**<u>Senator Michael S. Lee</u>**
**William J. Baer**
**Nominee, Assistant Attorney General (Antitrust), U.S. Department of Justice**
**Questions for the Record**

1. When speaking before the Antitrust Modernization Commission in 2005, you noted several factors the FTC weighs when deciding to challenge a merger, including customer complaints, barriers to entry, and internal documents. With respect to the Herfindahl–Hirschman Index, you stated that "[T]he bottom line is that HHI numbers are not dispositive," and that "enforcement decisions appropriately weight other factors."

    a. If confirmed, which factors would you direct the Antitrust Division to weigh when reviewing proposed mergers?

       Response: If confirmed, I would direct the Antitrust Division to assess proposed mergers according to the analytical techniques set forth in the revised Horizontal Merger Guidelines. These Guidelines assist the enforcement agencies in "identify[ing] and challeng[ing] competitively harmful mergers while avoiding unnecessary interference with mergers that are either competitively beneficial or neutral," and assist the business community "by increasing the transparency of the analytical process underlying the Agencies' enforcement decisions." U.S. Dep't of Justice and Fed. Trade Comm'n, <u>Horizontal Merger Guidelines</u> 1 (2010). I believe these Guidelines accurately identify the appropriate factors to consider in reviewing proposed mergers, which include the presence or absence of barriers to entry, efficiencies, and whether the transaction involves failure and exiting assets.

2. Private parties rely heavily on the joint DOJ/FTC Horizontal Merger Guidelines. The agencies recently updated these Guidelines after not making significant revisions during the previous 18 years. You have noted that toward the end of this 18-year span, the Guidelines' approach did not always accurately reflect the on-the-ground reality of how the DOJ investigates mergers.[1] This divergence between the Guidelines and DOJ practice increases uncertainty and costs for businesses as they contemplate mergers.

    a. If confirmed, what steps would you take to educate industry about the Antitrust Division's current analytical approach to mergers, particularly when it differs from the Guidelines?

       Response: While at the Bureau of Competition at the Federal Trade Commission, I was privileged to be involved in the 1997 revisions to the Merger Guidelines. Those revisions, as well as subsequent joint efforts by DOJ and FTC, such as the 2006 Commentary on the Horizontal Merger Guidelines, reflect the Agencies' on-going efforts to make their decision-making process as transparent as possible to the business community. I believe that the 2010 Horizontal Merger Guidelines

[1] *See*, *e.g.*, Bill Baer, Remarks at the Dep't of Justice and Fed. Trade Comm. Merger Workshop 176–77 (Feb. 19, 2004).

further reflect a solid bipartisan effort to continue to provide a framework pursuant to which businesses can understand the reasoned approach behind merger enforcement, enabling them to evaluate proposed transactions and anticipate likely government response thereto. I would plan to continue this policy of transparency and communication so that the business community is informed of evolution in the analyses applied by the Agencies.

3. In 2008, the Antitrust Division completed a Report entitled *Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act*. Among its key findings, the Report stated that market power alone does not prove the existence of monopoly power and that no single test for determining whether conduct is anti-competitive works well in all cases. The report also cautioned against vague and overly inclusive enforcement actions based on their potential to undermine economic growth and harm consumers. President Obama's first AAG in the Antitrust Division, Christine Varney, withdrew that Report, stating that it "goes too far in evaluating the importance of preserving possible efficiencies," and as a result "understates the importance of redressing exclusionary and predatory acts that result in harm to competition, distort markets, and increase barriers to entry."

   a. Do you agree with Ms. Varney's assessment of the Section 2 report and would you have withdrawn it?

      Response: I believe that the Section 2 report generally contained sound analysis of the Supreme Court's Section 2 jurisprudence. However, I agree with former Assistant Attorney General Varney that the report's conclusions espoused a more hesitant approach toward enforcement than is warranted by the case law and did not focus sufficiently on the protection of consumer welfare. In addition, the Section 2 report was one of the few statements of antitrust enforcement policy in the last twenty-five years that was not issued jointly with the FTC. Indeed, a bipartisan majority of the FTC expressed concern that the approach articulated in the report's conclusions could "radically weaken[] enforcement of Section 2 of the Sherman Act." Statement of Commissioners Harbour, Leibowitz, and Rosch at 1 (Sept. 8, 2008). I believe that coordinated statements of policy engender confidence in the Agencies and provide clearer guidance for businesses and practitioners, and that is what I would strive for if confirmed.

   b. With which specific findings and recommendations in the report do you disagree?

      Response: The Section 2 report, in my opinion, suggested approaches to enforcement in areas such as predatory pricing, bundled pricing, refusals to deal, and exclusive dealing, that were more restrictive than warranted by the case law. In particular, I agree with those who worried that the "disproportionality test" endorsed by the report, which would be employed where conduct-specific tests were not applicable and would prohibit conduct only where the anticompetitive harms substantially outweigh the likely procompetitive benefits, strayed from the established standard for proving harm to competition and could inhibit effective enforcement against anticompetitive conduct.

c. Are there any findings or recommendations in the report with which you agree, and if so, which?

Response: As noted in my previous responses, although the Section 2 report contained a sound analysis of existing Supreme Court precedent, I believe that the resulting enforcement guidelines in the report were more constrained than would be supported by that precedent.

4. A 1998 *Business Week* article entitled "The FTC's Eager Sheriff" described your approach to antitrust enforcement as very aggressive. The article argued that, under Chairman Pitofsky and with your leadership in the Bureau of Economics, the FTC had engaged in "easily the most aggressive antitrust activity in 25 years," including opposing 20 mergers in the first 5 months of 1998.[2]

   a. What is your reaction to this analysis and how would you characterize your approach to antitrust enforcement, both while Director of the FTC's Bureau of Competition and more generally?

   Response: I believe that the purpose of antitrust enforcement is to provide consumers with the benefits of vigorously competitive markets by taking action against restraints that threaten to deny consumers those benefits. I believe that my track record reflects that I approach antitrust enforcement sensibly. Enforcers must be vigorous and effective, but fair. In my time at the FTC, I believe that I followed these basic tenets and, if confirmed, would expect to do the same at the Antitrust Division.

5. In your testimony you stated that you would support a legislative repeal of the Supreme Court's decision in *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007). Doing so would restore a standard of *per se* illegality for resale price maintenance ("RPM") agreements. The Supreme Court has held that *per se* illegality is only appropriate when the conduct is "manifestly anticompetitive"[3] and "lack[s] . . . any redeeming virtue."[4]

   a. Do you disagree with the Supreme Court's standard for applying a *per se* standard only to conduct that is manifestly anticompetitive and lacks any redeeming virtue?

   Response: I agree with the Supreme Court's determination that manifestly anticompetitive conduct should be judged per se unlawful. In the RPM context, past precedent has given manufacturers the flexibility to impose legitimate vertical restraints while limiting per se condemnations to agreements between

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[2] *Trustbuster William Baer: The FTC's Eager Sheriff*, Business week (July 5, 1998), *available at* http://www.businessweek.com/stories/1998-07-05/trustbuster-william-baer-the-ftcs-eager-sheriff.

[3] *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49-50 (1977).

[4] *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289 (1985)

manufacturers and dealers on resale prices.

b. Many economists believe RPM can yield procompetitive results.[5] Do you dispute that RPM can sometimes yield procompetitive benefits?

Response: I believe that the pre-Leegin framework provided opportunities for vertical restraints that allow manufacturers to achieve procompetitive objectives and prohibited likely anticompetitive conduct, while offering clarity and consistency to the business community. Essentially, the pre-Leegin framework continued to allow legitimate manufacturer-imposed vertical restraints, such as a manufacturer's ability to suggest resale prices to dealers. At the same time, it prohibited collusive conduct that had the purpose and effect of limiting discounting by competing retailers. See Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 910, 912 (2007) (Breyer, J., dissenting) ("[A]greements setting minimum resale prices may have serious anticompetitive consequences." "Most economists today agree that . . . resale price maintenance tends to produce higher consumer prices than would otherwise be the case.").

6. Many economists believe that exclusive dealing arrangements can yield procompetitive benefits, including the value that arises from manufacturers investing in promotional or other demand enhancing services without fear of discount retailers free-riding on that investment. At the same time, the risk of anticompetitive harm in exclusive dealing arrangements may be mitigated by the competition that a manufacturer and retailer continue to face with respect to their product.

   a. Do you agree with those economists that conclude that exclusive dealing arrangements may yield procompetitive benefits?

   Response: I agree that exclusive dealing arrangements, which require the purchase of products or services exclusively from a single supplier, do have the potential to yield procompetitive benefits. For this reason, such arrangements are appropriately analyzed under a rule of reason standard to determine whether, on balance, any anticompetitive harms resulting from the restraint are outweighed by procompetive benefits, such as distribution efficiencies.

   b. Do you agree that retailers participating in exclusive dealing arrangements face competition within the market for their product?

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[5] *See, e.g.,* Benjamin Klein, *Competitive Resale Price Maintenance in the Absence of Free-Riding*, FTC Hearings on Resale Price Maintenance, (February 17, 2009), *available at*: http://www.ftc.gov/opp/workshops/rpm/docs/bklein0217.pdf ; See Bureau of Economics Staff Report to the FTC, T. Overstreet, Resale Price Maintenance: Economic Theories and Empirical Evidence 170 (1983) (noting that "[e]fficient uses of [resale price maintenance] are evidently not unusual or rare").

Response: While it is difficult to generalize, a rule of reason assessment of exclusive dealing would appropriately look at a number of factors, including the extent to which consumers benefit from robust interbrand competition.

c. Are RPM agreements materially different from exclusive dealing arrangements with respect to their potential for procompetitive benefits and their mitigated risk of anticompetitive harm?

Response: As Justice Breyer notes in his dissent in Leegin, RPM agreements have historically been demonstrated to be sufficiently anticompetitive for Congress and the courts to conclude that per se treatment was warranted. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 908-09 (2007) (Breyer, J., dissenting) ("[In overturning Dr. Miles,] [t]he Court justifies its departure from ordinary considerations of stare decisis by pointing to a set of arguments well known in the antitrust literature for close to half a century. Congress has repeatedly found in these arguments insufficient grounds for overturning the per se rule. And, in my view, they do not warrant the Court's now overturning so well-established a legal precedent."). And courts had excepted from per se condemnation certain behaviors that allowed manufacturers to encourage the provision of services from their dealers and to minimize the risk of free riding by discounters. As a result, I think the pre-Leegin per se rule appropriately condemned agreements between manufacturers and dealers on minimum resale prices -- those vertical restraints unlikely to achieve the procompetitive benefits potentially found in exclusive dealing arrangements and therefore warranting rule of reason assessment.