction raised competition concerns in the $2.3 billion U.S. market for tin mill products. These are finely rolled steel sheets that are normally coated with tin or chrome and used in many consumer-product applications, such as sanitary food cans and general line cans for aerosols, paints and other products.

In August 2006, the Division announced that it had concluded that Mittal's proposed acquisition of Arcelor would adversely affect competition in the $2 billion tin mill products market in the eastern United States by eliminating constraints on the ability of producers to coordinate their behavior and thereby increase the price of tin mill products to can manufacturers and other customers. The Division filed suit to block the transaction, and at the same time filed a consent decree.

To remedy the Division's concerns, the proposed consent decree required Mittal to divest a steel mill that supplied tin mill products to the eastern United States. Mittal's first obligation was to attempt to divest Dofasco Inc., a Canadian Company owned by Arcelor. However, the proposed consent decree anticipated the possibility that Mittal might be unable to sell Dofasco because Arcelor had, in an attempt to defeat Mittal's hostile takeover bid, placed legal title to Dofasco into a Dutch foundation. Therefore, if the sale of Dofasco could not be carried out as required, the proposed consent decree gave the Department the right to select for divestiture either Mittal Steel's Sparrows Point mill or its Weirton mill, located in Weirton, W.Va.

The Department determined after a thorough review that, between these two facilities, the divestiture of Sparrows Point would most reliably remedy the anticompetitive effects of the acquisition, and required Mittal to divest it to a buyer acceptable to the Department. The Department found that Sparrows Point is a profitable and diversified facility that has the capacity to produce more than 500,000 tons of tin mill products annually. Sparrows Point currently operates as an integrated facility that produces the steel slabs used in the manufacture of tin mill products and, unlike the Weirton mill, would not have to develop new sources of supply for this critical input upon its separation from Mittal Steel.

Maytag/Whirlpool—When the Division investigates a merger, we typically look first at the numbers, the merging parties' likely market shares and the degree of concentration in the market. If those numbers are high in a particular case, we may make an initial presumption that there is a problem with the transaction. But that presumption is rebuttable based on the specific facts of any individual case. We proceed to examine the evidence that is developed during the investigation, customer statements and documents, deposition testimony, and internal documents and data from the companies as well as from third parties. These investigations can take many months and require analysis and review of millions of documents and exceedingly voluminous data. Based upon the evidence, we then decide whether our initial presumption is warranted.

Last March, the Division decided not to challenge the merger of home appliance manufacturers Maytag Corporation and Whirlpool Corporation. Our investigation focused on residential clothes washers and dryers, although we considered the impact of the merger across the entire range of products offered by the two companies. We found that, despite the two companies' relatively high share of laundry product sales in the U.S., any attempt to raise prices likely would be unsuccessful. Maytag and Whirlpool represented two well-known brands in the industry, but rival appliance brands such as General Electric, Frigidaire, and Kenmore were also well established, and newer brands such as LG and Samsung had quickly established themselves in recent years in the U.S.

More generally, it became clear that washers and dryers that are made in Mexico and Asia are being shipped, or could be shipped, to the United States. Further, the large retailers that collectively account for almost two-thirds of all home appliance sales in the United States—stores like Sears, Lowe's, The Home Depot, and Best Buy—have the ability to foster major shifts in share toward or away from any particular supplier. This was confirmed by events in the marketplace. Best Buy, for example, had significant success with LG laundry products following their introduction in May 2003. In early 2005, Best Buy discontinued selling Maytag laundry products altogether and replaced some of the discontinued models with LG products. Home Depot has also been selling LG laundry products since June 2005, and LG now accounts for a significant percentage of laundry sales at both retailers.

Ultimately, we concluded that the presence of strong rival suppliers that had the ability to expand sales significantly, combined with customers who could respond to proposed price increases by increasing the share of those rival suppliers, in conjunction with large cost savings and other efficiencies that the parties were able to substantiate—and that should benefit consumers—all indicated that the transaction was not likely to harm consumer welfare. Thus, any initial presumption had been rebutted, and we closed our investigation.

Exelon/PSEG—In the energy industry, last year the Division investigated the proposed merger of Exelon Corporation and Public Service Enterprise Group Inc. The $16 billion merger would have combined the assets of two of the largest electricity generators in the mid-Atlantic region and would have created one of the largest electricity companies in the United States.

Huge variations in the marginal cost of running different kinds of generators affect the competitive dynamic in the wholesale market for electricity. The marginal costs of running a hydroelectric dam generator or nuclear power plant are substantially less than the marginal costs of running coal-fired steam turbine generators or gas-fired combustion turbine generators. The prevailing price in the market is determined by the least efficient plant necessary to meet demand. As a result, it is possible for an electricity company with a relatively small market share to have a greater ability to exercise market power due to the combination of generation plants it owns.

The combination of plants owned by a particular supplier affects its incentive and ability to exercise market power by withholding output from selected plants to drive up the market-clearing price. The Exelon/PSEG merger would have combined a firm that had significant low-cost nuclear and hydroelectric generating capacity (owned by Exelon) with a firm that had significant higher-cost coal-fired steam turbine capacity (owned by PSEG).

The Division concluded that the combined firm would have significantly more incentive and ability to withhold output from selected high-cost plants than either firm had independently before the merger. Under the terms of a proposed consent decree, the merged firm would have been required to divest six electricity plants in Pennsylvania and New Jersey that provide more than 5,600 megawatts of generating capacity and that included key generating units in the mid-range of the fuel curve—units that often were on or near the margin and thus would have enhanced the ability of the merged firm to exercise market power. Exelon later abandoned its effort to acquire PSEG.

Telecommunications—The telecommunications industry has kept the Division very busy during the last few years, and it looks likely it will continue to do so. The Division has recently investigated the mergers of Verizon and MCI, SBC and AT&T, the new AT&T and BellSouth, Sprint and Nextel, and Cingular and AT&T Wireless, among others. The Division took action to challenge portions of these transactions to protect competition, and decided not to challenge others after concluding that they were not likely to result in a substantial lessening of competition.

The Division's Verizon/MCI and SBC/AT&T investigations resulted in consent decrees early in Fiscal Year 2006. The Division investigated all areas in which the two sets of merging firms competed, including residential local and long distance service, Internet backbone services and a variety of telecommunications services provided to business customers. With the exception of the local private line service that was the subject of the consent decrees, the Division concluded that the transactions would not harm competition and would likely benefit consumers due to existing competition, emerging technologies, the changing regulatory environment, and exceptionally large merger-specific efficiencies.

The decrees require the parties to divest portions of certain local fiber-optic network facilities in order to protect competition in the market for facilities-based local private line service to certain business customers in a number of metropolitan areas. Like all Antitrust Division consent decrees, the Verizon/MCI and SBC/AT&T decrees are subject to the Tunney Act, which requires a determination by a federal district court that entry of the decrees is in the public interest. The decrees are currently before the U.S. District Court for the District of Columbia. That court must determine whether the decrees, designed to prevent the competitive harm the United States alleged in its complaint, are in the public interest.

DFA/Southern Belle—Late last year, the Antitrust Division, along with the Commonwealth of Kentucky, announced a consent decree that required DFA to divest its interest in the Southern Belle dairy resulting from a lawsuit in U.S. District Court challenging DFA's acquisition of its interest in the Southern Belle dairy. The complaint charged that the acquisition reduced competition for school milk contracts in 100 school districts in Kentucky and Tennessee because it gave DFA significant partial ownership interests in two dairies—the Southern Belle dairy and the nearby Flav-O-Rich dairy—that competed against each other for such contracts. As a result, the acquisition reduced the number of independent bidders for school milk contracts from two to one in 45 school districts in eastern Kentucky, and from three bidders to two in 55 school districts in eastern Kentucky and Tennessee.

The day before filing their motions for summary judgment, the defendants modified their ownership agreements to reduce DFA's legal rights to exercise control over Southern Belle. Without addressing the ownership arrangement that had been in effect for two years, the district court granted summary judgment to the defendants, holding that the government failed to establish a mechanism by which the acquisition was likely to affect competition adversely in the school milk markets under the defendants' modified agreement. We appealed that decision to the Sixth Circuit, arguing among other things that the acquisition as it existed for two years violated Section 7 of the Clayton Act and that the defendants' modifications did not remedy that violation.

In October 2005 the Sixth Circuit reversed the district court's summary judgment to DFA and remanded for trial. Agreeing with the Division, the court of appeals concluded that the district court should have addressed the original ownership arrangement and that the government presented sufficient evidence to survive summary judgment on that issue. The court held that DFA's fifty percent ownership of the two competing dairies and the closely aligned interests of the dairies' managements could lead to anticompetitive behavior, violating Section 7 even in the absence of DFA rights to control the two competitors' decisionmaking. On remand, the Division aggressively prepared for trial and reached a consent decree with DFA shortly prior to trial requiring the divestiture.

Merger Review Process and Transparency

Bringing enforcement actions is the most well-known aspect of the Division's merger activities, but it is not the only one. The Division also seeks continually to improve its merger review process and its merger enforcement transparency. Improving in these areas improves overall merger enforcement and benefits American consumers and businesses.

In December 2006, the Division announced a revision to its Merger Review Process Initiative. The Process Initiative helps us identify and devote increased resources to those transactions that should be challenged while at the same time spending fewer resources on transactions that are not anticompetitive. That is good government.

Thanks to the Hart-Scott-Rodino (HSR) premerger review process that Congress enacted in 1976, today most federal merger challenges occur before deals close, when effective injunctive relief is available, structural relief is more practical and effective, and harm to consumer welfare has not yet occurred. The HSR Act gives the Antitrust Division and the FTC an opportunity to examine most large transactions before they close. Our goal is to identify quickly both transactions that threaten harm to competition and those that do not threaten competition, devoting our resources to challenging the former while letting the latter proceed.

Merger analysis itself has evolved significantly since the HSR Act was passed. There was a time when the Supreme Court affirmed decisions blocking mergers based largely on market share and a perceived unwritten guiding principle that the government always won. Times have changed. Courts have shifted their focus from a static analysis of market shares and concentration toward a fuller analysis of the future competitive process in the relevant market. We certainly closely look at market shares and HHIs, but we also closely examine the competitive process for unilateral or coordinated effects, entry, and efficiencies as well. We frequently employ the increasingly sophisticated economic tools that have been developed by the antitrust community, such as regressions, merger simulations, diversion ratios, and critical loss analyses. While our advances in economic analysis can help us make better enforcement decisions, they often require significant quantities of data and information to conduct properly.

Consequently, the second request process can be costly and time-consuming. Indeed, there has been an explosion in the volume of documents and information produced by parties in response to second requests. While there was a time when the production of a few hundred boxes of documents was a large production, now we talk in terms of gigabytes, terabytes, and millions of pages of documents. In the Verizon/MCI and AT&T/SBC mergers, for example, the Division obtained approximately 25 million pages of documents alone.

Given the tremendous increases in review burdens on both the Antitrust Division staff and parties to proposed mergers, it behooves us to seek ways to limit those burdens, while at the same time retaining our ability to effectively assess and challenge anticompetitive mergers. The first step in that direction was the Division's 2001 Merger Review Process Initiative, which included means of improving our ability to identify those transactions that do not threaten harm to competition during the initial HSR waiting period without issuing a second request. The Initiative also provided means to improve the efficiency of our review process after a second request issues.

The Initiative worked. Notwithstanding the significant number of enforcement matters last year, the Division has improved its ability to close investigations of transactions that are not anticompetitive. Since the Initiative was announced, for matters that do not lead to an enforcement action, the average number of days between the opening of a preliminary investigation and the closing of the investigation (either before or after issuance of a second request) has fallen from about 93 days to 57 days. The average length of second request investigations dropped from 213 days for the two years before the Initiative to 154 days during the last two years, a drop of over 25 percent.

While the 2001 Initiative has resulted in investigations that are more focused and efficient, it was clear that improvements could still be made. Therefore, the Division announced last December a number of significant refinements that build on the successes of the 2001 Initiative. Many of the changes formally adopt merger investigation procedures already successfully used by Antitrust Division staff, such as commonly used second request modifications and a revised Model Second Request that accounts for problems that have arisen in past investigations.

We are committed to continued improvements in the merger review process. At the same time, we will not forgo getting the information we need to successfully challenge anticompetitive mergers. If we proceed to a judicial challenge, the courts expect the Division to present a thorough and detailed empirical analysis of a challenged merger's likely anticompetitive effects, and they expect us to do so promptly after the complaint is filed. We fully intend to meet that expectation to protect U.S. consumers and businesses from anticompetitive mergers

Turning to transparency, transparency is readily achieved when the Division brings an enforcement action. Theories and evidence of anticompetitive harm are available to the public through complaints, press releases, and competitive impact statements. The public often has as much, if not greater, interest, however, in why the Division decides not to bring an enforcement action in particular cases. While confidentiality restrictions place significant limits on what the Division may say publicly about its HSR investigations, we have been active and intend to remain active in issuing closing statements in mergers that we do not challenge after extensive investigations. These statements describe our rationale for the enforcement decision within confidentiality limits. Thus, for example, we issued closing statements detailing our rationales for not challenging the AT&T/Bellsouth and Maytag/Whirlpool mergers. We will continue to do so where appropriate to help the public better understand our actions.

The Division's transparency efforts also have included the release of a joint DOJ/FTC Commentary on the Horizontal Merger Guidelines in March 2006. The Commentary is the latest chapter in the agencies' ongoing efforts to provide guidance to the antitrust bar and businesses regarding how the agencies enforce Section 7 of the Clayton Act.

The analytical framework and standards used to analyze the likely competitive effects of mergers are embodied in the Horizontal Merger Guidelines, which the Division and the FTC jointly issued in 1992 and revised in 1997. The Commentary, which is available on both agencies' websites, explains how the Division and the FTC have applied particular guidelines provisions relating to market definition, competitive effects (including coordinated interaction and unilateral effects analysis), entry conditions, and efficiencies. Included throughout the Commentary are summaries of actual mergers that the agencies analyzed under the Merger Guidelines.

Civil Non-Merger Conduct

Civil non-merger enforcement is based on anticompetitive conduct under the Sherman Act. Although it can involve unreasonable restraints of trade under Section 1 of the Sherman Act, it more frequently implicates single-firm conduct under Section 2 of the Sherman Act. Enforcement of Section 2 of the Sherman Act presents some of the most difficult challenges in antitrust law today. An important part of the Division's mission is to advance development of antitrust law in procompetitive ways. Sound antitrust enforcement policy requires prosecution of exclusionary conduct that reduces output and increases prices while at the same time striving to avoid condemnations that chill procompetitive behavior.

Determining when unilateral conduct is unlawful under Section 2 has proven difficult because the aggressive, unilateral behavior typcially at issue in Section 2 cases often resembles the healthy, aggressive competition that the antitrust laws seek to promote. The antitrust laws should encourage vigorous competition—even by companies with a large share of the relevant market. Because the current state of the law does not always define clearly what is lawful and what is not, uncertainty can chill procompetitive behavior while undermining deterrence of anticompetitive conduct. For this reason, the Antitrust Division, in conjunction with the FTC, is holding hearings to help advance our own thinking about unilateral conduct, better inform our judgment about when it is appropriate for the United States to bring enforcement actions under Section 2 of the Sherman Act, and help us to develop clear and objective standards that will apply in Section 2 matters.

A number of prominent practitioners and economists have participated in these hearings, and the Antitrust Division is grateful to them for agreeing to share their insights. We also received important participation from the business community, consumer groups, and business historians. The hearings have focused on predatory pricing, predatory buying, refusals to deal, tying, exclusive dealing, bundled loyalty and market share discounts, misleading and deceptive practices, market definition and market power, and remedies. There were also hearings on foreign antitrust enforcement, empirical studies, business history and strategy, and business and academic perspectives on single-firm conduct.

Some of our most recent significant enforcement efforts in this area include:

Dentsply—The Division brought suit against Dentsply alleging monopolistic practices in the false teeth industry. Dentsply had used its monopoly power to erect a barrier to effective entry, expansion, and competition in the United States market for false teeth. Dentsply repeatedly blocked its competitors from developing networks of dental laboratory dealers necessary to compete effectively in the market. Dentsply's anticompetitive actions precluded many dealers selling Dentsply's teeth from supplementing their product lines by adding competing tooth brands, even in response to the requests of their dental lab customers. At the same time, competing tooth suppliers wanted to sell their teeth through those dealers to become more effective competitors to Dentsply.

On April 26, 2006, the District Court entered a Final Judgment enjoining Dentsply from preventing distributors from adding competitors' products to their offerings, conditioning the sale of its teeth or other products to any dealer based on the dealer's sale of competing brands or its consideration of whether to sell competing brands, or coercing dealers to drop competing tooth brands in order to become authorized Dentsply tooth dealers.

Real Estate Services—The Division's enforcement against anticompetitive agreements included its extensive efforts to stop anticompetitive practices in the real estate services industry, including its lawsuit against the National Association of Realtors (NAR). For many people, the purchase or sale of a home not only represents the fulfillment of the American dream but is their single most significant personal financial transaction. The Division has focused its enforcement activities to ensure that the industry and consumers can take advantage of newer business models. In addition, the Division, often in collaboration with the FTC, has vigorously pursued competition advocacy efforts by commenting on the detrimental competitive effects of various legislative and regulatory proposals that limit competitive alternatives at the state level. I will discuss these efforts in greater detail later on.

In September 2005, the Division (I am recused from this matter) filed suit after NAR promulgated rules that would limit competition from real estate brokers who use the Internet to serve their customers. The lawsuit alleges that NAR's policy prevents consumers from receiving the full benefits of competition and threatens to lock in outmoded business models and discourage discounting

NAR has hundreds of affiliated Multiple Listing Services (MLS) across the country—one in virtually every community. Each MLS maintains a database to which member brokers contribute the property listings of the customers they represent. A broker participating in an MLS thus has access to all or nearly all of the property listings in the local market and can distribute those listings to customers. Some brokers have recently begun delivering listings to customers via the Internet, through what are known as Virtual Office Websites, or VOWs. In an effort to protect high commissions (which have increased by over 50% in recent years), real estate brokers have instituted efforts to foreclose competition from VOWs and other innovative brokerage models.

NAR's recent VOW policies include an "opt-out" provision that allows brokers to prevent Internet-based competitors from providing the same listing information over the Internet that other brokers can provide from their offices. The Division's lawsuit also challenges a NAR membership rule that denies access to MLS listings to brokers that operate referral services. This rule effectively prevents two brokers from working together in what can be a more innovative and efficient way, with one attracting new business and educating potential buyers about the market, and the other guiding the buyer through home tours and the contract and closing processes.

In November 2006, a U.S. District Court denied NAR's motion to dismiss. The lawsuit is proceeding.

Competition Advocacy

In addition to its traditional law enforcement role, the Antitrust Division regularly seeks to promote competition through advocacy efforts. Competition advocacy includes providing advice and analysis concerning a variety of matters, including Supreme Court cases, international efforts, and legislation and regulation at both the federal and state levels. Anticompetitive constraints imposed by government action can have a much broader negative impact on consumers than any single cartel or merger -- potentially affecting entire sectors of the economy -- but are generally exempt from direct challenge under the antitrust laws. Moreover, governmentally-imposed restraints are likely to be more durable than private restraints because market forces are less likely to overcome them. The Division believes that robust competition advocacy is an important part of our mission to protect competition on behalf of American consumers.

The Division is focused and active on the international front. With more and more countries adopting antitrust enforcement regimes, the Antitrust Division has made a particular priority of strengthening international cooperation and promoting antitrust policy convergence. In the last year, the Division pursued these goals by continuing to work closely with multilateral organizations around the world, and by working to develop and maintain strong bilateral relationships with enforcement agencies in other countries.

Two organizations stand out for their recent work in achieving consensus on important antitrust issues: the International Competition Network (ICN), which the Division and the FTC helped to launch in 2001, and the Organization for Economic Cooperation and Development (OECD).

The ICN provides an opportunity for senior antitrust officials and non-governmental advisors, from both developed and developing countries, to work together to achieve practical improvements in international antitrust enforcement. In just over five years, the ICN has grown from 14 founding members into a global network of 100 members from 88 jurisdictions. In 2006, the Division was heavily involved in the ICN's Unilateral Conduct Working Group, which announced plans to focus on the objectives of single-firm enforcement and the standards for analysis of dominance (monopolization).

The OECD's 30 member countries share a commitment to democratic government and market-based economies, and the OECD provides an appropriate forum for governments to seek answers to common problems, identify best practices, and coordinate policies. The Division has been closely involved in all phases of the OECD's competition work. In 2006, I chaired the OECD's Competition Committee Working Party on International Cooperation & Enforcement, where, among other work, I led roundtables on issues affecting all three major areas of antitrust enforcement: cartels, merger review, and unilateral conduct.

The Division remains committed to developing strong, productive bilateral relationships with its foreign counterparts. Improving the already strong relationship with the European Commission remains a priority, and the Division continues to work closely with its counterpart in Brussels on a wide range of cartel, merger, and other enforcement and policy matters. For example, in February 2006, the Division confirmed publicly that it was coordinating with the EC and other foreign competition authorities in investigating potentially anticompetitive practices in the air cargo industry. The Division also attended numerous meetings with its sister agencies in the governments of United

States trading partners, such as Japan and Korea. Further, U.S., Canadian, and Mexican agencies created working groups on unilateral conduct and intellectual property.

The Division also is closely following China's efforts to enact its first comprehensive antitrust law. The Division has reviewed several draft versions of China's antimonopoly law, and met with relevant Chinese Government officials periodically to discuss the draft law in detail. In September 2006 I met with the Vice-Chairman of the Standing Committee of the National People's Congress, as well as various other key Chinese government officials involved in the antimonopoly law drafting process, to discuss sound competition policy and to provide our comments on the bill. In addition, my deputy for international matters held working-level discussions with the relevant Chinese Government counterparts on several occasions last year and will be visiting China again this Spring to continue those discussions. Division officials also moderated discussions on the draft antimonopoly law with Chinese Government officials in a U.S.-China Legal Exchange Program hosted by the Commerce Department that was held in Seattle, Cleveland, and Washington, D.C. in December 2006. The Division will continue to promote sound antitrust analysis and international cooperation abroad.

On the domestic front, the U.S. Supreme Court has taken an active docket of antitrust and competition-related cases in the past year, and the Division has assisted the Solicitor General in submitting the views of the United States as *amicus curiae*. In 2006, the court issued decisions in *Texaco Inc. v. Dagher*, stating that "rule of reason" analysis generally governs pricing decisions by joint venturers; *Illinois Tool Works Inc. v. Independent Ink, Inc.*, holding that the mere fact that a tying product is patented does not support a presumption of market power for purposes of antitrust tying analysis; and *Volvo*

Trucks North America, Inc. v. Reeder-Simco GMC, Inc., clarifying the standards for secondary-line price discrimination claims under the Robinson-Patman Act. In each case, the Court reached the conclusion urged by the United States. Later in 2006, the Division assisted in briefs filed in *Weyerhaeuser Co. v. Ross Simmons Hardwood Lumber Co., Inc.*, regarding the standards governing buyer-side predatory pricing. In a decision issued just last month, the Supreme Court issued a unanimous decision consistent with the United States' position.

The Division also assisted in briefs filed in *Bell Atlantic Corp. v. Twombly*, concerning pleading standards for antitrust civil conspiracy claims; and *Credit Suisse First Boston Ltd. v. Billing*, considering the test for implied immunity from the antitrust laws based on the operation of securities regulations and statutes. These cases remain under review by the Court.

The Division, together with the FTC, also educates policymakers and the general public about the benefits of competition in a variety of markets. One market we have devoted substantial efforts to is the real estate market. The Division provides assistance and information to entities considering rules—such as rules that prohibit rebates to consumers or that undermine online brokerage models—that would inhibit some types of competition that can lower the cost of buying or selling a home.

During 2006, several states modified proposed or existing laws and regulations to enhance competition to the benefit of consumers. Delaware, Ohio, Tennessee, and Wisconsin all passed bills that included a waiver provision to enable individual consumers to choose not to purchase unwanted types of real estate brokerage services. The West Virginia Real Estate Commission, the Tennessee Real Estate Commission, the

Kentucky Real Estate Commission, the South Dakota Real Estate Commission, and the State of South Carolina all lifted bans on consumer rebates and other inducements to consumers in real estate transactions. The result is that consumers in these states now have the potential to save thousands of dollars on the purchase of a home.

The Division is also engaged in a broader effort to ensure that all American consumers will continue to benefit from competition in the real estate services industry. A well-attended workshop in October 2005, jointly sponsored by the Antitrust Division and the FTC, was a key part of that effort. Participants from brokerage firms, NAR, local realtor associations, fee-for-service and internet referral brokers, and buyers' brokers spotlighted the competitive issues facing this industry. The Division will continue to maintain its enforcement and advocacy efforts in this area to ensure that consumers enjoy the benefits of better service, increased choice, and lower prices resulting from competition.

Conclusion

I would emphasize in closing that none of what I have discussed could have been accomplished without the dedicated career staff of the Antitrust Division, and in fact it is because of their experience, talent, and dedication to the mission of protecting consumers that we have been able to achieve the successes we have—both in terms of quantity and quality.

Given the important role we assign to competition in our nation's economy, the Antitrust Division must be a vigorous, formidable, and effective enforcer of our laws. While I am pleased with all that we have accomplished thus far, I recognize that the hallmark of any successful organization is the continuing desire to improve. In that regard I look forward to working with this Subcommittee and its staff.

Mr. Chairman, that completes my prepared remarks. I would be pleased to respond to the Subcommittee's questions at this time.

TESTIMONY SUBMITTED BY SENATE AGRICULTURE COMMITTEE CHAIRMAN TOM HARKIN (D-IA)

AT THE SENATE JUDICIARY SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS HEARING

"OVERSIGHT OF ENFORCEMENT OF ANTITRUST LAWS"

I thank Senators Kohl and Hatch for holding this hearing on enforcement of antitrust laws. It is an issue that deserves a lot of attention because it is very important to independent producers and rural America. Consolidation and vertical integration of the packing and processing industries continue to increase—limiting producer market options and their ability to compete in a fair marketplace.

Currently in the United States, the top four firms control 50 percent of hog production and 64 percent of hog processing. In cattle procurement, the top four firms control 84 percent of cattle slaughter.

With so few buyers left, a handful of companies can more easily exert market power and require take-it-or-leave-it contracts forcing producers to make a fundamental decision: sign the contract and go along with unfair practices, or just simply walk away from their family farm and find another occupation.

There are a number of ways to address a heavily consolidated and vertically integrated marketplace, most notably, not allowing anti-competitive mergers to occur. Congress enacted the Sherman and Clayton Acts to protect consumers and producers against concentrated power and leverage. The Department of Justice is charged with enforcing these laws. But history shows that the Department is not committed to preventing, or altering industry mergers and acquisitions that lessen competition.

In recent years, the Department of Justice allowed Smithfield Foods to acquire the Farmland Foods pork division, thereby eliminating an entire buyer of hogs in Iowa. Smithfield's market share in pork processing increased from 20 to 26 percent. Last fall, Smithfield announced its intentions to acquire Premium Standard Farms, which could push Smithfield's market share in pork processing to over 30 percent. Although this acquisition is still under review by the Department, I cannot emphasize enough that there be a thorough review and that the effects on producers, not just consumers be carefully evaluated.

As the former Ranking Democratic Member and now Chairman of the Committee on Agriculture, Nutrition and Forestry, I am fully aware of how detrimental lax enforcement of laws designed to protect producers from unfair and anti-competitive practices can have on the marketplace. Just last year, a report by USDA's Inspector General, which I commissioned, found widespread inaction, efforts to block investigations of unfair and anti-competitive conduct, and even efforts to cook the books to give the appearance of actual enforcement by the Grain Inspection, Packers and Stockyards Administration at the Department of Agriculture.

This year, the Agriculture Committee will be crafting a new farm bill and I look forward to working with the Judiciary Committee to protect producers from unfair and anti-competitive practices. Most notably, the producer impacts from a merger or acquisition must be properly evaluated by the Department of Justice before it blesses such a transaction.

Recently, I introduced the "Competitive and Fair Agricultural Markets Act of 2007," which will serve as the basis for developing a competition package in the new farm bill. This legislation will strengthen the Agricultural Fair Practices Act and clarify and improve enforcement of the Packers and Stockyards Act.

Again, I appreciate Senators Kohl and Hatch for holding this much needed hearing today and look forward to working with the committee as the farm bill process starts to unfold to protect producers from unfair and anti-competitive practices."

Statement
United States Senate Committee on the Judiciary
Oversight of the Enforcement of the Antitrust Laws
March 7, 2007

The Honorable Herbert Kohl
United States Senator , Wisconsin

Good afternoon. Today's hearing marks the first time in more than four years that we have held an oversight hearing to examine the enforcement of our nation's antitrust laws. Today we will hear from Assistant Attorney General Barnett and FTC Chairman Majoras - both able and talented public servants. We particularly commend Chairman Majoras for her leadership and her efforts to bring more competition to the prescription drug market.

However, we are very concerned with the direction that the Antitrust Division has taken under this Administration. With the exception of criminal enforcement, there is an alarming decline in the Division's antitrust enforcement efforts across the board, particularly with respect to mergers. Compared to the last four years of the Clinton administration, the number of merger investigations initiated by the Justice Department in the most recent four years has declined by nearly 60 %, and the numbers of mergers challenged has declined by 75 %.

These aren't just statistics, these are real cases affecting consumers in many sectors of the economy. Whether it is the Whirlpool/Maytag deal, AT&T's acquisition of Bell South, or anti-competitive conduct in agriculture, the division has simply not done enough to protect consumers. As a result of this permissive, hands-off approach, the Division is encouraging even more consolidation, including companies who have lost their attempts to merge to try again in this environment. To quote the New York Times, merger policy [QUOTE] "often appears to be little more than 'anything goes.'" It is hard for us to disagree.

While all of these issues are worthy of significant attention, the most important antitrust issue for me and my constituents this year is AirTran's bid to acquire Midwest Airlines in a hostile takeover. As you know, Midwest Airlines is a true success story. Midwest Airlines is a unique company in the airline industry – an airline that offers the highest quality of service, and is actually beloved by its customers. Midwest Airlines has been recognized as the best domestic airline more than 45 times in the past 17 years by a variety of industry surveys. Beyond this, Midwest Airlines is vital to the economy of Wisconsin and the Greater Milwaukee area. It offers direct service to 36 key business centers everyday from its hub in Milwaukee. Should AirTran acquire Midwest Airlines and decide in the future to reduce service from Milwaukee, the negative consequences for the Wisconsin economy would be enormous.

Unfortunately, the business model of AirTran is very different than Midwest Airlines. It is a no frills, discount airline with low ratings for quality and customer service in industry ratings. No one doubts that the quality of Midwest's stellar service offered to consumers will suffer should AirTran complete this acquisition. Even more worrisome is AirTran's history of promising high levels of service when entering new markets and then abruptly breaking these promises and sharply reducing service. Dallas/Fort Worth, Washington Dulles and Pittsburgh are just three examples of cities in which AirTran has sharply reduced service in recent years contrary to optimistic promises made just a few years earlier. In sum, an acquisition of Midwest Airlines by AirTran would likely cause a substantial injury to consumers – specifically the many thousands of travelers and businesses throughout Wisconsin and around the nation who rely on Midwest Airlines for reliable, high quality, and competitively priced air travel.

I was therefore very disappointed and surprised to learn that the Justice Department recently closed its investigation of the AirTran/Midwest deal after only a cursory review lasting fewer than 30 days. Despite the obvious dangers of this acquisition in terms of frequency of service and quality of service for the many thousands of Midwest Airlines customers, your division did not initiate the full "Second Request" investigation that most in the industry expected. I cannot understand how the Justice Department could conclude after such a cursory review that this deal would pose no risks to competition and consumers. Mr. Barnett, I will ask you about this very important deal and for a commitment to reopen this investigation to examine its impact to consumers and businesses in Wisconsin.

So, we will discuss this essential issue and if time permits others including: consolidation in the oil and gas industry; reverse payments in the pharmaceutical industry; mergers and investigations in the agriculture sector; the interpretation of the Tunney Act, among many others. We will be monitoring your agencies carefully, Mr. Barnett and Chairman Majoras, with respect to these and other issues as you carry out your vital responsibilities on behalf of American consumers.

Prepared Statement of
The Federal Trade Commission

Before the
Subcommittee on
Antitrust, Competition, and Consumer Rights

of the Committee on the Judiciary
United States Senate

Washington, D.C.
March 7, 2007

Prepared Statement of the Federal Trade Commission

presented by

Deborah Platt Majoras, Chairman

Before the

Committee on the Judiciary
Subcommittee on Antitrust, Competition, and Consumer Rights
United States Senate

An Overview of Federal Trade Commission Antitrust Activities

March 7, 2007

Chairman Kohl, Ranking Member Hatch, and Members of the Subcommittee, I am Deborah Platt Majoras, Chairman of the Federal Trade Commission ("FTC" or "Commission").[1] The Commission has great respect for the Congressional oversight process, and I am pleased to appear before you to present the testimony of the FTC providing an overview of the Commission's recent antitrust enforcement activities.

Competition is critical in order to protect and strengthen the free and open markets that are the foundation of a vibrant economy. The goal of the FTC's competition mission is to remove the obstacles that impede competition and prevent its benefits from flowing to consumers. In order to accomplish this mission, the FTC has focused its enforcement efforts on sectors of the economy that have the greatest impact on consumers, such as health care, energy,

[1] This written statement represents the views of the Federal Trade Commission. My oral presentation and responses to questions are my own and do not necessarily reflect the views of the Commission or any other Commissioner.

and real estate. In the past year, the Commission pursued a broad range of merger and nonmerger enforcement actions in these and other industries. The FTC has also facilitated cooperation and voluntary compliance with the law by promoting transparency in enforcement standards, policies, and decision-making processes.

In FY2006 there were 1768 premerger filings, a 28 percent increase from FY2004. Reflecting an increase in investigative activity, the number of requests for additional information issued by the FTC increased by 40 percent over the same period. During FY2006, the Commission or its staff identified sixteen transactions raising concerns for competition; we required relief in nine cases, while seven additional transactions were withdrawn, abandoned, or restructured by the parties. So far in FY2007, premerger filings are up seventeen percent from the previous year.

I. Health Care

The health care industry plays a crucial role in the U.S. economy in terms of the impact that it has on consumer spending and welfare. In global terms, health care expenditures in the U.S. represent almost $2 trillion and have been increasing steadily for the last 30 years. During the past year, the FTC dedicated substantial resources to protecting consumers by vigorously reviewing proposed merger transactions in the health care industry, investigating potentially anticompetitive conduct that threatens consumer interests, and taking action to prevent anticompetitive effects from manifesting themselves. Specifically, the agency achieved substantial relief in seven mergers it reviewed by obtaining signed consent decrees in the areas of generic drugs, over-the-counter medications, injectable analgesics, and other medical devices and diagnostic services. In addition, the agency continued to investigate, and challenge where appropriate, agreements among pharmaceutical companies and physicians.

A. Pharmaceuticals

The Commission was particularly active in enforcing the antitrust laws in the pharmaceutical industry. In March 2006, the FTC ensured continued competition for generic drugs by requiring a consent order to address competitive concerns raised by Teva Pharmaceutical Industries, Ltd.'s $7.4 billion acquisition of IVAX Corporation. The order required the parties to divest the rights and assets necessary to manufacture and market fifteen different generic pharmaceutical products, including the generic forms of widely-used penicillin antibiotics amoxicillin and amoxicillin clavulanate potassium, maintaining for consumers the benefits of competition in these important products that the merger would otherwise have eliminated.

In April 2006, the FTC challenged Allergan, Inc.'s $3.2 billion acquisition of Inamed Corporation. The FTC accepted a final consent order that required the parties to divest Inamed's rights to develop and market Reloxin, a potential rival to Allergan's Botox. Botox is the best-selling botulinum toxin in the United States, and the only such product approved by the FDA to treat facial wrinkles. At the time of the order, Reloxin was the only botulinum toxin product in Phase III of clinical trials and the next likely entrant to challenge Botox, with a substantial lead over other potentially-competing products. By requiring the parties to divest the U.S. rights to Reloxin, the FTC preserved for consumers the benefits of competition in cosmetic botulinum toxins.

In December 2006, the FTC approved a consent order regarding Barr Pharmaceuticals' proposed acquisition of Pliva.[2] In settling the Commission's charges, Barr is required to divest its generic antidepressant, trazodone, and its generic blood pressure medication, triamterene/HCTZ. Barr is also required to divest either Pliva's or Barr's generic drug for use in treating ruptured blood vessels in the brain. Finally, Barr is required to divest Pliva's branded organ preservation solution.

In December 2006, the FTC approved a final consent order with Watson Pharmaceuticals, Inc. and Andrx Corporation that maintained competition for thirteen generic drug products. This order required that Watson: (1) end its marketing agreements with Interpham Holdings, Inc.; (2) assign and divest the Andrx rights necessary to develop, make, and market generic extended release tablets that correct the effects of type 2 diabetes; and (3) divest Andrx's rights and assets related to the developing and marketing of 11 oral contraceptives.[3]

In January 2007, the Commission protected competition for non-prescription drugs by entering a consent order regarding Johnson & Johnson's proposed $16.6 billion dollar acquisition of Pfizer's consumer health division. This order required that Pfizer sell its Zantac, Cortizone, and Unisom divisions as well as Johnson & Johnson's Balmex division. At issue in this matter was competition for non-prescription H-2 Blockers, hydrocortisone anti-itch products, nighttime

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[2] *In the Matter of Barr Pharms., Inc.*, FTC Docket No. C-4171 (Nov. 22, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0610217/0610217barrdo_final.pdf.

[3] *In the Matter of Watson Pharms., Inc., and Andrx Corp.*, FTC Docket No. C-4172 (Dec. 12, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0610139/061212do_public_ver0610139.pdf.

sleep aids, and diaper rash treatments.[4]

In January 2007, the Commission published a consent order for public comment regarding the proposed acquisition of Mayne Pharma Limited by Hospira, Inc. This order requires the sale of assets used to manufacture and supply five generic injectable pharmaceuticals, and results in the preservation of competition in the markets at issue.[5]

Outside of merger review, the Commission continues to be vigilant in the detection and investigation of agreements between drug companies that delay generic entry. The Commission's challenge to an alleged anticompetitive agreement involving Ovcon, a branded oral contraceptive product, has led to the introduction of lower priced generic products. In November 2005, in the case of *F.T.C. v. Warner Chilcott Holdings Company III, Ltd.*, the Commission filed a complaint in federal district court seeking to put an end to an agreement between drug manufacturers Warner Chilcott and Barr Laboratories that, by allegedly violating the antitrust laws, denied consumers the choice of a lower-priced generic version of Warner Chilcott's Ovcon 35.[6] Under threat of a preliminary injunction sought by the FTC, in September 2006 Warner Chilcott waived the exclusionary provision in its agreement with Barr that

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[4] *In the Matter of Johnson & Johnson and Pfizer Inc.*, FTC Docket No. C-4180 (Jan. 16, 2007) (decision and order), *available at* http://www.ftc.gov/os/caselist/0610220/0610220c4180decisionorder_publicversion.pdf.

[5] FTC News Release, *FTC Challenges Hospira/Mayne Pharma Deal* (Jan. 18, 2007), *available at* http://www.ftc.gov/opa/2007/01/hospiramayne.htm; *In the Matter of Hospira, Inc. and Mayne Pharma Ltd.*, FTC Docket No. C-4182 (Jan. 18, 2007) (decision and order), *available at* http://www.ftc.gov/os/caselist/0710002/070118do0710002.pdf.

[6] *FTC v. Warner-Chilcott Holdings Co. III*, No 1:05-cv-02179-CKK (D.D.C. filed Nov. 7, 2005) (complaint filed), *available at* http://www.ftc.gov/os/caselist/0410034/051107comp0410034%20pdf.

prevented Barr from entering with its generic version of Ovcon. The next day, Barr announced its intention to start selling a generic version of the product.[7] Under an agreement settling the case, entered in October 2006, Warner Chilcott must: (1) refrain from entering into agreements with generic pharmaceutical companies in which the generic agrees not to compete with Warner Chilcott and there is either a supply agreement between the parties or Warner Chilcott provides the generic with anything of value and the agreement adversely effects competition; (2) notify the FTC whenever it enters into supply or other agreements with generic pharmaceutical companies; and (3) for three months, take interim steps to preserve the market for the tablet form of Ovcon in order to provide Barr the opportunity to compete with its generic version.[8] Though Warner Chilcott settled, the FTC's case against Barr is ongoing.

Anticompetitive patent settlements between brand and generic companies present one of the greatest threats American consumers face today. The agency has directed significant efforts at antitrust challenges to what have come to be called "exclusion payment settlements" (or, by some, "reverse payments"). In these settlements, a brand-name drug firm pays a generic firm to delay entry of its competing product, effectively sharing the brand's profits that are preserved by an agreement not to compete. Recent court decisions, however, have made it more difficult to bring antitrust cases to stop exclusion payment settlements, and the impact of those court rulings is becoming evident in the marketplace. These developments threaten substantial harm to

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7 FTC News Release, *Consumers Win as FTC Action Results in Generic Ovcon Launch* (Oct. 23, 2006), *available at* http://www.ftc.gov/opa/2006/10/chilcott.htm.

8 *FTC v. Warner-Chilcott Holdings Co. III,* No 1:05-cv-02179-CKK (D.D.C. filed Oct. 23, 2006) (stipulated final permanent injunction and final order), *available at* http://www.ftc.gov/os/caselist/0410034/finalorder.pdf.

consumers and others who pay for prescription drugs. Despite the Supreme Court's decision not to grant the FTC's petition for *certiorari* in *Schering*,[9] we continue to be vigilant in the detection and investigation of patent settlements between drug companies that delay generic entry.

The Commission strongly supports the intent behind bipartisan legislation introduced by Senators Kohl, Leahy, Grassley, and Schumer, which was reported by this Committee last month, including the objective to adopt a bright line approach to addressing exclusion payments. The FTC submitted testimony to the Senate Judiciary Committee in January 2007, expressing its support for a legislative solution to the problem of anticompetitive patent settlements in the pharmaceutical industry.[10] We welcome the opportunity to continue working with you to advance a legislative remedy in this important area.

B. Medical Devices and Diagnostic Systems

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[9] *Schering-Plough Corp. v. Fed. Trade Comm'n,* 402 F.3d 1056 (11th Cir. 2005), *cert. denied* 126 S. Ct. 2929 (2006). In the *Schering-Plough* matter, the Commission sustained a challenge to two agreements into which Schering entered with generic drug manufacturers through which Schering paid the generics to delay the sale of their products. Schering argued, ultimately successfully in the Court of Appeals for the Eleventh Circuit, that the agreements were an appropriate way to settle the patent litigation and that, because the generics were potentially constrained by Schering's patents from entering, the payments to the generics to agree to accept an entry date did not violate the antitrust laws. In particular, the court ruled that a payment by the patent holder, accompanied by an agreement by the challenger to defer entry, could not support an inference that the challenger agreed to a later entry date in return for such payment, even if there was no other plausible explanation for the payment. The Commission sought *certiorari* in the Supreme Court because we believe that the court of appeals' ruling, contrary to antitrust law and Congress's intent in enacting Hatch-Waxman, essentially imposes a rule that a patentee is presumptively entitled to buy protection from all generic competition for the full patent term, even if such a payment effectively augments the patent's exclusionary power.

[10] Prepared Statement of the Federal Trade Commission Before the Senate Judiciary Committee on *Anticompetitive Patent Settlements in the Pharmaceutical Industry: The Benefits of a Legislative Solution* (Jan. 17, 2007), *available at* http://www.ftc.gov/speeches/leibowitz/070117anticompetitivepatentsettlements_senate.pdf.

This past year, the Commission actively enforced the antitrust laws against transactions that allegedly would have reduced competition for several types of medical devices and diagnostic systems. In July 2006, the FTC preserved competition in the markets for life-saving medical devices by requiring a consent order in the $27 billion acquisition of Guidant Corporation by Boston Scientific Corporation. These two companies are the largest market share holders in several coronary medical device markets in the U.S., together accounting for 90% of the U.S. PTCA balloon catheter market and 85% of the U.S. coronary guidewire market. The order required the divestiture of Guidant's vascular business to an FTC-approved buyer.[11]

In August 2006, the Commission ensured the maintenance of competition in the market for breast cancer diagnostics, specifically for Prone Stereotactic Breast Biopsy Systems, in the matter of Hologic, Inc.'s proposed acquisition of Fischer Imaging. The FTC approved a consent order that required the divestiture of the key biopsy system assets to Siemens, a company well-positioned to become a competitor in this market.[12]

In December 2006, the Commissions issued a consent order regarding the proposed $12.8 billion merger between Thermo Electron and Fisher Scientific. The Commisson's order requires that Thermo Electron divest Fisher's Genevac division, and thereby maintains competition in the

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[11] *In the Matter of Boston Scientific Corp. and Guidant Corp.*, FTC Docket No. C-4164 (July 21, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0610046/060725do0610046.pdf.

[12] *In the Matter of Hologic, Inc.*, FTC Docket No. C-4165 (Aug. 9, 2006)(decision and order), *available at* http://www.ftc.gov/os/caselist/0510263/0510263decisionandorderpubrecver.pdf.

market for centrifugal vacuum evaporators, a tool used in the health care industry.[13]

C. Hospitals and Other Institutional Providers

The Commission has worked vigorously to preserve competition among the nation's hospitals. In October 2005, an FTC Administrative Law Judge found that Evanston Northwestern Healthcare Corporation's completed acquisition of an important competitor, Highland Park Hospital, resulted in higher prices and a substantial lessening of competition for acute care inpatient services in parts of Chicago's northern suburbs.[14] In May 2006, the Commission heard oral arguments on the appeal in this matter. We are continuing to investigate other hospital mergers.[15]

D. Physician Price Fixing

During the past year, the FTC continued to investigate and challenge unlawful price fixing by physician groups. In three separate matters, the FTC challenged agreements between physicians as illegal, and successfully ended price fixing schemes. In August 2006, the FTC approved a final consent order settling charges that agreements among 30 competing members of the Puerto Rico Association of Endodontists were unlawful. The FTC charged that these

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[13] *In the Matter of Thermo Electron Corp.*, FTC Docket No. C-4170 (Nov. 30, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0610187/061205do0610187.pdf.

[14] *In the Matter of Evanston Northwestern Healthcare Corp.*, FTC Docket No. 9315 (Oct. 20, 2005) (initial decision), *available at* http://www.ftc.gov/os/adjpro/d9315/051021idtextversion.pdf.

[15] The Commission also challenged the merger of two of the top three operators of outpatient kidney dialysis clinics and required divestitures in 66 markets throughout the United States. *In the Matter of Fresenius AG*, FTC Docket No. C-4159 (June 30, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0510154/0510154dopublicversion.pdf.

members had agreed to set the prices they would charge dental insurance plans and had refused to deal with plans that would not accept the collectively determined prices. The FTC's complaint charged that the Association's actions led to higher costs for consumers.[16]

In August 2006, in the matter of New Century Health Quality Alliance, the Commission approved a final consent order settling charges against two independent practice associations ("IPAs") and eighteen member physician practices in the Kansas City area. The Commission's Complaint challenged the independent practice associations' and physician practices' alleged refusal to deal with health care plans, except on collectively agreed-upon terms, including price.[17]

In February 2007, the FTC challenged agreements among organizations representing more than 2,900 independent physicians in the Chicago area. The charges involved Advocate Health Partners (a "super-PHO" with numerous physician-hospital organizations as members), along with 10 related parties, collectively setting prices that otherwise independent physicians would charge to health plans, without any sort of efficiency-enhancing integration among the member practices that would justify their conduct. Specifically, the Commission alleged that AHP negotiated contract rates with health plans on behalf of its members, terminated member contracts with a health plan that rejected a proposed collective rate, and threatened that it would not contract with a health plan for hospital services unless that plan stopped contracting with

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[16] *In the Matter of Puerto Rico Ass'n of Endodontists, Corp.*, FTC Docket No. C-4166 (Aug. 24, 2006) (complaint), *available at* http://www.ftc.gov/os/caselist/0510170/0510170c4166praecomplaint.pdf.

[17] *In the Matter of New Century Health Quality Alliance, Inc.*, FTC Docket No. C-4169 (Sept. 29, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0510137/0510137nchqaprimedecisionorder.pdf.

individual physicians and agreed instead to a group contract. The FTC settled the charges and approved a consent order that prohibits AHP and the other named parties from engaging in such anticompetitive conduct in the future.

Some time after the allegedly unlawful conduct in this case began, AHP and the other respondents developed and implemented a Clinical Integration Plan, seeking to integrate the member practices in such a way as to justify collective rate-setting. The Commission has made no determination on the legality of the plan, and although the order does not prohibit the parties from continuing it, it does contain mechanisms allowing the Commission to monitor the continued development, implementation, and results of the plan. The Commission fully intends to continue this monitoring, and retains the ability to challenge conduct related to the plan if it determines at any time that such a challenge is warranted and in the public interest.

II. Energy

Few issues are more important to American consumers and businesses than the decisions being made about current and future energy production and use. The FTC plays a key role in maintaining competition and protecting consumers in energy markets. In doing so, the FTC has assembled vast competition policy and enforcement expertise in matters affecting the production and distribution of gasoline and natural gas liquids used in heating and other industrial applications. The agency invokes all the powers at its disposal – including investigation of possible antitrust violations, prosecution of cases, industry studies and analyses, and advocacy before other government agencies – to protect consumers from anticompetitive conduct in the industry.

Consistent with past practice, the FTC continues to monitor retail gasoline and diesel prices in 360 cities and wholesale prices in 20 major markets across the country to identify possible anticompetitive activities and determine whether a law enforcement investigation is warranted. If FTC staff members detect unusual price movements in an area, they research the possible causes and consult, when appropriate, with state attorneys general, state energy agencies, and the federal Energy Information Administration. If evidence of anticompetitive conduct is found, the Commission will open an investigation and pursue all appropriate law enforcement action.

In November 2006, Chevron and USA Petroleum abandoned a transaction in which Chevron would have acquired most of the retail gasoline stations owned by USA Petroleum, the largest remaining chain of service stations in California not controlled by a refiner. The FTC was concluding its investigation of the proposed acquisition at the time, and USA Petroleum's president acknowledged that the parties abandoned the transaction because of resistance from the FTC.[18]

Also in November 2006, the FTC challenged EPCO's proposed $1.1 billion acquisition of TEPPCO's natural gas liquids storage businesses. The FTC approved a consent order that allowed the acquisition to be completed only if TEPPCO first divested its interests in the world's largest natural gas liquids storage facility in Mont Bellvieu, Texas to an FTC-approved buyer.[19]

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[18] *See* Elizabeth Douglass, *Chevron Ends Bid to Buy Stations*, L.A. TIMES, Nov. 18, 2006, *available at* http://www.latimes.com/business/la-fi-chevron18nov18,1,7256145.story?coll=la-headlines-business&ctrack=1&cset=true.

[19] *In the Matter of EPCO, Inc., and TEPPCO Partners, L.P.*, FTC Docket No. C-4173 (Oct. 31, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0510108/0510108c4173do061103.pdf.

In May 2006, the FTC released its report on gasoline price manipulation and post-Katrina gasoline price increases.[20] This report contained the findings of a Congressionally-mandated Commission investigation into whether gasoline prices nationwide were "artificially manipulated by reducing refinery capacity or by any other form of market manipulation or price gouging practices." The report also contains the agency's findings concerning gasoline pricing by refiners, large wholesalers, and retailers in the aftermath of Hurricane Katrina. In its investigation, the FTC examined evidence relating to a broad range of possible forms of manipulation. It found no instances of illegal market manipulation leading to higher prices during the relevant time periods, but found fifteen examples of pricing at the refining, wholesale, or retail level that fit the relevant legislation's definition of evidence of "price gouging." Other factors such as regional or local market trends, however, appeared to explain these firms' prices in nearly all cases. The report reiterated the FTC's position that federal gasoline price gouging legislation, in addition to being difficult to enforce, could cause more problems for consumers than it solves, and that consumers are likely to be better off if competitive market forces are allowed to determine the price for gasoline that drivers pay at the pump.

In December 2006, the Commission issued a report that examined the current state of ethanol production in the United States and measured market concentration using capacity and production data.[21] The study, which is the second in a series of annual reports, concludes that

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[20] Federal Trade Commission, *Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases* (Spring 2006), *available at* http://www.ftc.gov/reports/060518PublicGasolinePricesInvestigationReportFinal.pdf.

[21] FTC News Release, *FTC Issues 2006 Report to Congress on Ethanol Market Concentration* (Dec. 5, 2006), *available at* http://www.ftc.gov/opa/2006/12/fyi0678.htm.

U.S. ethanol production currently is not highly concentrated, and that market concentration has decreased over the past year by between 21 and 35 percent. The study also examined the possible effect on concentration of agreements between ethanol producers and third-party marketers. By attributing the producers' market shares to marketers when producers make such agreements, FTC staff derived alternative estimates of market concentration. The staff also estimated market concentration using both capacity and production data. The study concluded that the level of concentration in ethanol production would not justify a presumption that a single firm, or a small group of firms, could wield sufficient market power to set or coordinate price or output levels. The report notes, however, that staff cannot rule out the possibility that future mergers within the industry may raise competitive concerns.[22]

III. Real Estate

Purchasing or selling a home is one of the most significant financial transactions most consumers will ever make. Given this fact, the FTC has actively investigated restrictive practices in the residential real estate industry, including efforts by private associations of brokers to impede competition from brokers who use non-traditional listing arrangements. In the past year alone, the agency has brought eight enforcement actions against associations of realtors or brokers who adopted rules that allegedly withheld the valuable benefits of the multiple listing services they control from consumers who chose to enter into non-traditional listing contracts with real estate brokers. These association policies allegedly limited the ability of home sellers to choose a listing type that best served their specific needs.

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[22] Federal Trade Commission, *2006 Report on Ethanol Market Concentration* (Dec. 1, 2006), *available at* http://www.ftc.gov/reports/ethanol/Ethanol_Report_2006.pdf.

In July 2006, the Commission charged the Austin Board of Realtors with violating the antitrust laws by preventing consumers with real estate listing agreements for potentially lower-cost unbundled brokerage services from marketing their listings on important public web sites.[23] In September 2006, the FTC issued a final consent order settling charges against the Austin Board of Realtors. Under the terms of the settlement, the Austin Board of Realtors is prohibited both from adopting or enforcing any rule that treats one type of real estate listing agreement more advantageously than any other listing type and from interfering with the ability of its members to enter into any kind of lawful listing agreement with home sellers.[24]

In December 2006, the Commission protected consumers by requiring a series of consent orders in five matters relating to the operation of multiple listing services in parts of Colorado, New Hampshire, New Jersey, Virginia, and Wisconsin. These matters were: (1) Williamsburg Area Association of Realtors, Inc.; (2) Monmouth County Association of Realtors; (3) Northern New England Real Estate Network, Inc.; (4) Realtors Association of Northeast Wisconsin, Inc.; and (5) Information and Real Estate Services, LLC.[25] The complaints charged the associations

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[23] FTC News Release, *FTC Charges Austin Board of Realtors With Illegally Restraining Competition* (July 13, 2006), *available at* http://www.ftc.gov/opa/2006/07/austinboard.htm.

[24] *In the Matter of Austin Bd. of Realtors*, FTC Docket No. C-4167 (Aug. 29, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0510219/0510219c4167AustinBoardofRealtorsDecisionandOrder.pdf.

[25] FTC News Release, *FTC Charges Real Estate Groups with Anticompetitive Conduct in Limiting Consumers' Choice in Real Estate Services* (Oct. 12, 2006), *available at* http://www.ftc.gov/opa/2006/10/realestatesweep.htm; FTC News Release, *FTC Approves Final Consent Orders in Real Estate Competition Matters* (Dec. 1, 2006), *available at* http://www.ftc.gov/opa/2006/12/fyi0677.htm.

with violating the FTC Act by adopting anticompetitive rules or policies that, when implemented, prevented properties with non-traditional listing contracts from being displayed on a wide range of public web sites. Each respondent, prior to the Commission's acceptance of the consent orders for public comment, rescinded or modified its rules to discontinue the challenged practices. The orders require that these services be open to all types of listing agreements.[26]

In October 2006, the agency filed administrative complaints against both RealComp II Ltd., and MiRealSource, Inc.[27] The complaints charged that these two real estate groups illegally restrained competition by limiting consumers' ability to obtain low-cost real estate brokerage services. The first complaint alleged that MiRealSource adopted a set of rules to exclude low-cost listings from its multiple listing service, as well as other rules that restricted competition in real estate brokerage services. The second complaint alleged that Realcomp II engaged in anticompetitive conduct by prohibiting information on Exclusive Agency Listings and other forms of nontraditional listings from being transmitted from the multiple listing service it

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[26] *In the Matter of Information and Real Estate Servs., LLC,* FTC Docket No. C-4179 (Nov. 22, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0610087/0610087do061201.pdf; *In the Matter of Northern New England Real Estate Network, Inc.*, FTC Docket No. C-4175 (Nov. 22, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0510065/0510065do061128.pdf; *In the Matter of Williamsburg Area Ass'n of Realtors, Inc.*, FTC Docket No. C-4177 (Nov. 22, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0610268/0610268do061128.pdf; *In the Matter of Realtors Ass' of Northeast Wisconsin, Inc.*, FTC Docket No. C-4178 (Nov. 22, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0610267/0610267do061130.pdf; *In the Matter of Monmouth County Ass'n of Realtors*, FTC Docket No. C-4176 (Nov. 22, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0510217/0510217do061128.pdf.

[27] FTC News Release, *FTC Charges Real Estate Groups with Anticompetitive Conduct in Limiting Consumers' Choice in Real Estate Services* (Oct. 12, 2006), *available at* http://www.ftc.gov/opa/2006/10/realestatesweep.htm.

maintains to public real estate web sites. The complaints alleged that the conduct was collusive and exclusionary, because in agreeing to keep non-traditional listings off the multiple listing service and/or public web sites, the brokers enacting the rules were, in effect, agreeing among themselves to limit the manner in which they compete with one another, and withholding valuable benefits of the multiple listing service from real estate brokers who did not go along.[28] In February 2007, the Commission approved a consent order for public comment in the matter of MiRealSource, in which MiRealSource agreed to provide its services to all member brokers.[29] The FTC is currently in the process of litigating the Realcomp II complaint.

IV. Defense

In October 2006, the FTC entered into a consent order with the Boeing Company and Lockheed Martin Corporation regarding their proposed joint venture, United Launch Alliance, L.L.C. The FTC complaint alleged that, by combining the only two suppliers of U.S. government medium to heavy launch services, the joint venture as originally structured would have reduced competition in the markets for medium to heavy launch services and space vehicles. During each stage of the investigation and in fashioning the relief in this case, the Commission worked closely with the Department of Defense ("DoD"). The Commission's

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[28] *In the Matter of MIREALSOURCE, Inc.*, FTC Docket No. 9321 (Oct. 10, 2006) (complaint), *available at* http://www.ftc.gov/os/adjpro/d9321/061012admincomplaint.pdf; *In the Matter of REALCOMP II LTD.*, FTC Docket No. 9320 (Oct. 10, 2006) (complaint), *available at* http://www.ftc.gov/os/adjpro/d9320/061012admincomplaint.pdf.

[29] *In the Matter of MIREALSOURCE, Inc.*, FTC Docket No. 9321 (Feb. 5, 2007) (decision and order), *available at* http://www.ftc.gov/os/adjpro/d9321/070205decisionorder.pdf; *In the Matter of MIREALSOURCE, Inc.*, FTC Docket No. 9321 (Feb. 5, 2007) (agreement containing consent order), *available at* http://www.ftc.gov/os/adjpro/d9321/070205agreement.pdf.

consent order requires the parties to take the following actions: (1) United Launch Alliance must cooperate on equivalent terms with all providers of government space vehicles; (2) Boeing and Lockheed's space vehicle businesses must provide equal consideration and support to all launch services providers when seeking any U.S. government delivery in orbit contract; and (3) Boeing, Lockheed, and United Launch Alliance must safeguard competitively sensitive information obtained from other space vehicle and launch services providers.[30]

In December 2006, the Commission challenged General Dynamics' proposed $275 million acquisition of SNC Technologies, Inc. and SNC Technologies, Corp., and entered into a consent order. General Dynamics and SNC were two of only three competitors providing the U.S. military with melt-pour load, assemble, and pack (LAP) services used during the manufacture of ammunition for mortars and artillery. The Commission's consent order alleviated the alleged anticompetitive impact of the proposed acquisition by requiring General Dynamics to divest its interest in American Ordnance to an independent competitor.[31]

V. Other Industries

The FTC ensured continued competition for funeral and cemetery services by entering

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[30] *In the Matter of Lockheed Martin Corp. and The Boeing Co.*, FTC File No. 051 0165 (Oct. 3, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0510165/0510165decisionorderpublicv.pdf; *In the Matter of Lockheed Martin Corp. and The Boeing Co.*, FTC File No. 051 0165 (Oct. 3, 2006) (agreement containing consent order), *available at* http://www.ftc.gov/os/caselist/0510165/0510165agreement.pdf.

[31] *In the Matter of General Dynamics Corp.*, FTC Docket No. C-4181 (Feb. 7, 2007) (decision and order), *available at* http://www.ftc.gov/os/caselist/0610150/0610150decisionorder.pdf; *In the Matter of General Dynamics Corp.*, FTC Docket No. C-4181 (Dec. 28, 2006) (agreement containing consent orders), *available at* http://www.ftc.gov/os/caselist/0610150/0610150agreement.pdf.

into a consent agreement with the nation's two largest funeral home and cemetery chains, Service Corporation International and Alderwoods Group Inc. In its complaint, the Commission alleged that the proposed merger of the two companies would lessen competition in 47 markets for funeral or cemetery services, leaving consumers with fewer choices and the prospect of higher prices or reduced levels of service. Under the consent agreement, SCI must sell funeral homes in 29 markets and cemeteries in 12 markets across the United States. In six other markets, SCI must sell certain funeral homes that it plans to acquire or end its licensing agreements with third-party funeral homes affiliated with SCI.[32]

In March 2006, the FTC challenged Valassis Communications Inc.'s alleged invitation to collude with its direct competitor, News America Marketing, in the markets for free-standing newspaper inserts. The Commission charged that Valassis invited News America to allocate customers and fix prices, and thereby end an ongoing price war between the two companies. The Commission's consent order settling the charges bars Valassis from engaging in, or attempting to engage in, similar anticompetitive conduct in the future.

In September 2006, the FTC prevented a reduction in competition for industrial gases by approving a final consent order in the matter of Linde AG and the BOC Group PLC. The consent order required Linde to divest its Air Separation Units (ASU's) and all other assets in 8 localities across the United States. In addition, the order required Linde to divest its bulk refined helium assets to Taiyo Nippon Sanso Corporation. The consent order maintains competition in

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[32] *In the Matter of Service Corp. Int'l and Alderwoods Group Inc.*, FTC Docket No. C-4174 (Dec. 29, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0610156/070105do0610156.pdf.

the markets for liquid oxygen, liquid helium, and bulk refined helium in several U.S. markets.[33]

In February 2007, the Commission issued a final opinion and order in the non-merger proceeding against technology developer Rambus, Inc.[34] The Commission determined that Rambus unlawfully monopolized the markets for four computer memory technologies that have been incorporated into industry standards for dynamic random access memory – DRAM chips. DRAM chips are widely used in personal computers, servers, printers, and cameras. In addition to barring Rambus from making misrepresentations or omissions to standard-setting organizations again in the future, the FTC's order requires Rambus to license its SDRAM and DDR SDRAM technology and sets maximum allowable royalty rates it can collect for the licensing, bars Rambus from collecting or attempting to collect more than the maximum allowable royalty rates from companies that incorporated its SDRAM and DDR SDRAM technology, and requires Rambus to employ a Commission-approved compliance officer to ensure that Rambus's patents and patent applications are disclosed to industry standard-setting bodies in which it participates.[35] The Commission considers standard setting to have significant potential benefits for consumers, and it intends to be vigilant in challenging deceptive or unfair practices that may distort that process.

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[33] *In the Matter of Linde AG and The BOC Group PLC*, FTC Docket No. C-4163 (Aug. 29, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0610114/0610114c4163LindeBOCDOPubRecV.pdf.

[34] FTC News Release, *FTC Issues Final Opinion and Order in Rambus Matter* (Feb. 5, 2007), *available at* http://www.ftc.gov/opa/2007/02/070502rambus.htm.

[35] *In the Matter of Rambus Inc.*, Docket No. 9302 (Feb. 5, 2007) (opinion of the Commission on remedy), *available at* http://www.ftc.gov/os/adjpro/d9302/070205opinion.pdf; *In the Matter of Rambus Inc.*, Docket No. 9302 (Feb. 2, 2007) (final order), *available at* http://www.ftc.gov/os/adjpro/d9302/070205finalorder.pdf.

VI. Guidance, Transparency, and Merger Review Process Improvements

During the last year, the FTC implemented reforms to the merger review process and electronic filing of Hart-Scott-Rodino pre-merger notification forms, both of which are aimed at streamlining the merger review process. To increase the transparency of the merger review decision-making process, the FTC and the Antitrust Division of the Department of Justice ("DOJ") jointly released a commentary on the agencies' Horizontal Merger Guidelines.

In February 2006, the Commission announced the implementation of significant merger process reforms aimed at reducing the costs borne by both the FTC and merging parties.[36] These reforms include, most importantly: reducing the number of custodians from which parties must supply information to a maximum of 35 per party in most cases, provided the parties agree to certain conditions; reducing the time period for which parties are required to search for documents from three to two years in general; providing parties with the right to meet with the Bureaus of Competition and Economics management regarding data requests, if necessary; allowing the parties to preserve substantially fewer backup tapes; and allowing parties to submit privilege logs that contain much less detailed information.[37]

In March 2006, the FTC and DOJ jointly released a "Commentary on the Horizontal Merger Guidelines" ("Commentary") that continues the agencies' ongoing efforts to increase the transparency of their decision-making processes – in this case, with regard to federal antitrust

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[36] FTC News Release, *FTC Chairman Announces Merger Review Process Reforms* (Feb. 16, 2006), *available at* http://www.ftc.gov/opa/2006/02/merger_process.htm.

[37] *Reforms to the Merger Review Process: Announcement by Deborah Platt Majoras, Chairman, Federal Trade Commission* (Feb. 16, 2006), *available at* http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf.

review of "horizontal" mergers between competing firms. The analytical framework and standards used to scrutinize the likely competitive effects of such mergers are embodied in the Horizontal Merger Guidelines, which the agencies jointly issued in 1992, and revised, in part, in 1997. The Commentary explains how the FTC and DOJ have applied particular Guidelines principles in the context of actual merger investigations over the last thirteen years.[38] The Commentary brings greater transparency to the Agencies' merger analysis and greater certainty to businesses and merger practitioners, and enhances the quality of communications between the government and merging parties during the merger review process.

In June 2006, the FTC and the DOJ implemented an electronic filing system that allows merging parties to submit via the Internet the premerger notification filings required by the Hart-Scott-Rodino ("HSR") Act.[39] This new system eliminates the time and expense entailed in duplicating and delivering documents. Previously, parties were required to submit to both the FTC and the DOJ paper copies of their Forms and documentary attachments. Under the new system, filers have three options: (1) complete and submit the Form and all attachments in hard copy; (2) complete the electronic version of the Form and submit the Form and all attachments electronically; or (3) complete the electronic version of the Form and submit it electronically while submitting all documentary attachments in paper copy.

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38 *Commentary on the Horizontal Merger Guidelines* (2006), *available at* http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf.

39 FTC News Release, *Federal Trade Commission and Department of Justice Allow Electronic Submission of Premerger Notification Filings* (June 20, 2006), *available at* http://www.ftc.gov/opa/2006/06/premerger.htm.

In January 2007, the Commission published a report showing the trend in merger enforcement investigations for the fiscal years 1996-2005. The report promotes transparency in the Commission's merger enforcement by providing information on the market structures and other features of the investigations that resulted in Commission enforcement actions.[40]

VII. Competition Advocacy

A significant tool for strengthening competition is the FTC's competition advocacy work. The Commission and staff frequently provide comments to federal and state legislatures and government agencies, sharing their expertise on the competitive impact of proposed laws and regulations when they alter the competitive environment through restrictions on price, innovation, or entry conditions. In the past year FTC commissioners and staff have testified before Congress 22 times, including ten times on antitrust-related matters including legislative proposals to prohibit gasoline price gouging,[41] real estate brokerage services,[42] contact lens sales

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[40] Federal Trade Commission, *Horizontal Merger Investigation Data, Fiscal Years 1996-2005* (Jan. 25, 2007), *available at* http://www.ftc.gov/os/2007/01/P035603horizmergerinvestigationdata1996-2005.pdf.

[41] *FTC Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases: Hearing Before the Senate Committee on Commerce, Science and Transportation* (2006) (Prepared Statement of the FTC, Presented by Deborah Platt Majoras, Chairman), *available at* http://www.ftc.gov/os/testimony/0510243CommissionTestimonyConcerningGasolinePrices05232006Senate.pdf.

[41] *Competition in the Real Estate Brokerage Industry: Hearing Before the H. Subcomm. on Housing and Community Opportunity* (2006) (Prepared Statement of the FTC, Presented by Maureen K. Ohlhausen), *available at* http://www.ftc.gov/os/2006/07/CompetitionintheRealEstate%20BrokerageIndustry%20estimony%20ouse07252006.pdf.

and distribution practices,[43] competition in group healthcare,[44] broadband and Internet competition,[45] and barriers to entry and competition by generic drugs.[46] Moreover, in recent months FTC commissioners, senior staff members, and I have testified before the Antitrust Modernization Commission to aid its examination of proposals to modify existing U.S. competition laws.[47]

Experience has shown that government-imposed restrictions are among the most effective and durable restraints on competition. Recent FTC advocacy efforts have contributed to several positive consumer outcomes. In the past year, the agency has commented on issues related to

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42 *Consumer Protection and Competition Issues Concerning the Contact Lens Industry: Hearing Before the H. Subcomm. on Commerce, Trade, and Consumer Protection* (2006) (Prepared Statement of the FTC, Presented by Maureen K. Ohlhausen), *available at* http://www.ftc.gov/os/testimony/060915_v040010cpcicontactlensindustryhouse.pdf.

43 *Competition in Group Health Care: Hearing Before the Senate Comm. on the Judiciary* (2006) (Prepared Statement of the FTC, Presented by David P. Wales), *available at* http://www.ftc.gov/os/testimony/P859910CompetitioninGroupHealthCareTestimonySenate09062006.pdf.

44 *FTC Jurisdiction Over Broadband Internet Access Services: Hearing Before the Senate Comm. on the Judiciary* (2006) (Prepared Statement of the FTC, Presented by William E. Kovacic, Commissioner), *available at* http://www.ftc.gov/os/2006/06/P052103CommissionTestimonyReBroadbandInternetAccessServices06142006Senate.pdf.

45 *Barriers to Generic Entry: Hearing Before Senate Special Committee on Aging* (2006) (Prepared Statement of the FTC, Presented by Jon Leibowitz, Commissioner), *available at* http://www.ftc.gov/os/2006/07/P052103BarrierstoGenericEntryTestimonySenate07202006.pdf.

46 *See, e.g., Antitrust Modernization Committee Hearing* (Mar. 21, 2006), (Prepared Statement of Deborah Platt Majoras, Chairman), *available at* http://www.ftc.gov/speeches/majoras/060321antitrustmodernization.pdf; *Antitrust Modernization Committee Hearing* (Sept. 29, 2005) (Prepared Statement of Maureen K. Ohlhausen).

attorney matching services, attorney advertising rules, real estate settlement services, pharmacy benefit managers, wine distribution, patent rules of practice, and on-line auction trading assistants.

The Commission authorized staff to file comments with the Professional Ethics Committee of the State Bar of Texas concerning on-line attorney matching services, which are designed to help consumers find attorneys who are able to handle their legal needs. FTC staff argued that online legal matching services have the potential to lower consumers' costs related to acquiring information about the price and quality of legal services, which is likely to lead to more intense competition among attorneys and will ultimately benefit consumers. At the same time, staff saw "no indication that consumers were likely to suffer harm" from online legal matching services that would justify banning them.[48] The Ethics Committee subsequently issued a revised opinion that largely followed staff's recommendation to require certain disclosures in connection with the use of on-line matching services, rather than banning all such services.

In September, 2006, the Commission authorized staff to file comments with the New York Unified Court System pursuant to a request from the court's Proposed Rules Governing Lawyer Advertising. Staff was concerned that several provisions in the proposed rules were overly broad, could restrict truthful advertising, and could adversely affect prices paid and services received by consumers. Staff suggested that the New York Unified Court System protect consumers from false and misleading advertising by revising the rules and using less restrictive means such as requiring clear and prominent disclosure of certain information. In

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[48] FTC Staff Comments to Mr. W. John Glancy, Chairman, Professional Ethics Committee for the State Bar of Texas (May 26, 2006), *available at* http://www.ftc.gov/os/2006/05/V060017CommentsonaRequestforAnEthicsOpinionImage.pdf.

January, 2007, the New York Unified Court System promulgated revised rules which adopted nearly all of the staff's recommendations.

In June 2006, the Commission authorized the filing of comments with the New York State Assembly Committee on the Judiciary regarding proposed legislation to expand the scope of activities constituting the unauthorized practice of law. These comments were prepared jointly with the DOJ. The Agencies were concerned that the proposed legislation would prevent non-lawyers from competing with lawyers in situations where there is no clear showing that non-attorney services have caused consumer harm.[49] The legislative session ended without any action taken on the bill.

In October 2006, FTC staff filed comments with the Virginia House of Delegates on the subject of pharmacy benefit managers. The Commission argued that the proposed legislation, which would regulate some aspects of the contractual relationships between pharmacy benefit managers and health benefit plans and pharmacies, might indirectly lead to higher drug prices for Virginia consumers.[50] This proposed legislation also failed to be enacted.

In April 2006, FTC staff submitted comments to a Florida State Senator on a Florida bill concerning wine distribution. Staff argued that the bill would promote competition by providing greater access to more extensive wine varieties, and would lower consumer prices in the market.

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[49] Federal Trade Commission and United States Department of Justice Comments to Assemblywoman Helene E. Weinstein, Chair, Committee on Judiciary, New York State Assembly (June 21, 2006), *available at* http://www.ftc.gov/os/2006/06/V060016NYUplFinal.pdf.

[50] FTC Staff Comments to Terry G. Kilgore, Member, Commonwealth of Virginia House of Delegates (Oct. 2, 2006), *available at* http://www.ftc.gov/be/V060018.pdf.

However, staff noted that the provision which limits the ability of large producers to import wine into Florida would likely reduce the benefits to consumers.[51]

The FTC submitted comments in May 2006 with the U.S. Patent and Trademark Office ("PTO") regarding a January 3, 2006, statement of proposed rulemaking. The Commission supported the PTO's proposed rules on continuations – and urged their adoption – as they accommodate the legitimate uses of continuations, limit abuses that can harm the competitive process, and promote the patent system's ability to provide incentives to innovate to the extent that they reduce the pendency of patent applications.[52]

The FTC staff submitted comments supporting a bill under consideration by the Louisiana State Senate that would exempt on-line auction trading assistants from being required to attain an auctioneer's license prior to operating their businesses. The FTC argued that the bill will stimulate competition in the market for online retail services in the state by reducing barriers to entry and thus increasing consumer choices.[53] The staff's analysis was utilized during deliberations over the bill, which was ultimately signed into law.

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[51] FTC Staff Comments to The Honorable Paula Dockery (Apr. 10, 2006), *available at* http://www.ftc.gov/os/2006/04/V060013FTCStaffCommentReFloridaSenateBill282.pdf.

[52] Comments of the United States Federal Trade Commission Before the United States Patent and Trademark Office, In the Matter of Changes to Practice for Continuing Applications, Requests for Continued Examination Practice, and Applications Containing Patentably Indistinct Claims, Docket No. 2-5-P-066 (May 3, 2006), *available at* http://www.ftc.gov/os/2006/05/P052103CommissionCommentsRePTODocketNo2-5-P-066BeforethePatentandTrademarkOfficeText.pdf.

[53] FTC Staff Comments to The Honorable Noble E. Ellington, Louisiana State Senate (May 26, 2006), *available at* http://www.ftc.gov/os/2006/06/VO60015CommentstoLouisianaStateSenateImage.pdf.

VIII. Amicus Briefs

As in the past, the FTC has been active in providing amicus briefs to aid the courts in analyzing and resolving competition-related policy issues. The matters in which the agency has intervened range from Section 2 cases, to price fixing matters, to vertical price restraints.

In two joint amicus briefs, filed in May and August 2006, the FTC and DOJ urged the U.S. Supreme Court to grant *certiorari* and reverse the Ninth Circuit Court of Appeals decision in the case of *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber*. The Ninth Circuit held that the standard for a predatory pricing claim articulated by the Supreme Court in *Brooke Group Ltd v. Brown & Williamson Tobacco Corp.* did not apply to a case in which the plaintiff alleged "predatory bidding" in violation of Section 2 of the Sherman Act, and approved instructions that allowed a jury to find a violation based on assessments of factors such as "fairness" and "necessity."[54] On February 20, 2007, the U.S. Supreme Court vacated and remanded the Ninth Circuit decision, and held that the *Brooke Group* test applies to predatory bidding claims.

In June 2006, the FTC and DOJ filed a joint amicus brief in the case of *Latino Quimica-Amtex S.A., et al. v. Atofina S.A.*, which involved an international price-fixing conspiracy by manufacturers of two chemicals, sodium monochloroacetate and monochloroacetic acid, which are used in manufacturing foods, pharmaceuticals, herbicides, and plastics. At issue were the Sherman Act claims of several foreign companies that purchased the chemicals from

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[54] Brief for the United States as Amicus Curiae, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber*, No. 05-381 (U.S. May 26, 2006) (FTC and DOJ joint brief), *available at* http://www.ftc.gov/os/2006/05/P062112WeyerhaeuservRoss-SimmonsAmicusBrief.pdf; Brief for the United States as Amicus Curiae Supporting Petitioners, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber*, No. 05-381 (U.S. Aug. 25, 2006) (FTC and DOJ joint brief), *available at* http://www.ftc.gov/ogc/briefs/05381weyerhaeuser217988.pdf.

manufacturers located outside the United States, for delivery outside of the United States. In keeping with the position previously advanced in the *Empagran* litigation, the brief urged the Second Circuit to affirm the dismissal of the complaint for lack of jurisdiction.[55] Shortly after the brief was filed, the parties withdrew the appeal.

In January 2007, the FTC and DOJ filed a joint amicus brief with the U.S. Supreme Court in the case of *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, addressing whether an agreement between a supplier and dealer that sets the dealer's minimum retail price constitutes a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. 1, or is instead properly analyzed under the rule of reason. The brief argues that the *per se* rule against vertical minimum resale price maintenance established in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), is irreconcilable with modern economic analysis and the Court's modern antitrust jurisprudence, and should be overruled.[56]

In January 2007, the FTC and DOJ filed a joint amicus brief in the case of *Credit Suisse First Boston v. Glen Billing*, addressing the application of the antitrust laws to activities subject to SEC regulation. The brief argues that collaborative underwriting activities occurring during the initial public offering of securities that are expressly or implicitly authorized under the securities laws, as well as conduct inextricably intertwined with such activities, are immune from

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[55] Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Defendants-Appellees and in Support of Affirmance of the Judgment, *Latino Quimica-Amtex S.A., et al. v. Atofina S.A.* No. 05-5754-cv (2d Cir. June 1, 2006), *available at* http://www.ftc.gov/os/2006/06/P062113LatinoQuimica-AmtexvAtofinaAmicusBrief.pdf.

[56] Brief of the United States as Amicus Curiae Supporting Petitioner, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc* No. 06-480 (U.S. Jan. 22, 2007) (FTC and DOJ joint brief), *available at* http://www.ftc.gov/os/2007/01/070122Leegin06-480amicusPDC.pdf.

the antitrust laws. At the same time, the brief cautions that not all underwriting activities occurring in connection with an initial public offering are exempt from the antitrust laws. The brief urges the U.S. Supreme Court to vacate the lower court rulings, neither of which struck the appropriate balance between the interests of the antitrust and securities laws.[57]

The FTC also participated in discussions with DOJ and other federal agencies regarding the position taken by the United States as amicus in several cases involving intellectual property, which had important implications for competition and consumer interests.[58] In the cases decided to date, the Supreme Court has vacated or reversed lower court rulings that threatened consumer interests by taking an unduly rigid approach to patent litigation and remedies.[59]

IX. Hearings, Conferences, Workshops, and Reports

Hearings, conferences, and workshops organized by the FTC represent a unique opportunity for the agency to develop policy research and development tools. These events and other agency reports foster a deeper understanding of the complex issues involved in the economic and legal analysis of antitrust law.

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[57] Brief of the United States as Amicus Curiae Supporting Vacatur, *Credit Suisse First Boston v. Glen Billing* No. 05-1157 (U.S. Jan. 22, 2007) (FTC and DOJ joint brief), *available at* http://www.ftc.gov/os/2007/01/070122creditsuisse05-1157amicus).pdf.

[58] *See* Brief for the United States as Amicus Curiae Supporting Respondent, *eBay Inc. and Halfcom, Inc. v. MercExchange, LLC,* 126, S.Ct. 1837 (2006) (No. 05-130); Brief for the United States of America Supporting Petitioner, *MedImmune, Inc. v. Genentech, Inc.,* 127 S.Ct. 764 (2007)(No. 05-608); Brief for the United States as Amicus Curiae Supporting Petitioner, *KSR In'l Co. v. Teleflex, Inc.,* No. 04-1350 (U.S. Aug. 2006).

[59] *See MedImmune, Inc. v. Genentech, Inc.,* 127 S.Ct. 764, 777 (2007); *eBay Inc. and Half.com, Inc. v. MercExchange, LLC,* 126 S. Ct. 1837, 1838-39 (2006).

In June 2006, the FTC and DOJ began holding a series of public hearings designed to examine the boundaries of permissible and impermissible conduct under Section 2 of the Sherman Act.[60] The primary goal of the hearings is to examine whether and when specific types of single-firm conduct are procompetitive or benign, and when they may harm competition. The agencies have already held fourteen days of hearings that have examined conduct such as predatory pricing, tying, price bundling, royalty rebates, refusals to deal, misleading and deceptive conduct, and exclusive dealing. The hearings have solicited input directly from businesses, business schools, and historians, as well as lawyers and economists with antitrust expertise. The hearings will continue through the spring, and will include sessions that examine issues relevant for identifying monopoly power and fashioning remedies. After the hearings conclude, staff from the agencies will prepare a public report that will incorporate the results of the hearings, as well as relevant scholarship and research.

A second major area of activity has involved intellectual property. The Commission is continuing to make use of the results of proceedings it commenced earlier this decade. In February 2002, the Commission and DOJ convened hearings to develop a better understanding of how to manage the issues that arise at the intersection of antitrust and intellectual property law and policy. The hearings took place over 24 days and involved more than 300 panelists. The agencies heard perspectives from business representatives, the independent inventor community, leading patent and antitrust organizations and practitioners, and scholars in economics and patent and antitrust law. In addition, the FTC received about 100 written submissions.

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[60] Federal Trade Commission and Department of Justice Hearings on Section 2 of the Sherman Act: Single Firm Conduct as Related to Competition, *available at* http://www.ftc.gov/os/sectiontwohearings/index.htm.

The Commission issued the first of two reports that stem from the hearings in 2003. The first report, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*,[61] concluded that competition in markets and patents can work in tandem to foster innovation, but the report found that each policy requires a proper alignment with the other to do so. The FTC's first report analyzed and made recommendations for the patent system. The Commission and DOJ are nearing completion of the second report, which will describe and make recommendations for competition law and policy.

In March 2006, FTC staff initiated a study on authorized generic drugs.[62] The study is intended to help the agency understand the circumstances under which innovator companies launch authorized generics; to provide data and analysis of how competition between generics and authorized generics during the Hatch-Waxman Act's 180-day exclusivity period has affected short-run price competition and long-run prospects for generic entry; and to build on the economic literature about the effect of generic drug entry on prescription drug prices. At this time, the Commission has given public notice regarding its proposed methodology, and staff is reviewing the public comments that have been received.

In September 2006, FTC staff released a report on the municipal provision of wireless internet access. The Commission recognizes that improving consumer access to broadband internet service is an important goal for federal, state, and local governments, and the report

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[61] Federal Trade Commission, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* (Oct. 2003), *available at* http://www.ftc.gov/os/2003/10/innovationrpt.pdf.

[62] FTC News Release, *FTC Proposes Study of Competitive Impacts of Authorized Generic Drugs* (Mar. 29, 2006), *available at* http://www.ftc.gov/opa/2006/03/authgenerics.htm.

describes a variety of options to reduce competitive risks arising from municipal provision of wireless internet access while still achieving benefits from increased broadband access.[63]

In November 2006, the Commission released a report that provides enforcement perspectives on the Noerr-Pennington doctrine, which precludes application of the antitrust laws to certain private acts that urge government action. The report provides FTC's views on how best to apply the doctrine to conduct that imposes significant risk to competition but does not further the important First Amendment and governmental decision-making principles underlying the doctrine.[64]

In February 2007, the FTC hosted a public workshop on "Broadband Connectivity Competition Policy."[65] This workshop brought together experts from business, government, and the technology sector, as well as consumer advocates and academics. The purpose was to explore competition and consumer protection issues relating to broadband Internet access, including so-called "network neutrality." The workshop explored issues raised by recent legal and regulatory determinations that providers of certain broadband Internet services, such as cable modem and DSL, are not subject to the FCC's common carrier regulations.

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[63] Federal Trade Commission, *Municipal Provision of Wireless Internet* (Sep. 2006), *available at* http://www.ftc.gov/os/2006/10/V060021municipalprovwirelessinternet.pdf.

[64] Federal Trade Commission, *Enforcement Perspectives on the Noerr-Pennington Doctrine* (2006), *available at* http://www.ftc.gov/reports/P013518enfperspectNoerr-Penningtondoctrine.pdf.

[65] *FTC Workshop, Broadband Connectivity Competition Policy* (Feb. 13-14, 2007), *available at* http://www.ftc.gov/opp/workshops/broadband/index.html.

In April 2007, the Commission will hold a three-day conference on "Energy Markets in the 21st Century: Competition Policy in Perspective."[66] The conference will bring together leading experts from government, the energy industry, consumer groups, and the academic community to explore a range of energy issues that are important to American consumers and the U.S. and global economies. Panels will discuss topics including: the relationship between market forces and government policy in energy markets; the dependence of the U.S. transportation sector on petroleum; the effects of electric power industry restructuring on competition and consumers; what energy producers and consumers may expect in the way of technological developments in the industry; the security of U.S. energy supplies; and the government's role in maintaining competition and protecting energy consumers.

X. International Coordination and Technical Assistance

In February 2007, I created the FTC's Office of International Affairs to coordinate more effectively the full range of the FTC's international activities. The move brings international antitrust, consumer protection, and technical assistance programs under one office.

FTC's cooperation with competition agencies around the world is a vital component of our enforcement and policy programs, facilitating our ability to collaborate on cross-border cases, and promoting convergence toward sound, consumer welfare-based competition policies.

Commission staff routinely coordinate with colleagues in foreign agencies on mergers and anticompetitive conduct cases of mutual concern. The FTC promotes policy convergence through formal and informal working arrangements with other agencies, many of which seek the

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66 FTC Conference, *Energy Markets in the 21st Century: Competition Policy in Perspective* (Apr. 10-12, 2007), *available at* http://www.ftc.gov/bcp/workshops/energymarkets/index.html.

FTC's views in connection with developing new policy initiatives. For example, during the past year, the FTC consulted with the European Commisssion ("EC") regarding its review of policies on abuse of dominance and remedies, with the Canadian Competition Bureau on merger remedies and health care issues, and with the Japan Fair Trade Commission on abuse of dominance and revisions to its merger guidelines. We will also be consulting with the EC on its new draft guidelines for the review of non-horizontal mergers. The FTC participated in consultations in Washington and in foreign capitals with top officials of, among others, the EC, the Japan and Korea Fair Trade Commissions, and the Mexican Federal Competition Commission. In 2006, I became the first FTC Chairman to visit China, establishing important relationships with officials involved in developing the first comprehensive competition law in China, and underscoring the importance of the FTC's and DOJ's work to provide input into the drafting process.

The FTC is an active participant in key multilateral fora that provide important opportunities for competition agencies to enhance mutual understanding in order to promote cooperation and convergence, including the International Competition Network ("ICN"), the Organization for Economic Cooperation and Development ("OECD"), the United Nations Conference on Trade and Development ("UNCTAD"), and Asia-Pacific Economic Cooperation ("APEC"). For example, over the past year, the FTC has served on the ICN's Steering Group, co-chaired its Unilateral Conduct working group and related objectives subgroup, chaired its Merger Notification and Procedures subgroup, and played a lead role in its working group on Competition Policy Implementation. In addition, the FTC also participates in U.S. delegations that negotiate competition chapters of proposed free trade agreements, including in connection with negotiations with Korea, Thailand, and Malaysia during the last year.

The FTC also assists developing nations as they move toward market-based economies with developing and implementing competition laws and policies. These activities, funded mainly by the United States Agency for International Development and conducted in cooperation with DOJ, are an important part of the FTC's efforts to promote sound competition policies around the world. In 2006, the FTC sent 34 different staff experts on 30 technical assistance missions to 17 countries, including the ten-nation ASEAN community, India, Russia, Azerbaijan, South Africa, Central America, and Egypt. We also conducted missions in Jordan and Ethiopia, and concluded a highly successful program in Mexico.

XI. Outreach Initiatives

The FTC is committed to enhancing consumer confidence in the marketplace through enforcement and education. This year, Commission staff launched a multi-dimensional outreach campaign targeting new and bigger audiences with the message that competition, supported by antitrust enforcement, helps consumers reap the benefits of competitive markets by keeping prices low and services and innovation high, as well as by encouraging more choices in the marketplace. The Commission is building a library of brochures, fact sheets, articles, reports and other products – both in print and online – in its efforts to reach consumers, attorneys and business people, and is planning to leverage its limited resources through a "wholesale/retail" approach to outreach that involves partnering with other organizations to disseminate information on its behalf.

The Commission's website, www.ftc.gov, continues to grow in size and scope with resources on competition policy in a variety of vital industries. The FTC has launched industry-specific websites for Oil & Gas, Health Care, Real Estate, and Technology. These minisites serve as a one-stop shop for consumers and businesses who want to know what the FTC is doing to promote competition in these important business sectors. In the past year, the FTC also issued practical tips for consumers on buying and selling real estate, funeral services, and generic drugs, as well as "plain language" columns on oil and gas availability and pricing.

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Mr. Chairman and Members of the Subcommittee, we appreciate this opportunity to provide an overview of the Commission's efforts to maintain a competitive marketplace for American consumers, and we appreciate the strong support that we have received from Congress. I would be happy to answer any questions that you may have.

Testimony

of the

The National Association of Exclusive Buyer Agents
NAEBA

Submitted to the

Senate Subcommittee on Antitrust, Competition
Policy and Consumer Rights

Hearing on

Oversight of the Enforcement of the Antitrust Laws

March 7, 2007

The National Association of Exclusive Buyer Agents (NAEBA) commends Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights for holding this hearing on "Oversight of the Enforcement of the Antitrust Laws".

NAEBA is a not for profit national association of non-traditional buyer brokers who only represent home buyers avoiding the conflict of interest inherent in most traditional real estate firms today. The traditional real estate firms now claim to fully represent the buyer seeking a lower price and best terms for the buyer while another agent in the same company claims to fully represent the seller ostensibly getting the highest price and best terms for the seller. In many states across the country today this is done without adequate dual agency disclosures, without the consumer's full knowledge and consent, locking consumers into contracts that leave them unable to protect their rights in their own real estate purchase or sale. Because of the dominance of traditional brokerage consumers do not know about our alternative offerings which give them more protection and advocacy.

NAEBA strongly supports the important mission of the Anti-Trust Division of the U.S. Department of Justice and the work of the Federal Trade Commission as they pursue the anti-competitive practices of the National Association of Realtors and its affiliates across the country as they seek to dominate and control the market place.

In reviewing the enforcement of our antitrust laws the subcommittee plays a critical role in assessing antitrust enforcement effectiveness and priorities. While we believe that both the Federal Trade Commission and the Department of Justice's Antitrust Division are doing an outstanding job of protecting consumers' interests, given their resources and constraints on the scope of their efforts, we believe that additional funding for both of these agencies and a broader mandate for action is important to enable them to fully protect the interests of homeowners and other consumers.

The most anticompetitive real estate services practice today is "dual agency". Home buyers and sellers have inherently opposing interests. Home buyers want the lowest price and the most favorable terms from their perspective, and home sellers want the highest price and most favorable other terms from their perspective. Historically most real estate brokers exclusively represented home sellers. Both the broker and agent who represented the seller, and the broker and agent who worked with the buyer owed a fiduciary duty to the seller. The buyer was not represented by any agent or broker.

This imbalance changed with the advent of "exclusive buyer agency" in the 1990's. These brokers and agents represented only buyers, never sellers. As a result home buyers using an exclusive buyer agent/broker were able to achieve equality in the process. Like the seller, the buyer now had a broker and agent adviser who owed their fiduciary duty only to the buyer.

Unfortunately the growing practice of exclusive buyer agency was undermined by the National Association of Realtors and their state affiliates who successfully lobbied state legislatures to rewrite state laws and/or regulations to allow the same broker, and in some cases the same agent, to simultaneously represent both the buyer and seller of the same home without informed consent. This is akin to a single law firm representing opposing parties in a civil lawsuit, and calls into question the ability of the real estate broker and/or agent to carry out all of their fiduciary responsibilities to both parties. We urge the subcommittee to study these state laws to determine whether they are anticompetitive and to undertake remedial action if appropriate.

There are related compliance problems with state real estate consumer disclosure regulations, which are intended to help make home buyers and sellers aware of the role of the licensee in the purchase or sale. Although these regulations require that home buyers be told whom the agent represents, less than one-third of real estate agents comply, according to the National Association of Realtors' 2005 Profile of Home Buyers and Sellers. Also, even when used, these forms are generic, watered down by disproportionate REALTOR dominance on state real estate commissions. We believe that as a result many home buyers mistakenly assume that the real estate agent and broker they are working with will be exclusively representing their interests and providing the full range of real estate services, under all circumstances. This undermines competition; for without that information about the agent's and broker's ability to represent them under all circumstances, a home buyer is unable to fully gauge a critical factor in deciding upon representation.

NAR's general counsel Laurie Janik was quoted in the real estate trade publication Realty Times that "These statistics say that people are being sloppy. They need to take agency disclosure requirements seriously; it is a critical element of consumer protection. I don't think it is good for practitioners or consumers that the trend line is going down. We aren't going in the right direction -- compliance is worsening." NAR's 2005 Legal Scan, an annual compilation of the thousands of lawsuits related to real estate transactions, also confirmed the problem - 24% of the lawsuits related to home purchases and sales were over disclosure issues. Despite the widespread knowledge of declining compliance with state disclosure regulations, no state real estate associations, state real estate commissions, or states legislature have undertaken aggressive steps to reverse the decline.

Some state Realtor associations (Ohio and Wisconsin) have just recently authored and passed legislation which would move this disclosure from first substantive contact to the time the offer is written. Other states are in the process of abolishing state mandated disclosure in favor of brochures produced by brokerages. Of course this is either inadequate or far too late for the buyer to make an informed decision about representation but does allow the Realtors to more easily comply with the law. It seems a shame that legislation can be passed which brings the law into compliance with the bad practices of the Realtor rather than provide early disclosure of potently vital information which would allow for informed decision making on the part of the buyer. Since this problem directly impacts competition, we suggest that the subcommittee and the antitrust agencies undertake further study of this issue.

We appreciate the subcommittee's interest in assuring that the interests of American homeowners and other consumers are protected from anti-consumer practices, and hope the subcommittee will be vigilant in its oversight on these and related issues and that the Department of Justice and the Federal Trade Commission will diligently pursue their mandate to protect real estate consumers.

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