Senator Klobuchar's Questions for the Record
Subcommittee on Antitrust, Competition Policy and Consumer Rights
"Oversight of the Enforcement of the Antitrust Laws"

For Assistant Attorney General Baer:

1. In these tough budget times, we're asking every agency to do more with less. Can you explain to us the value that you think antitrust enforcement brings to consumers and the economy as a whole?

Answer:

Vigorous enforcement of the antitrust laws ensures that consumers reap the benefits of competitive markets. Companies that illegally insulate themselves from competitive pressures gain the ability to raise prices, reduce output, and limit investments. Competition leads to better-quality products and services, lower prices, and higher levels of innovation.

The Antitrust Division works hard to make every taxpayer dollar count. The available data suggests that the American taxpayer is getting real value for those dollars. In just the last five fiscal years, the division has obtained criminal fines averaging nearly $785 million per year. That is roughly 10 times our average annual net appropriation of $79 million (full appropriation minus Hart-Scott-Rodino filing fees). These fines do not go to the Antitrust Division, but rather are contributed to the Crime Victims Fund, helping those victimized by crimes throughout our country. We can point to a similar track record of success with regard to civil enforcement. The division protects consumers by stopping anticompetitive mergers and by attacking conduct that harms competition, raises prices, lowers the quality of goods, and hampers innovation. One example is our recent e-books enforcement action. Our lawsuit caused publishers to abandon illegal agreements that kept e-book prices high. In a matter of months since our settlement, the average price for e-book best sellers has dropped by $3, from $11 to $8 a book. In short, effective enforcement of the antitrust laws saves consumers money.

2. The Antitrust Division and the Federal Trade Commission share responsibility for government enforcement of the federal antitrust laws. Sometimes this leads to conflicts regarding which agency will review a merger, what is known as the "clearance process." In some cases, the agencies take a long time, sometimes nearly the entire length of the thirty day pre-merger waiting period, to decide which one will investigate a merger. This unnecessarily delays resolution of the merger investigation, and imposes unnecessary burdens on the merging parties.

    - What is your agency doing to resolve clearance disputes in a more effective way? Are you working with the Antitrust Division/FTC, as the

Antitrust Modernization Commission suggested in 2007, to develop a new merger clearance agreement?

Answer:

The two antitrust enforcement agencies are focused on making the clearance process as efficient and effective as possible. During Fiscal Years 2009-2012 there was only one Hart-Scott-Rodino clearance discussion that took longer than 15 days to resolve. And in FY 2012, only 2 clearance discussions between the two agencies lasted longer than 7 days. Chairwoman Ramirez and I are committed to ensuring this level of cooperation continues.

3. Recently, standard essential patents have been the subject of several cases filed at the International Trade Commission (ITC). We can all agree that standardization of technology and standard essential patents have been critical to the development of a competitive market for smartphones and tablets. But recently, concerns have been raised about the practice of bringing standard essential patents cases to the ITC seeking an exclusion order to prevent products with the patents from being imported into the U.S. Some worry that the ITC exclusion orders related to standard essential patents could gravely harm competition.

    - What sorts of negative effects might the use of exclusion orders regarding standard essential patents have on competition and consumer welfare in general?

Answer:

An ITC exclusion order potentially precludes United States sales of an imported product incorporating the technology subject to the order. That can have a significant effect on competition and consumers. That is why, in January 2013, the division and the U.S. Patent and Trademark Office jointly issued a Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments, which concluded that in most circumstances it would be inappropriate for an exclusion order to issue in an ITC proceeding if a patent holder has promised to license the patent on fair, reasonable, and non-discriminatory terms. For additional analysis of the use of ITC exclusion orders, please see the next answer.

    - Is there any justification for the use of exclusion orders in the context of standard essential patents?

Answer:

The ITC determines the appropriate circumstances for issuing exclusion orders in its matters. The recent joint DOJ/PTO Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments concluded that in most circumstances it would be inappropriate for an exclusion order to issue if a patent holder has promised to

license the patent on fair, reasonable, and non-discriminatory terms. However, the joint Policy Statement also noted that there may be limited circumstances in which a standard essential patent holder who has made a RAND commitment may be justified in seeking an exclusion order, including, for example, where a licensee or someone using a technology refuses to participate in a reasonable negotiation or may not be subject to the jurisdiction of the U.S. courts.

4. You made assurances to the Committee during your confirmation hearing that effective local and regional enforcement would be a priority for you despite the planned closing for four regional offices Atlanta, Dallas, Cleveland and Philadelphia. News reports have indicated that very few attorneys opted to take the offer made to move to another Antitrust Division office. For example, the Division lost 14 of its 15 lawyers that had been in the Philadelphia office.

    - How are you ensuring that the work of these lawyers is being picked up either at main justice or another regional office?

    - What policies or procedures have you put in place to ensure that local and regional price fixing and other anticompetitive conduct is investigated and charged?

Answer:

The 2012 reorganization of the Antitrust Division's field office structure was designed to help the division ensure effective management of its resources in a fiscally constrained environment. The division has committed to helping all affected employees either relocate to other division offices at their current salaries and at division expense or find alternative employment in their local commuting area. So far, 72% of affected employees have stayed with the federal government and 58% of the affected attorneys have remained with the division.

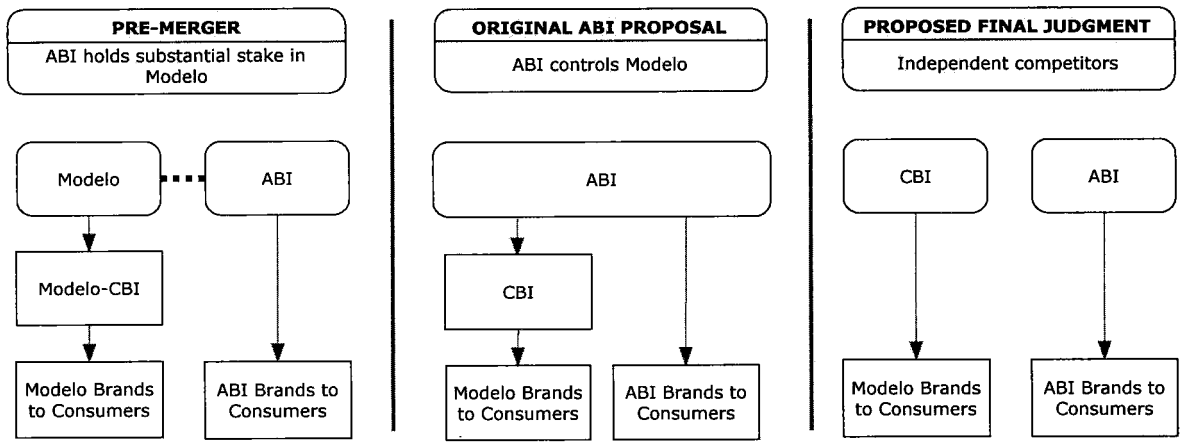
The division is committed to continuing to protect the American public from criminal antitrust misconduct, whether international, domestic, regional, or local in scope and effect. Over the years, the division has pursued many cases in states and regions where we did not have the physical presence of an office. That work will continue.

5. The Justice Department recently settled its suit to block InBev's acquisition of Grupo Modelo. As part of the settlement, in order to resolve the Department's concerns, InBev's will have to sell all of Grupo Modelo's interest in the U.S. to a rival distributor, Constellation. Your settlement indicates that you're sure Constellation will be a vigorous competitor to InBev in the way that Grupo Modelo had been.

    - How will you monitor competition and what action could you take if it Constellation does not or is not able to compete effectively?

Answer:

We sued to block the Anheuser Busch-InBev (ABI)/Grupo Modelo merger, which would have combined the largest and third-largest brewers of beer sold in the United States. That merger, combining these two large brewers of beer, would have harmed competition by eliminating a vigorous competitor that had thwarted ABI's attempts to lead industry prices higher. As a condition of settling our lawsuit, the division required a remedy that protects competition in the United States beer market. As shown in the diagram below, the settlement creates an independent horizontal competitor in the United States. This new competitor not only will have the brewery assets and intellectual property rights to fully replicate Modelo's existing competitive position in the United States, it will also have the rights to brew and sell three additional Modelo beer brands. The settlement will preserve competition in the beer market in the United States.



The division will monitor the settlement and act swiftly if it determines the parties are violating the settlement's terms. To aid in this effort, the proposed settlement requires appointment of a Monitoring Trustee, paid for by the defendants, who will oversee implementation of the settlement.

- It has been reported that ABI is pursuing a policy of pressuring its distributors to carry only ABI aligned brands and to cease distributing other brands like those of craft brewers. During the course of your investigation of the ABI/Modelo transaction, did you inquire about this policy and would approval of this transaction as proposed increase the leverage of ABI to effectuate this policy? Will your settlement address this problem in any way?

Answer:

The division recognized the importance of distribution to competition in the market for beer. The proposed settlement with ABI specifically addresses distribution issues,

including by imposing requirements on ABI regarding its distribution network that are designed to limit ABI's ability to interfere with Constellation's effective distribution of Modelo brand beer. These requirements ensure that Constellation can avoid discrimination at the hands of ABI-owned distributors, in recognition of the influence ABI already exercises in the concentrated beer distribution markets.

Senator Blumenthal questions for the record: "Oversight of the Enforcement of the Antitrust Laws"

Video Marketplace

According to FCC data, the cost of cable has been steadily increasing multiple times the rate of inflation for over a decade.

Cable distributors complain content owners are bundling programming together and charging supra-competitive rates.

Broadcasters and other major content owners argue they need the leverage of blacking out a channel in order to negotiate a fair rate for their programming.

Independent content owners argue that they are restricted from distributing their content more broadly online, due to contractual obligations with cable and satellite distributors.

Sometimes industry disagreement results in programming blackouts, blocking subscribers from watching their favorite team play, or their favorite program.

Caught in the middle of all of this are consumers, who are not able to vote with their wallets. I hear from constituents in Connecticut all the time upset about their run-away cable bills, or upset about the violence and language they see on television. They want lower prices and more choices to drop the channels they find offensive.

It seems to me there may be a big problem in this market. Consumers are forced to swallow price increases and sign up for unwanted bundles, and there is significant disagreement in the industry about what's fair.

- Assistant Attorney General Baer, if the Antitrust Division were to find market power being abused in the rising costs of cable service, or the increasing frequency of programming blackouts, do you have sufficient legal tools and resources to ensure this market works better for consumers?
- Specifically, if you were to find abuse of market-power in this industry what kinds of actions could the DOJ take to address issues of product tying, or contractual restraints on trade?

Answer:

The antitrust laws provide the tools necessary to prohibit abuse of monopoly power or other anticompetitive conduct that injures competition and consumers. The division will bring enforcement actions under the Sherman Act against any such unlawful practices, including those involving anticompetitive product tying or contractual restraints on trade.

The Market for Special Access and Consumer Broadband Rates

Consumer demand for broadband services is growing at a breakneck pace, especially in the mobile market. I am concerned about reports on the lack of competition in the special access market, and the impact this may have on prices paid for access to these connections, and ultimately on the prices consumers pay for broadband access.

As you know, every time a consumer accesses the Internet to download a movie, complete a banking transaction online, or make a VoIP phone call, their content is transmitted across an ecosystem of broadband infrastructure. Known as the "on-ramps" to the Internet, dedicated special access telecommunication lines are needed to carry a subscribers' Internet traffic.

There have been widespread reports about market power abuse and anticompetitive conduct in the special access market. For example, incumbent carriers have been accused of requiring "loyalty provisions" in service contracts to qualify for any rate that is not cost prohibitive.

Customers of these services have complained to the FCC that these contracts effectively (but not explicitly) require a customer to purchase a large proportion of their services from a given seller, de facto forcing the customer to purchase only from the seller. These reports describe incumbent providers leveraging access to their networks in markets where they are the sole provider, to make it cost prohibitive for their customers to seek a competitor's service elsewhere.

In 2006, the GAO reported on the subject, "Unless the competitor can meet the customer's entire demand, the customer has an incentive to stay with the incumbent and purchase additional circuits from the incumbent, rather than switch to a competitor or purchase a portion of their demand from a competitor –even if the competitor is less expensive."

These practices may artificially inflate the cost of broadband service and contribute to rising costs for consumers.

- Assistant Attorney General Baer, what kind of criteria does the Antitrust Division use to assess possible competitive harm in contracting arrangements?
- Has the Antitrust Division pursued cases where customers have been forced into contracts through tying and / or loyalty requirements?

Answer:

The Antitrust Division uses the criteria in the relevant case law in assessing possible competitive harm in contracting arrangements. One example was *United States v. Dentsply International, Inc.* 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. The Final Judgment enjoins Dentsply from preventing distributors from adding competitors' products to their offerings, conditioning the sale of its teeth or other products to any dealer on the dealer's sale of competing brands or its consideration of whether to sell competing brands, and

coercing dealers to drop competing tooth brands in order to become authorized Dentsply tooth dealers.

Most-favored-nations clauses are another type of contracting arrangement that can harm competition and consumers. The most commonly used MFN provisions guarantee a customer that it will receive prices that are at least as favorable as those provided to other buyers of the same seller, for the same products or services. MFNs can, under certain circumstances, raise competitive concerns because they may raise other buyers' costs or foreclose would-be competitors from accessing the market. In addition, MFNs can facilitate collusion and stabilize coordinated pricing among sellers. In 2010, the division sued Blue Cross Blue Shield of Michigan, challenging its use of MFNs in its contracts with hospitals. Our concern was that these provisions raised the price of health care and health insurance for Michigan consumers. Recently, Michigan enacted legislation prohibiting the use of MFNs in contracts between insurers and hospitals. This new law is a victory for Michigan residents and has allowed the division to dismiss its lawsuit.

Finally I note that in September 2012, the division and the FTC jointly held a public workshop on MFNs, which focused on the circumstances under which MFNs can harm competition across the economy.

Written Questions of Senator Chuck Grassley for Judiciary Antitrust Subcommittee Hearing "Oversight of the Enforcement of the Antitrust Laws", April 16, 2013

Questions for Assistant Attorney General Baer

1. As you know, I'm concerned about increased consolidation in agriculture and possible anti-competitive and abusive practices in the industry.

    a. What has the Antitrust Division been doing with respect to competition issues in agriculture since you've taken the helm?

    b. Has the Antitrust Division made any changes to its policy, practices or procedures when looking at agriculture competition issues since the issuance of the DOJ-USDA agriculture workshop report?

    c. Do you believe that the antitrust laws need to be modified to protect against abusive and anti-competitive practices and unfair consolidation in the agriculture sector?

    d. Will the Justice Department be more pro-active in policing anti-competitive behavior in agriculture? What kind of assurances can you personally give me that the Antitrust Division is taking competition concerns in the agriculture sector seriously?

Answer:

In 2010, the Department of Justice and the Department of Agriculture held a series of public workshops to explore competition issues in the agriculture industry. Those workshops helped the division improve its understanding and knowledge of agricultural markets, fostered a closer working relationship with the Department of Agriculture on issues relating to competition and improved our working relationships with farm organizations and state attorneys general on issues of antitrust concern in the agricultural sector.

Agriculture is an important part of the nation's economy. I am committed to preventing anticompetitive mergers or conduct from harming our agricultural markets. The division has attorneys and economists who focus on agricultural matters, including mergers and conduct aimed at acquiring or exercising market power. In addition, the division has a dedicated Special Counsel for Agriculture, who engages in outreach with the agricultural community to uncover potential anticompetitive activity, and who works with the litigating sections to evaluate and investigate complaints.

I believe that the current antitrust laws provide the antitrust division with the authority needed to protect competition in the nation's markets, including agricultural markets. I

am committed to ensuring that the division remains vigilant in policing anticompetitive mergers and conduct in those markets.

2. American Airlines and US Airways recently announced that the two companies would be merging. I want to make sure that air service to Iowa is not adversely impacted. Consumers in smaller communities and rural areas are often the hardest hit by these mergers.

    a. Can you assure me that the Antitrust Division is taking a hard look at this proposed transaction to ensure that it does not lead to higher prices and reduced choices for Iowans?

Answer:

While the Antitrust Division cannot comment on ongoing investigations, I can assure you that the division will conduct a thorough investigation of the proposed transaction with the goal of ensuring consumers benefit from a competitive marketplace.

    b. How does the Justice Department evaluate consumer benefits created by airlines whose business models are based on a hub and spoke approach as compared to airlines whose business models are geared toward point-to-point service? When the Justice Department looks at hubs, either in the context of a merger or an investigation, how does it account for the potential benefits hub operations can bring to smaller communities?

Answer:

The Antitrust Division evaluates mergers pursuant to the joint Department of Justice/FTC Horizontal Merger Guidelines. In its analysis the division takes into account the extent to which a particular business model benefits consumers, including, for example, whether a hub-and-spoke approach potentially enables consumers in smaller communities to reach more destinations more efficiently than a point-to-point approach.

    c. How does the Justice Department look at the impact of divestiture of slots on service to smaller communities?

Answer:

The division evaluates the competitive implications of any remedial relief being considered in any investigation. That would include the possiblity of slot divestitures in its analysis of airline mergers.

Questions for the Record Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee
Hearing before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights
on "Oversight of the Enforcement of the Antitrust Laws"
April 16, 2013

Questions for Assistant Attorney General Baer

1) In 2012, the Government Accountability Office (GAO) issued a report concerning Federal oversight and self-regulation of Group Purchasing Organizations (GPOs). This area has long been of interest to the Judiciary Committee. After I raised concerns about the potential impact on patient costs of GPO contracting practices with the Justice Department in 2000, and the Department of Health and Human Services in 2001, the Antitrust Subcommittee held a series of hearings on GPO practices that culminated in a joint report by the Department of Justice and Federal Trade Commission in 2004. During the hearings, many expressed concern that fees paid by vendors to GPOs distort demand, resulting in higher prices for hospitals and consumers.

Although the Department of Justice and FTC have investigated complaints against various GPOs, since 2004 the Department has filed only one lawsuit against a GPO under the antitrust laws, and the FTC has filed none. The GAO's 2012 report observed: "While the oversight of GPOs is conducted through the exercise of investigatory authorities of HHS, DOJ, and FTC... this oversight does not address other key questions that have previously been raised about GPOs' activities. For example, inasmuch as the collection of contract administrative fees is permitted under the safe harbor provision to the Anti-Kickback statute and safe harbor regulation, this oversight cannot address whether or to what extent these fees create a financial incentive that is inconsistent with GPOs obtaining the lowest prices for their customers."

Do you believe that the current legislative framework is sufficient to address the risk of undesirable conduct by GPOs that increases prices for consumers? Do you agree that the legal framework could be strengthened through other measures, such as revisiting the safe harbor for GPOs provided in the Anti-Kickback Statute?

Answer:

The antitrust laws provide both the division and the Federal Trade Commission with the tools to address anticompetitive actions by Group Purchasing Organizations (GPOs). The Antitrust Division is committed to investigating potential violations of the antitrust laws by GPOs and bringing enforcement actions when supported by the facts and law.

I have alerted my colleagues in the Department of Justice's Civil Division about your concerns regarding the Anti-Kickback Statute.

2) Last year, I asked then-Commissioner Ramirez and the Acting Assistant Attorney General for Antitrust, Joseph Wayland, whether "patent trolling" behavior by certain patent-assertion entities could constitute an antitrust violation. Mr. Wayland responded: "Any effort by

a patent owner to harm competition by improperly extending the exclusionary scope of its patent . . . may violate the antitrust laws, and allegations of such actions merit investigation." I was pleased that your agencies recently held a joint workshop to further investigate this question. How do your agencies intend to follow up on the workshop?

Answer:

In December 2012, the Division and the FTC hosted a public workshop on patent-assertion entity (PAE) activities. The workshop brought together outside attorneys, economists, and industry representatives to address the competition implications of PAEs. The Department of Justice and the FTC invited the public to submit written comments to the agencies by April 5, 2013. The agencies now are reviewing the workshop record and the numerous comments we received, which are available at www.justice.gov/atr/public/workshops/pae/#comments, and after that review, will determine the appropriate next steps.

"Oversight of the Enforcement of the Antitrust Laws"
Senate Antitrust Subcommittee Hearing
April 16, 2013

Written Questions
Senator Michael S. Lee

Questions for Assistant Attorney General Baer

1. At our Subcommittee's hearing last week, you stated that you believed the report on Section 2 of the Sherman Act issued by the Department in 2008 and retracted by your predecessor, Ms. Varney, may have "been going too far too fast."

    a. On the Antitrust Division's website, the Section 2 report is still listed under "Reports."

        i. What function does the "Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act" report play in antitrust guidance?

        ii. Should those in the business community rely on the report?

        iii. If not, why is it on the website?

        iv. Should the business community assume that any of the report's findings and conclusions are incorrect, and if so, which findings and conclusions?

Answer:

Upon withdrawing the Section 2 Report, former Assistant Attorney General Varney stated, "I do believe the hearings and the report provided a valuable discussion of the enforcement issues involving single firm conduct." I agree. The Section 2 Report provides a comprehensive history and analysis of the case law and scholarship relating to monopolization offenses as they have developed since the Sherman Act's passage. It is a valuable resource for antitrust lawyers, businesses, and the general public. Like my predecessor, however, I believe that the Report's conclusions do not reflect well-settled positions on Section 2 enforcement. Thus, the Report's conclusions should not be relied upon as an indication of the division's enforcement intentions. The website containing the Report makes that point explicitly.

    b. You also stated that you were concerned about the 2008 report because the FTC had not joined in the guidance and you worried over having guidance not fully adopted by both enforcement agencies. But, in the absence of the report, the business community has little formal guidance as to the boundaries of

Section 2 enforcement.

i. Do the FTC and DOJ Antitrust Division agree on the proper boundaries of Section 2 enforcement?

ii. If not, on which issues do the agencies disagree?

iii. If the agencies agree on the proper boundaries of enforcement, why not publish joint guidance on Section 2 enforcement so that the business community can rely on formal guidance?

iv. Will you commit to work with Ms. Ramirez to develop and publish guidance on Section 2 of the Sherman Act?

Answer:

The Antitrust Division works closely with the FTC on a range of antitrust issues, including the proper scope of single-firm enforcement. My experience, both as a private practitioner and an antitrust enforcer at both the division and the FTC, leads me to believe that the agencies approach Section 2 enforcement in similar fashion. Moreover, I support the development of formal guidelines, like the Horizontal Merger Guidelines, where there is both a well-developed body of case law and extensive agency experience with recurring factual and legal issues. Here we lack the data points that typically would serve as the basis for formal agency guidelines. I will commit to working with the FTC and Chairwoman Ramirez on issues relating to the proper enforcement of Section 2.

c. At our Subcommittee's hearing last week, you stated that you fear any formal or official guidance on Section 2 enforcement "would be so qualified that the business community wouldn't get the benefit of it."

i. Is it your view that there are no areas of Section 2 enforcement that are sufficiently clear and unqualified that guidance in those areas could be of use to the business community?

ii. Will you commit to releasing a Section 2 report that outlines, at a minimum, those areas of law on which there is sufficient clarity that guidance on the issues will be helpful to the business community?

Answer:

My work in private practice convinces me of the value of agency guidance to the business community and the public. But guidance can be provided in many forms. In a complex area like Section 2 helpful guidance can best be provided by articulating the factual and legal basis for enforcement actions (including in complaints, briefs and competitive impact statements), by issuing closing statements in appropriate circumstances that explain a decision not to pursue a particular action, and by discussing these issues in speeches and other public appearances.

d. The Section 2 Report states: "[T]here is a significant risk of long-run harm to consumers from antitrust intervention against unilateral, unconditional refusals to deal with rivals, particularly considering the effects of economy-wide disincentives and remedial difficulties."

i. Do you agree with this statement? If not, why not?

Answer:

When evaluating any antitrust enforcement action, the division considers any competitive effects and will continue to account for effects on competition, including any potential economy-wide disincentives. The division also will continue to take into account potential remedial difficulties in its enforcement matters.

e. The Section 2 Report concludes that "antitrust liability for unilateral, unconditional refusals to deal with rivals should not play a meaningful part in section 2 enforcement."

i. Do you agree with this conclusion? If not, why not?

Answer:

Section 2 enforcement is appropriate where there is demonstrable competitive harm that is not outweighed by cognizable efficiencies. A review of the division's enforcement actions over many years demonstrates that we take a judicious approach to enforcement in matters involving unilateral, unconditional refusals to deal. I intend to continue that approach.

f. The Section 2 Report states that "the essential-facilities doctrine is a flawed means of deciding whether a unilateral, unconditional refusal to deal harms competition."

i. Do you agree with this statement? If not, why not?

ii. What is your view of the proper boundaries of this doctrine for current antitrust enforcement?

Answer:

The division's approach in matters involving alleged essential facilities is both careful and deliberate. Many commentators have criticized the essential-facilities doctrine, but the Supreme Court has not provided definitive guidance on the doctrine. Therefore, the division will apply its general Section 2 approach of examining whether there is demonstrable competitive harm from a particular fact pattern that is not outweighed by cognizable efficiencies.

g. Some criticized the Section 2 Report's conclusions regarding unilateral, unconditional refusals to deal with rivals as creating a divergence from

foreign jurisdictions.

i. Do you believe the enforcement agencies should increase enforcement of these doctrines in the United States so as to create greater uniformity with foreign jurisdictions in this area of law?

Answer:

U.S. consumers and the public interest are best served by applying the most up-to-date legal and economic thinking and techniques to antitrust enforcement. We will continue to ensure that division antitrust enforcement is consistent with economic theory and U.S. case law. In addition, we will work closely with our international enforcement counterparts to ensure that they understand and appreciate our approach to enforcement and the rationale underlying that approach.

h. The Section 2 Report states: "Compelling access to inputs, property rights, or resources undoubtedly can enhance short-term price competition, but doing so can do more harm than good to the competitive process over the long term."

i. Do you agree with this statement? If not, why not?

Answer:

The division is mindful of the long-term impact its enforcement and approach to remedies might have on research and development and on innovation. It takes that impact into account in determining whether enforcement action is warranted.

i. The Section 2 Report concludes that "antitrust liability for mere unilateral, unconditional refusals to deal with rivals should not play a meaningful role in section 2 enforcement."

i. Do you agree with this conclusion? If not, why not?

Answer:

Please see answer to 1(e), above.

j. The Section 2 Report concludes that "a rule of per se illegality for tying is misguided because tying has the potential to help consumers and cannot be said with any confidence to be anticompetitive in almost all circumstances."

i. Do you agree with this conclusion? If not, why not?

Answer:

The strong weight of legal authority and commentary suggests that tying arrangements are best assessed under the rule of reason. I am sympathetic to that view.

2. In 2011, the Department released an updated policy guide to merger remedies, entitled "Remedies Guide." The 2011 Guide places greater emphasis on behavioral remedies than did the 2004 Remedies Guide. For example, the 2011 Guide replaces statements evidencing a strong preference for structural remedies and instead states that in some circumstances, "behavioral relief may be the best choice."

    a. Do you agree that the Department's 2011 guidance provides for a greater role for behavioral remedies relative to the role outlined in the 2004 Guide?

    b. If so, do you agree with the increased emphasis on behavioral remedies?

    c. What in your view is the proper balance between the use of structural and behavioral remedies by the Department?

Answer:

The Antitrust Division's Policy Guide to Merger Remedies states that the division will pursue a structural remedy in "the vast majority of cases involving horizontal mergers." I believe structural remedies are well suited to protect competition in merger cases and support their use in horizontal merger matters. There can be situations, particularly in connection with vertical mergers, where a conduct remedy may adequately protect consumers while enabling the merging parties to realize a transaction's pro-consumer efficiencies.

3. At our Subcommittee's hearing last week, you stated that you agreed with Chairwoman Ramirez's statement that "the standards used by the two agencies for obtaining a preliminary injunction are quite similar." You further agreed that "it would be difficult to point to a specific situation where...a case would have led to a different outcome had it been handled by a different agency." You seemed to suggest that you do not believe the differing standards faced by the FTC and DOJ to obtain a preliminary injunction result in a practical problem that Congress needs to address.

    a. In its 2007 Report and Recommendations, the Antitrust Modernization Commission wrote that the "FTC's ability to continue a merger case in administrative litigation also may lead companies whose transactions are investigated by the FTC to feel greater pressure to settle a matter than if they had been investigated by the DOJ."

        i. Should companies face greater pressure to settle if their mergers are reviewed by the FTC rather than the DOJ?

ii. Do you agree that even the perception of a more lenient standard for FTC cases than those brought by the DOJ could result in a practical difference for litigants who must weigh litigation risk?

Answer:

The language under which the courts evaluate the two agency's merger injunction requests is not identical. I have not, however, in my experience seen a situation where I thought that the difference in language has been outcome determinative. As a practical matter, any effort to seek a federal court injunction against a proposed merger requires the FTC or the division to present a convincing factual and legal basis for competitive concern in order to secure appropriate relief.

b. The 2007 Report further states that differences in the preliminary injunction standards faced by the FTC and the DOJ, whether real or perceived, "can undermine the public's confidence that the antitrust agencies are reviewing mergers efficiently and fairly and that it does not matter which agency reviews a given merger."

i. Do you agree that public confidence is important and can be affected by public perception of differing standards applied to identical issues?

ii. Do you agree that it would be problematic if the identity of the reviewing agency led to different outcomes due to the parties' perception that the FTC and the DOJ face different standards for obtaining a preliminary injunction?

iii. What measures do you believe appropriate to remedy any perceived or real inconsistency in the preliminary injunction standards faced by the agencies?

Answer:

As I noted above, I do not believe that there is a real-world difference in the factual showing the agencies must make to secure injunctive relief in the federal courts. Indeed, the joint Horizontal Merger Guidelines make clear that the antitrust agencies will apply the same analytical framework to merger review.

c. In *FTC v. CCC Holdings*, the district court granted the FTC's request for a preliminary injunction. The judge noted that although the defendants' arguments might "ultimately win the day," under Section 13(b) the trial court needed only to determine that "the FTC had raised questions that are so 'serious, substantial, difficult and doubtful' that they are 'fair ground for thorough investigation, study, deliberation and determination by the FTC'" to conclude that a preliminary injunction should issue. Commentators have written that "[t]he importance of the CCC Holdings decision therefore is not

merely academic, and the resulting agency divergence is not merely procedural. It may be outcome determinative in some cases."[1]

i. Do you believe the standard applied by the district court in *FTC v. CCC Holdings* was the same as the preliminary injunction standard applicable to the DOJ in a merger case?

ii. Do you agree that application of that lower standard may have had an impact on the outcome of the case, in the sense that the outcome may have been different if the DOJ standard had been applied?

d. In the *Whole Foods* litigation, the FTC argued on appeal before the D.C. Circuit: "This Court has recognized, in keeping with the intent of Congress in creating the Commission and in enacting Section 13(b), that the Commission is not required to 'prove' any aspect of its case in order to secure a preliminary injunction in aid of its own adjudicative and remedial powers; rather, it need only show 'serious, substantial' questions requiring plenary administrative consideration. The district court's contrary approach ignores the statutory scheme, and effectively usurps the adjudicative role of the Commission."[2]

i. Do you contend the standard the Commission advanced in the *Whole Foods* appeal was the same standard DOJ has to meet in order to obtain a preliminary injunction in a merger case?

e. *FTC v. Libbey, Inc.*, 211 F. Supp.2d 34 (D.D.C. 2002), is another case in which a court applied a lower preliminary injunction standard to an FTC merger challenge than would have been applied if DOJ had brought the case.

i. Do you agree that the standard applied in that instance may have had an impact on the outcome of the case?

Answer to 3(c)-(e):

As noted above, the language under which the courts evaluate the two agency's merger injunction requests is not identical. I have not, however, in my experience seen a situation where I thought that the difference in language has been outcome determinative. As a practical matter any decision to seek a federal court injunction against a proposed merger requires the FTC or the division to present a convincing factual and legal basis for competitive concern in order to secure appropriate relief.

f. In February 2013, the Section of Antitrust Law of the American Bar Association issued a report entitled *Presidential Transition Report: The State of Antitrust Enforcement 2012*. The report commented that some circuits have

[1] Peter Love and Ryan C. Thomas, *FTC v. CCC Holdings: Message Received*, GCP (April 2009) at 10.

[2] http://www.ftc.gov/os/caselist/0710114/080114ftcwholefoodsproofbrief.pdf at 27.

relaxed the standard imposed on the FTC from the standard applicable to the DOJ. The Section noted that the standards applied in cases brought by the FTC differ from those in DOJ cases in other ways as well. The Section urged the FTC to adopt procedures "that will ensure that in merger cases it will seek injunctions only under the same equitable standard for a preliminary injunction as that applied to Division injunction cases." Absent such procedures, the report urged the Administration "to seek legislative changes to Section 13(b) of the Federal Trade Commission Act that will make it consistent with traditional equitable standards for injunctive relief."

i. Will you commit to adopt procedures to ensure that the Commission only seeks preliminary injunctions under the same equitable standards that apply to DOJ actions?

Answer:

I believe this question is directed at the FTC.

ii. Would you support legislation to clarify that the FTC and the DOJ must satisfy identical standards to obtain a preliminary injunction?

Answer:

The Administration does not have a position on any such proposed legislation.

iii. If you remain convinced that the differing standards applied to FTC and DOJ actions are "quite similar" and as a practical matter lead to little if any difference in outcome, what would be the harm in clarifying that the applicable standard is in fact the same or in establishing a unified standard?

Answer:

The Administration does not have a position on any such proposed legislation.

4. A January 2013 policy statement from the Department of Justice and the Patent and Trademark Office noted that "the approach the [ITC] adopts in cases involving FRAND-encumbered patents that are essential to a standard will be important to the continued vitality of the voluntary consensus standards-setting process and thus to competitive conditions and consumers in the United States." I agree, but worry that the DOJ/PTO statement provides little clarity as to whether an exclusion order is appropriate when a FRAND commitment has been made. For example, the statement embraces a seemingly vague and undefined concept of willingness.

a. What more can Congress and the Department do to address this issue?

b. Do you believe there should be a legislative fix?

Answer:

The policy statement issued jointly by the Department and the PTO provided an appropriate analytical framework for the ITC to consider whether an exclusion order is appropriate in a given case. That statement noted that making a RAND commitment under an SSO's policies would appear to be at odds with seeking an ITC exclusion order, although it also acknowledged that there may be some circumstances in which an SEP holder who has made a RAND commitment may be justified in seeking an exclusion order from the ITC, including where a licensee or someone using a technology refuses to participate in a reasonable negotiation or may not be subject to the jurisdiction of the U.S. courts.

The Administration has not proposed any legislation regarding this issue at this time.

5. Some have expressed concern about the process by which the Department decides whether and when to file suit in merger cases. I'd like to clarify where, under your leadership, the Department stands on this issue.

    a. What is the Antitrust Division's policy regarding giving prior notice to the parties of your intention to file suit to enjoin a merger?

    b. What is the Antitrust Division's recent practice in this regard? Have you provided such notice? How explicit is that notice? How far in advance is it given?

    c. Have there been any recent exceptions to the Department's policy or practice in this regard? If so, why?

Answer:

The division encourages open and active engagement with parties during the merger review process. We inform parties as early as practicable about the issues we are considering; we invite both written and oral presentations by the parties concerning the issues we have identified, and we are in close contact with them throughout the merger review process. I intend to continue that practice. Without going into the specific facts of any individual cases, we believe parties understand our enforcement considerations, our legal and factual concerns, and timing during this process.

6. Advance notice to parties prior to litigation may improve the likelihood of resolving disputes, would provide greater transparency, and could improve perceptions in the business community that the process is open and fair.

    a. Do you agree that it is reasonable to give parties at least 24-hour notice before you file suit against them?

b. What if anything would be lost by providing 24-hour notice?

c. Are there any circumstances in which you believe it would be appropriate for the Department not to provide parties such advance notice of intent to sue?

Answer:

As noted, the division is committed to making parties aware of its concerns throughout the merger review process. I believe that it is important that there be a candid dialogue between enforcers and merging parties. To the extent we have identified concerns with a given transaction, and the parties are interested in discussing alternatives to litigating, we expect the parties to come forward with proposals to address those concerns. If we determine that the parties are not prepared to address our concerns within a reasonable time frame, we must be prepared to act promptly to sue to block the transaction and protect consumers.

7. At our Subcommittee's hearing last week, in response to my question as to whether you were suggesting in your comments to the FCC that large carriers already have sufficient spectrum to meet their needs, you indicated that the Department urged the FCC "to take a close look at whether some of the spectrum that is already available to some of the carriers is being warehoused and not being put to effective use" and "to examine whether [the carriers] are using what they already have." In a March 16, 2011, speech, FCC Chairman Genachowski made the following comments regarding this idea of carriers warehousing spectrum:

> Despite the increasing acceptance of the incentive auction idea, as with any new idea, there are misimpressions being floated by some who want to preserve the status quo even in this time when change is necessary for our economic future. Let me address them. First, there are some who say that the spectrum crunch is greatly exaggerated—indeed, that there is no crunch coming. They also suggest that there are large blocks of spectrum just lying around and that some licensees, such as cable and wireless companies, are just sitting on top of, or "hoarding," unused spectrum that could readily solve that problem. That's just not true. Let's look at the facts. Multiple expert sources expect that by 2014, demand for mobile broadband and the spectrum to fuel it, will be 35 times the levels it was in 2009. Cisco has projected a nearly 60X increase between 2009 and 2015. This compares to spectrum coming on-line for mobile broadband that represents less than a 3X increase in capacity. The looming spectrum shortage is real and it is the alleged hoarding that is illusory. It is not hoarding if a company paid millions or billions of dollars for spectrum at auction and is complying with the FCC's build-out rules. There is no evidence of non-compliance.

a. Do you disagree with Chairman Genachowski's analysis?

b. Beyond your comments at the hearing, do you have any evidence that carriers are in fact warehousing spectrum?

Answer:

I agree with former Chairman Genachowski that we need to be concerned about spectrum shortages. Our comment to the FCC urges the Commission to take into account competition in its spectrum auction proceeding. One issue the division believes the FCC should consider in any spectrum auction is whether carriers may have an incentive to acquire spectrum and not put it to efficient use.

8. At our Subcommittee's hearing last week, when asked by Senator Blumenthal whether you thought the FCC "needs a policy like a spectrum screen or auction rules that specifically seek to encourage competition in the wireless marketplace," you responded: "The answer is yes. We believe that well-defined, competition-focused rules for putting spectrum, the newly available spectrum, to use quickly and efficiently is the best way of promoting consumer welfare and that is why we have publicly filed comments, and in addition, we have spent a fair amount of time working very cooperatively, quietly with the Federal Communications Commission on these difficult policy choices."

    a. Please describe what you meant by "working cooperatively, quietly" with the FCC on spectrum issues.

    b. Did these cooperative and quiet discussions take place as part of an ongoing proceeding at the FCC?

        i. If so, when specifically did these discussions take place?

    c. Did the Department file appropriate ex parte filings summarizing these negotiations?

Answer:

The FCC and the division have a shared interest in ensuring that consumers benefit from a competitive telecom marketplace. Pursuant to that shared commitment, the agencies' staffs regularly discuss issues that may be relevant to competition and consumers. In any such discussions, we adhere to the FCC's regulations regarding ex parte communications.

9. Many believe it important that the government remain "technologically neutral" in the rules it applies. That is, policymakers or regulators should not declare that, for example, iPhones are indispensable while Samsung tablets are not.

    a. Do you agree that the government ought not be picking winners and losers among competing technologies and platforms?

    b. What specific measures do you believe the government should take to ensure that it is not taking sides in the so-called "Smartphone Wars"?

Answer:

The Supreme Court has stated that the antitrust laws "were enacted for 'the protection of *competition*, not *competitors*.'" (*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)) (emphasis in original). We follow that guiding principle. As the Antitrust Division's Policy Guide to Merger Remedies states, "The Division's central goal is preserving competition, not determining outcomes or picking winners and losers." The most effective measure for ensuring that the division is not taking sides in any industry is for it to maintain its focus on promoting and protecting competition. This approach ensures that the consumer is always the winner.

10. The Department and the Federal Trade Commission share enforcement of the antitrust laws, both in mergers and conduct investigations. It is not always clear to the parties involved who will review a transaction or business practice. In June 2011, then-Chairman Leibowitz told the Senate Commerce Committee: "It is true that there are occasional clearance disputes over which agency is in the better position to investigate a matter . . . . The FTC and DOJ have a process in place to resolve clearance disputes, which helps resolve the issue quickly." Please provide the Subcommittee:

    a. The precise process(es) for resolving these disputes;

Answer:

The process by which the Department and the Federal Trade Commission agree on which agency will review a particular transaction or conduct is governed by a 1993 agreement, which sets forth a mechanism for determining as quickly as possible which agency will be "cleared" to open an investigation. That agreement provides that the agencies carefully consider the product expertise at each agency so that the agency with the most relevant expertise will conduct a particular investigation. For the few situations in which that mechanism proves insufficient, senior leadership in the two agencies consult and agree on a path forward.

    b. Examples of the types of agreements that the Commission and the Department have reached in merger and non-merger clearance disputes, including how the parties determine which agency will review a subsequent transaction involving the same company or industry and the duration of such agreements; and

Answer:

In a limited number of product areas where each has relevant expertise, the two agencies have reached understandings that expedite the clearance of certain potentially problematic mergers or conduct investigations. Generally, these situations are industry-specific and arise when a sector of the economy is

undergoing technological change and previously existing products or lines of business converge.

c. The number of such disputes since January 2009 and the average length of time such disputes lasted.

Answer:

I am advised that since January 2009, there have been 90 instances where both the division and the FTC were interested in reviewing the same Hart-Scott-Rodino notified transaction. In those instances, it took an average of five business days for the agencies to agree which agency should handle the investigation.

11. Under your predecessor, the Department showed great leadership in supporting the development of transparency and procedural fairness norms internationally. That work has been done in the OECD and is now being conducted in the ICN. It has also been incorporated into the Trans-Pacific Partnership and there will be an opportunity to do so in the US-EU Transatlantic Trade and Investment Partnership.

    a. What do you think about the need for increased transparency and due process in antitrust proceedings globally?

    b. Do you plan to continue to work in a similar vein as your predecessors in bringing these issues to forefront of the international antitrust policy debate?

Answer:

I agree with my predecessors that transparency and due process in antitrust proceedings are important goals. The division is and will remain actively engaged in promoting those values and explaining why they matter in our discussions with competition enforcers around the world.