U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 22, 2010

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

Dear Mr. Chairman:

Enclosed are the responses for the record of Christine Varney, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, to written questions received following the June 9, 2010, hearing held by the Subcommittee on Antitrust, Competition Policy and Consumer Rights entitled, "Oversight of the Enforcement of the 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. The Office of Management and Budget has advised us that there is no objection to the submission of this letter from the perspective of the Administration's program.

Sincerely,

Ronald Weich
Assistant Attorney General

cc: The Honorable Jeff Sessions
Ranking Member

Questions for the Record from the Hearing before
the Subcommittee Antitrust, Competition Policy and Consumer Rights
"Oversight of the Enforcement of the Antitrust Laws"
June 9, 2010

<u>From Senator Orrin G. Hatch</u>

For both Chairman Leibowitz and Assistant Attorney General Varney:

Q. Today we expect hospitals and healthcare providers to work more closely to improve upon efficiency and quality in delivering healthcare and in doing so, lower the cost of care both to patients and to the federal government. However, according to many care providers, a lack of clarity in the administration and enforcement of our antitrust laws has created confusion that has prevented greater clinical integration.

In the 1990s, the FTC and the Justice Department produced the "Statement of Antitrust Enforcement Policy in Health Care" and, at that time, acknowledged that further guidance would be necessary as health care continued to evolve. More than a decade has passed and providers are still waiting on that further guidance so that they can more effectively collaborate to improve the delivery and provide a real reduction in health care costs.

Do you intend to produce user-friendly guidance on clinical integration? If so, is there an expected timetable? If not, can you please explain why not?

A. Antitrust has—and will continue to have—an essential role to play in health care. If health care reform is to harness the power of competitive markets to produce more and more efficient systems, then we must be up to the challenge of ensuring that our health care markets are as competitive as possible. I strongly agree with you that, in this dynamic environment, a successful effort will require more than "business as usual." It will require that we provide clear and accessible guidance to health care consumers, providers, and payers so that there is the predictability needed for health care reform to succeed. We are currently working with our colleagues at the Federal Trade Commission to get a better understanding of the types of integrated delivery models that providers are contemplating, any potential antitrust concerns they might have, and how to best provide them with the guidance they need. Central to this, it is important that health care providers and other stakeholders in the health care industry understand that antitrust is not an impediment to the formation of innovative delivery systems that will improve the quality and reduce the cost of health care for Americans. In this regard, we will consider how we can improve, streamline, and make more transparent our review of integrated provider networks so that providers have user-friendly guidance for forming such networks in accordance with the antitrust laws.

Q. As you may know, I have had a keen interest in our domestic and international intellectual property laws. On May 26th, the FTC, DOJ, and the Patent and Trademark

Office held a workshop to discuss the interface between antitrust, intellectual property, and standards. This week, at the Organization for Economic Co-operation and Development meetings, it is my understanding that the member nations will examine many of these same issues. Further, the World Intellectual Property Organization recently held a workshop on this same subject matter and has plans to continue to explore them going forward.

Given the emphasis the U.S. government has placed on protecting intellectual property rights around the world, and given the challenges we face in China and other countries where foreign governments have been known to try to force outside innovators – including American innovators -- to transfer their intellectual property on non-commercial terms, how are you managing the dialogue on these critical issues at home and abroad? For example, when U.S. antitrust officials make statements that "patent hold ups" and "royalty stacking" are widespread problems without citing empirical evidence, doesn't this invite or provide cover to foreign governments to use their own antitrust laws and remedies to restrict intellectual property rights, potentially disadvantage American inventers and innovators – not to mention American jobs -- and ultimately undermine U.S. efforts to get foreign governments to protect intellectual property rights?

A. Innovation is critically necessary to promote economic growth, create jobs, and maintain U.S. competitiveness in the global economy. Intellectual property rights, competition, and U.S. industry standards are some of the significant engines that drive U.S. and global innovation. Recognizing the importance and value of intellectual property rights, the Department reached out and began a process of engagement with our colleges at the PTO and the FTC with substantive, fact-based discussions about critical issues at the intersection of patent and antitrust law policy. The Department will also be working with relevant U.S. agencies, including USTR, the Department of Commerce's National Institutes of Standards and Technology (NIST), and others in a process led by the National Science and Technology Council (NSTC) to ensure that our communication to international trading partners is well-informed and consistent with international obligations and the positions the U.S. has taken with respect to the development of and participation in international standards in the World Trade Organization (WTO). We will use these forums, as well as our active participation in the OECD and WIPO, to extol the empirically-supported, procompetitive benefits of the U.S. approach to creating and enforcing IP rights, promoting competition, and helping standard-setting organizations determine which patent policies will work best for their members in their specific industry and to discourage the development and use of competition policies and enforcement that unfairly disadvantage U.S. rights holders or create unnecessary obstacles to international trade. Since the issuance of the 1995 DOJ/FTC Antitrust Guidelines for the Licensing of Intellectual Property, we have recognized that standard antitrust analysis should be applied to intellectual property, taking into account any relevant differences in forms of property. Using these Guidelines as a touchstone, we consistently deliver the message that economies work best when intellectual property and antitrust law and policy work in balance to encourage research and development—creating and protecting intellectual property rights, regardless of the national origin or ownership of such rights, and promoting competition around those intellectual property rights.

Q. The Internet has obviously become a core part of the nation's infrastructure, driving growth, innovation, and information flow. I am interested in learning more about any concerns your agencies have with regard to any potential anti-competitive activity online. During the past few years, we've seen multiple investigations into the search and online advertising markets. As you know, the online search market is continually becoming the primary navigation tool for online consumers and an important channel for the distribution of content and information. Obviously, there are very few significant competitors in this market. Many have argued that this will have a negative impact on consumers.

What, in your view, is the state of competition in these markets? Are you concerned with anything that you are seeing in terms of anti-competitive activity or dominant players that could harm competition online? What do you think the focus of policy-makers should be in order to preserve competition and limit barriers to entry of the online markets?

A. The Antitrust Division has been active in opening investigations to thoroughly review conduct and transactions that threaten harm to competition in these industries, and where appropriate, has vigorously pursued enforcement actions to prevent exclusionary or discriminatory behavior from harming consumers. For example, in the last year the Division examined and cleared the proposed Internet search and paid search advertising agreement between Microsoft Corporation and Yahoo! Inc., and expressed views to the court about the proposed settlement of the Google Books litigation. In the latter case, the Division filed with the court statements setting forth our concerns with respect to the parties' proposed settlement agreement and underscored the importance of the concerns expressed in those filings at the court's settlement fairness hearing. We continue to monitor this matter. The antitrust laws provide an important set of tools for addressing conduct that can be used to harm consumers—whether Internet companies that are consumers of Internet gateway and platform services or consumers of applications and services distributed over the Internet.

For Assistant Attorney General Varney:

Q. I am hoping to get some clarification on the Department of Justice's decision to file suit against Dean Foods. As you may know, a June 2009 GAO report on *Agricultural Concentration and Commodity and Food Retail Prices*[1] concluded that "empirical economic literature has not established that concentration has adversely affected commodity or food prices in the beef, pork, dairy or retail sectors." That same GAO report found that concentration in dairy processing had little or no adverse impact on commodity or food prices. Can you cite specific evidence that contradicts the findings of the GAO on this matter?

A. Since the Department's challenge to Dean Foods Company's acquisition of Foremost Farms USA's Consumer Products Division currently is pending, I refer you to our public filings in the litigation. Generally, when the Department investigates a transaction's potential harm to

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[1] GAO-09-746R Concentration in Agriculture, June 30, 2009

competition in the agricultural sector, we consider all information available at the time to determine whether enforcement action is appropriate to protect and promote competition.

Q. With regard to the overall dairy market, some have argued that the problems in the dairy market do not stem from concentration, but from the system of milk price regulation, which has been in place since the Great Depression. According to this argument, consumers would benefit if this system was modernized and reformed. To what extent will these types of policy changes be discussed during the Justice Department's workshop later this month, the focus of which is on the dairy industry?

A. The June 25, 2010, workshop focusing on the dairy industry explored issues associated with milk prices and competition. The workshop had three substantive panels: a panel discussion to examine changes in the industry, the perspectives of industry stakeholders and the potential implications for regulation and enforcement; a panel on market concentration; and a panel on farm prices for milk, contracts and related issues. The milk marketing order system was discussed during this workshop. A transcript and video of the workshop are available on the Division's website at *www.justice.gov/atr/public/workshops/ag2010/index.htm.*

From Senator John Cornyn

1. A June 2009 GAO report on *Agricultural Concentration and Commodity and Food Retail Prices*[2] concluded that "empirical economic literature has not established that concentration has adversely affected commodity or food prices in the beef, pork, dairy or retail sectors." Beyond finding no evidence of adverse effects on prices, that same GAO report specifically found that concentration in dairy processing had little or no adverse impact on commodity or food prices. Do you believe that the GAO's conclusions were mistaken, and if so, on what basis?

Answer: The Department typically gathers information on market conditions, customer and competitor concerns and perspectives, and other information while conducting investigations of particular conduct or transactions. We generally seek information across numerous aspects of the industries in question, and consider all information that bears on the likely effect on competition of a transaction. In each case, our objective is to determine whether the information indicates that enforcement action under the antitrust laws is appropriate at that time in order to protect competition and consumers. While we have read the June 2009 GAO report on *Agricultural Concentration and Commodity and Food Retail Prices*, at this time the Department has not attempted to replicate or verify its conclusions. We have heard in the Joint DOJ and USDA workshops that many farmers are concerned with the impact of increased concentration in dairy processing.

2. Wouldn't you agree that the federal system of milk price regulation that dates back to the Great Depression has a significant effect on competition and milk prices? Will price regulation reform be considered as part of your workshop proceedings?

Answer: The June 25, 2010, workshop focusing on the dairy industry explored issues associated with milk prices and competition. The workshop had three substantive panels: a panel discussion to examine changes in the industry, the perspectives of industry stakeholders and the potential implications for regulation and enforcement; a panel on market concentration; and a panel on farm prices for milk, contracts and related issues. The milk marketing order system was discussed during this workshop, and the Division does believe that any analysis of milk pricing trends and levels of competition should include an evaluation of how regulation impacts the market. A transcript and video of the workshop are available on the Division's website at *www.justice.gov/atr/public/workshops/ag2010/index.htm.*

3. Are the Antitrust Division and the FTC concerned about the potential ability of companies with market power in the internet search market to use that market power to

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[2] U.S. General Accounting Office, Rep. No. GAO-09-746R, CONCENTRATION IN AGRICULTURE (2009).

steer consumers toward their own products or favored products in other markets, or otherwise to foreclose competition?

Answer: The antitrust laws protect consumers against conduct or transactions that harm the competitive process and deny consumers the protections of competition. We believe that the antitrust laws provide an important set of tools for addressing conduct that can be used to harm consumers in the Internet search market—whether it be consumers of gateway and platform services who seek faster and more reliable Internet infrastructure development, or consumers of applications and services distributed over the Internet who seek innovative new products and services brought to them by novel business methods. The Antitrust Division has been very active in its investigations to thoroughly review conduct and transactions that threaten harm to competition in these industries. When it is appropriate, the Division vigorously pursues enforcement actions to prevent conduct such as discriminatory practices that may foreclose competitors or favor certain content in a way that harms consumers.

4. It seems that both the Antitrust Division and the FTC have played a role in investigating transactions and activities in the Search and Search Advertising markets. The FTC has looked at Google acquisitions of DoubleClick, YouTube, and AdMob, along with the overlapping director issue, while the DOJ has examined the Google/Yahoo and Microsoft/Yahoo deals, as well as the proposed settlement of the Google Books litigation. How have the Antitrust Division and the FTC addressed clearance with respect to these investigations?

Answer: Over the years the two agencies have developed a process for determining which agency will handle a particular matter, generally on the basis of which agency has the most current experience in the particular markets involved. This process enables both agencies to make the most effective use of enforcement resources and avoids duplicative investigatory requests on private parties. On occasion a matter arises in which both agencies believe each has more expertise. In these circumstances, and indeed in all others, the agencies share responsibility for deciding which of them will handle the investigation. We worked with the FTC to clear the matters you mentioned as quickly and efficiently as possible, and will continue to do so for all matters.

5. There are reports that the European Commission may be investigating the state of competition in Internet search, search advertising, and related markets, and that numerous companies have raised concerns about a wide variety of issues. Are the Antitrust Division and the FTC coordinating their investigations of these issues with the European Commission?

Answer: Although I cannot comment on whether or not any specific investigation involving the markets you refer to has been undertaken, as a matter of practice we coordinate with the European Commission on issues of common interest. As I mentioned at the hearing, the Department has, in an unprecedented move, hired a European lawyer as a special counsel to the Assistant Attorney General to help us work on coordination issues for particular investigations, as well as more broadly.

6. Wouldn't you agree that minimum resale price agreements can foster competition in at least some situations? For example, hypothesize a market for blue jeans that is robustly competitive with regard to price, quality, and prestige. In this market, there are both low price brands that compete primarily on price and prestige brands that compete primarily on prestige. If a new market entrant wanted to establish itself as a an option between the two poles of a bargain brand and a prestige brand, it could mandate, through resale price maintenance agreements with its retailers, that its jeans be sold at a price point at or above the median price in the market. If the new entrant's marketing strategy succeeds, then consumers would gain a new option. For some price-conscious consumers, the new entrant could provide a prestige brand that was within their budget. For some prestige-conscious consumers, the new entrant could provide a cheaper prestige brand. For all consumers, there would be more options and more competition in the blue jean market. Wouldn't this hypothetical new market entrant's marketing strategy be pro-competitive?

Answer: I agree with Justice Breyer's statement in dissent in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 914 (2007), that "as many economists suggest, sometimes resale price maintenance can prove harmful; sometimes it can bring benefits."

7. If, at least in some cases, a minimum resale price agreement can be pro-competitive, then why isn't a rule of reason approach that evaluates the pro- and anti-competitive effects of a particular resale price maintenance agreement preferable to a per se rule that bans pro- and anti-competitive resale price maintenance agreements alike?

Answer: While some resale price maintenance agreements may bring benefits, figuring out what is the best legal rule for analyzing them—whether rule of reason or a per se ban— may depend on how easy it is for the courts to identify instances in which the benefits are likely to outweigh potential harms. While the law has been moving away from per se rules where analytical tools have developed the power and sophistication to determine competitive effects with more ease and accuracy, the courts have indicated that in instances where doing so proves too costly to administer, a clear and simple price-related antitrust rule may be preferable.

8. You have advocated a "structured rule of reason" for analyzing minimum resale price agreements. Do you still support such an approach? Do you think such an approach is preferable to a per se rule? Why or why not?

Answer: Because the *Leegin* majority found that the use of RPM can either serve legitimate business purposes, on the one hand, or lead to creation or maintenance of market power, on the other hand, the Court invited lower courts to separate the wheat from the chaff and "devise rules ... for offering proof, or even presumptions," "to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones." *Leegin*, at 898-99. I think a careful reading of *Leegin* suggests a structured application of the rule of reason tailored to the plaintiff's theory of how RPM is anticompetitive in the case at hand. A court adopting such an approach could impose a burden on a defendant that would vary with the strength of the showing made by the plaintiff. For instance, a court could require a defendant to establish that it adopted RPM to enhance its success in competing with rivals and that RPM was a reasonable method for accomplishing its procompetitive purposes. The use of a structured rule of reason is consistent with modern development of antitrust analysis under section 1 of the Sherman Act, which has shifted from a binary choice between the per se rule and a full-blown rule of reason analysis to a far more focused inquiry in many instances.

9. The ABA Section on Antitrust has published a comment criticizing the proposed changes to the merger guidelines. Specifically, the Antitrust Section is concerned that "the Proposed Guidelines unduly downplay the role of market definition." I agree with this criticism.

   The Clayton Act targets mergers that substantially lessen competition "in any line of commerce or in any activity affecting commerce in any section of the country." I read this language as requiring that the merger affects a specific product or geographic market. The binding Supreme Court case *Brown Shoe v. US* held that anti-competitiveness "can be determined only in terms of the market affected."

   a. If the agencies hope for a Clayton Act challenge to a merger to be upheld in court, must they not first define the market in which competition will be affected?
   b. Do you agree with the ABA Section on Antitrust that "it would be more consistent...to make clear that market definition remains a necessary element of merger analysis"?
   c. Can you commit to revising the proposed guidelines to require the definition of markets as a necessary step in merger analysis?

Answer: Courts interpret the Clayton Act to require definition of the market in which competition will be affected. Nevertheless, when the agencies investigate proposed transactions, each investigation involves following the facts of the particular matter—a process of determining what information we need and how to analyze that information to determine the likely competitive effects of the merger or acquisition. This process will lead the agencies to the point where we determine whether the evidence supports a finding of a violation of the antitrust laws. The revisions to the Guidelines, to be transparent and consistent with the agencies' practice, should make clear, as did the Commentary on the Horizontal Merger Guidelines issued in 2006, that the agencies' analysis need not start with market definition, even if the courts require presentation of evidence to define the relevant antitrust markets when the agencies bring a challenge. However, the Division is seriously considering the comments we have received on the latest draft of the revisions to the Guidelines, including the observations you make.

10. The 1992 Guidelines stated that the Antitrust Division and the FTC should began analysis and evaluation of mergers by defining the relevant market. The Agencies would then, in the following order, examine: market concentration, potential competitive effects, possible entry, efficiencies, and, if relevant, the failing firm defense.

This clearly defined and relatively objective framework functioned like a roadmap for businesses and antitrust practitioners, by which private actors could analyze their own conduct in the same manner in which the conduct would be analyzed by the agencies. The proposed revisions appear to dispense with this objective framework, allowing the agencies to holistically consider other "relevant factors" before defining the market and proceeding with a step-by-step analysis.

I understand that the revised guidelines are intended to present a more accurate picture of the manner in which lawyers and economists in the agencies actually analyze mergers. And I understand that the subjective experience of analyzing a merger did not always necessarily conform to the formal structure of the 1992 guidelines. But I fear that by dispensing with the objective step-by-step analysis and replacing it with a relatively subjective holistic analysis of factors, the new guidelines make it more difficult for private actors to conform their behavior to comply with the agencies' interpretation of antitrust law. Do you agree? Why or why not? Can you commit to revising the proposed guidelines to encompass a more rigorous statement of the objective findings that an agency must make before challenging a merger?

Answer: The goal of the review of the Merger Guidelines is to take into account legal and economic developments that have occurred since the last significant guidelines revision in 1992 and to determine whether the current guidelines accurately reflect the current practice of merger review at the Department and the FTC. It is important that companies have guidelines to help them plan transactions and avoid violating the antitrust laws, and we believe that the adjustments, by better reflecting agency practice, will give better guidance. As I noted above, the Division is continuing to refine the revisions to the Merger Guidelines to take into account various comments and to make them better reflect agency practice and give more useful guidance to the public.

From Senator Herbert Kohl

1. From time to time, we hear calls that the old rules of antitrust don't apply to the so-called "new economy," especially with respect to high-tech industries. Some argue that antitrust law is outmoded and retards innovation. Supporters of antitrust enforcement, on the other hand, argue that antitrust has proven time and again to be just as crucial to competition today as yesterday. They argue that antitrust principles remain sound, and are flexible enough to take into account conditions in new industries. What's your view? Are the concerns of those in the high tech industry regarding what they view of overzealous antitrust enforcement chilling innovation warrented? Do new high tech industries require a different framework of antitrust enforcement or are the existing antitrust doctrines sufficient?

Answer: I agree that the antitrust laws remain an important tool for ensuring that all Americans reap the benefits of competition. The antitrust laws are written in language sufficiently broad to allow flexible application that is suitable to enhance competition under a wide variety of circumstances. The Antitrust Division is mindful of the concern that more aggressive remedial schemes might chill competition on the merits, along with procompetitive benefits and innovation that may ultimately benefit consumers. As a fundamental principle, the Division works to develop sufficient market intelligence to understand the competitive significance of new business methods and strategies, and to know what emerging dynamics pose threats to established incumbents. Antitrust encourages firms to innovate and compete. We will continue to seek an enforcement regime that stops conduct or transactions that threaten harm to competition while working to craft the right remedies and, if necessary, pursue the best interpretation of the law in the courts, so that firms in high tech industries, as in all industries, have guidance they need to compete and innovate.

2. Google has attracted increased antitrust scrutiny in recent years. It has grown to become a dominant player in internet search and internet search advertising. For a majority of consumers the key point of access to the Internet is to perform a Google search. This gives Google enormous power over the entire Internet economy. Some commentators are concerned whether Google searches are truly neutral, and there have been accusations that Google's search algorithm favors its own e-commerce sites as well as Google's other niche sites and services. Is there a basis for the Antitrust Division and FTC to ensure "search neutrality" under antitrust law, especially considering the massive amount of information and multi-billion dollars of e-commerce that flow through the Internet? Or should we just trust Google's promise to operate a purely neutral search engine? More generally, how will you scrutinize allegations of anti-competitive behavior by Google in the Internet sector in the future?

Answer: The Antitrust Division has been active in opening investigations to thoroughly review conduct and transactions that threaten harm to competition in online industries, and where appropriate, has vigorously pursued enforcement actions to prevent discriminatory behavior from harming consumers. As part of its investigations, the Division considers all information relevant to determining whether the conduct in question raises competitive concerns. In addition, the Department continues to work with the Federal Communications Commission on its broadband policy, and supports its principles to preserve and promote the open and interconnected nature of the public Internet. The antitrust laws provide an important set of tools for addressing discriminatory conduct that can be used to harm consumers, whether it be consumers of Internet gateway and platform services who seek faster and more reliable Internet infrastructure development, or consumers of applications and services distributed over the Internet who seek innovative new products and services brought to them by novel business methods. You can be assured that we will work aggressively to thoroughly investigate allegations or other indications of anticompetitive conduct or transactions in Internet search and other e-commerce industries, and take enforcement action when appropriate to ensure that competition is not harmed.

3. We've also recently heard concerns expressed about Apple, and its growing share of mobile devices such as the i-Phone and i-Pad. Apple is now placing new requirements on applications developers for these developers that restrict the use of tools which allow developers to write apps to different devices. To some these restrictions resemble the conduct that Microsoft engaged in during the 1990s to exclude competitors from its platform. Do you have any concerns about the competitive implications of Apple's new restrictions on applications developers?

Answer: We are aware of the concerns in the marketplace regarding requirements that Apple, Inc. places on application developers. You can be assured that the Division will thoroughly investigate allegations of conduct that threatens harm to competition and consumers, and if we find that conduct such as that you describe violates the antitrust laws, we will take enforcement action.

4. Last month, the FCC released its annual report on competition in the cell phone industry, and found significant increases in concentration in the wireless market. Last July, I wrote to you after our hearing on the causes of prices increases charged for text messaging among the four major national cell phone carriers, prices that had doubled over a two year period. We concluded that there was no evidence of collusion among the cell phone providers, but that these parallel price increases were evidence of a lack of competition in the cell phone market. Last month's FCC Report appears to support that conclusion.

Are you concerned regarding the level of concentration in the cell phone market? What can the Justice Department do to promote more competition in this industry?

Answer: The Antitrust Division has long recognized the importance of preserving competition in the mobile wireless telecommunications industry, and has brought enforcement actions where appropriate. *See, e.g., United States v. Verizon Communications Inc.*, No. 1:08-CV-01878-EGS (D.D.C. 2008); *United States v. AT&T Inc.*, No. 1:07-01952-ESH (D.D.C. 2007); *United States v. Alltel Corp.*, No. 0:06-03631-RHK-AJB (D. Minn. 2006). The Antitrust Division will continue to monitor this important industry for potentially anticompetitive conduct, and we will take any enforcement action that may be warranted to protect and promote competition.

5. One issue that has long concerned us on the Antitrust Subcommittee is the state of competition in the cable and pay TV industry. Each year for the last decade and a half, consumers have suffered from continual annual cable rate increases at a rate of nearly triple the rate of inflation. These rate increases are occurring when the prices consumers pay for most other telecommunications services – such as local phone service and internet access – has hardly

increased at all. Are these cable TV rate increases a "red flag" showing us that there is a failure of competition in the cable TV industry?

Answer: In recent years, video distribution has received a boost of additional competition from wireline video providers, including the telephone companies. Nonetheless, in some instances a lack of competition can result in increases in cable TV rates. To this end, the Division has provided guidance to states in ensuring that video franchising does not impede competition, so that consumer gains in both video and broadband services are more likely to be realized. When franchising authorities impose restrictions on entry beyond those necessary to protect the public interest, this can weaken competitive pressures on cable TV rates. For example, some local franchising authorities have taken a long time to process applications for franchises, made demands for goods and services (such as landscaping) that are unrelated to the provision of video services, or imposed build-out requirements that have unnecessarily discouraged competitive entry. In a 2007 report, the Federal Communications Commission determined this conduct can create unreasonable barriers to entry into the provision of video services. *See Report and Order and Further Notice of Proposed Rulemaking, In re: Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, FCC 06-180 (rel. Mar. 5, 2007). Cable television consumers are better served if franchising restrictions do not prevent the market from creating a wider selection of providers. The Antitrust Division will continue to monitor this industry closely, take enforcement actions where necessary to prevent harm to consumers, and seek opportunities to bring our expertise to bear to promote competition.

6. (a) Recently we have been studying the emergence of video over the Internet. Millions of consumers now watch a wide variety of TV programming using broadband Internet connections. Some consumers – known as "cord cutters" – have dropped their pay TV subscriptions entirely and view TV programming over the Internet. The number of cord cutters today is estimated to be 800,000 and growing. Do you agree with me that video over the Internet has the possibility to develop into a strong competitive rival to traditional pay TV services such as cable and satellite? And how can antitrust enforcement ensure that competition flourishes and these new entrants are not stifled are retarded by the dominant pay TV players who might view this competition as a threat?

(b) We have recently heard reports that cable companies were demanding that programmers keep programming off the Internet as a condition of the cable company carrying that programming. Programmers – who need cable distribution of their programming – have no choice but to comply. Does this concern you? And, more generally, would you be concerned by obstacles placed by pay TV companies to prevent Internet distribution of programming?

Answer: I agree that competition makes consumers better off when they have more providers to choose from for viewing TV and other video programming—whether over cable, fiber optics, satellite, or the Internet. You can be assured that the Antitrust Division will thoroughly investigate allegations of conduct that have the effect of limiting the choices consumers have for distribution of programming, and will take action to protect competition and consumers.

7. During last February's Winter Olympics, NBC showed thousands of hours of Olympics events, much of it live, on its Internet website, NBCOlympics.com. But to view much of that content, a viewer first had to have a subscription to cable or satellite pay TV services. On February 27th, I wrote to NBC CEO Jeff Zucker stating "it is our view that video over the Internet has the potential to become a significant competitive alternative to traditional pay TV subscriptions, and it appears policies such as [NBC's] may have the effect of limiting the prospects of such competition."

Does this type of policy of requiring consumers to purchase pay TV subscriptions in order to view programming on the Internet concern you? If widely adopted, could such policies prevent the Internet from being a true competitive alternative to traditional pay TV services?

Answer: I agree consumers are better off when they have real competitive alternatives to choose from among providers of programming, and the Antitrust Division will thoroughly investigate allegations of conduct that has the effect of limiting the choices consumers have for distribution of programming, and will take action to protect competition and consumers.

8. Under the law today, it is the Department of Transportation, and not the Justice Department that decides whether to grant airlines antitrust immunity for international alliances. Last year, DOT granted two alliance applications, Continental's application to join United in the Star Alliance, and American Airlines's application to join British Airways in the OneWorld Alliance. In the first application, DOT granted antitrust immunity over serious objections from the Justice Department. Critics of airline alliances argue that they make it very difficult for smaller, independent airlines to compete.

(a) Are you satisfied with the Transportation Department's review of international airline alliances? Has the Transportation Department played sufficient heed to competition concerns?

(b) Do you believe that the law should be changed so that it is the Justice Department, and not the Transportation Department, with the authority to grant antitrust immunity to international airline alliances?

Answer: The Department has a good and productive process of sharing information and analysis with the Department of Transportation. We often get the benefit of their expertise in the airline industry, and we appreciate that our views on competition are considered as they review matters involving competition issues in their jurisdiction. As you point out, DOT has the final authority on airline antitrust immunity issues and has been directed by Congress to take account of issues beyond the scope of antitrust. Although we may have some differing perspectives on these matters, we know that both agencies are in agreement in wanting what is best for consumers.

9. (a) We've heard a lot of concerns about competition in the seed market recently. Many farmers and antitrust experts are especially concerned about the actions that Monsanto is taking to allegedly harm competition in the market for genetically modified seeds. What is your view of

this issue? And when do you expect we will see a conclusion to the DOJ investigation of that issue?

Answer: The competitive dynamics of the seed industry were a significant topic at the March 12, 2010, workshop on agriculture and antitrust enforcement, held jointly with the U.S. Department of Agriculture. I have confirmed that the Department has an open investigation into possible anticompetitive practices in the seed market, but beyond that I cannot comment. We will conduct a thorough investigation to determine whether the antitrust laws have been violated.

(b) In the Delta/Pineland merger in 2007, the Justice Department imposed conditions that prohibit Monsanto from refusing to allow seed companies to combine non-Monsanto traits with Monsanto traits in cotton. But we are told that exactly these practices are used by Monsanto today in soy and corn seeds. How can a practice that is improper for cotton seeds be permissible for soy and corn?

Answer: The Final Judgment in the Monsanto/Delta and Pine Land (DPL) merger litigation required Monsanto, among other things, to modify its cottonseed trait licenses with seed companies to permit those licensees to breed and sell, without penalty, cottonseed containing non-Monsanto traits and cottonseed containing both licensed Monsanto traits and non-Monsanto traits. These license modifications specifically addressed competition that otherwise would have been lost from Monsanto's acquisition of DPL. The United States alleged in its Complaint that the merger, among other harms, would have eliminated DPL as a partner independent of Monsanto for developers of cotton traits that would compete against Monsanto's traits. As stated in its Response to Public Comments, the United States made no determination as to whether Monsanto's cottonseed licensing provisions in and of themselves violated the antitrust laws (see footnote 74).

10. Meatpacking plants in the livestock industry have become increasingly concentrated over the years, and today four major meatpacking companies control the majority of the market. In some regions, farmers and ranchers have access to only one or two meatpacking plants leaving farmers and ranchers with little or no choice as to where to take their livestock to be processed. A 2007 study titled "Concentration in Agricultural Markets," by the University of Missouri's Department of Rural Sociology, showed that the market control of the top for processing firms in most agricultural sectors has continued to climb. According to the study, the top four firms' market share for beef processing was 83.5%, for pork was 66%, for broilers was 55.5%, and for turkeys was 55%. What actions can the Justice Department take to bring more competition to the processing sector?

Answer: The Department is making a priority of vigorous antitrust enforcement in agriculture industries, including livestock processing. In addition, as you have noted in letters to me and during the hearing, the Division and the U.S. Department of Agriculture (USDA) will be holding joint public workshops to explore competition issues affecting the agriculture industry, including competition in the livestock industry, and the appropriate role for antitrust and regulatory enforcement in that industry. Specifically, we will conduct a workshop on the livestock industry on August 27, 2010, in Fort Collins, Colorado, to address concentration in livestock markets, buyer power and enforcement of the Packers and Stockyards Act.

11. Some competition advocates believe that consolidation in the retail sector has led to monopsony or oligopsony buying power among food retailers, and that this in turn drives concentration in the meatpacking and food processing sectors. What is your view? Do you believe retailer concentration and buying power may be playing a role in driving the consolidation of agricultural markets? And, if you believe this is a concern, is there anything antitrust enforcement agencies can do to make the retail market more competitive?

Answer: I agree that concentration can increase the risk of monopsony power. Generally, issues involving products at retail are handled by the Federal Trade Commission. Nonetheless, I can assure you that the Department will continue to maintain as one of its priorities aggressive enforcement in the agriculture sector and will take action to prevent conduct or transactions that may harm competition in agriculture markets.

12. The Antitrust Division and the Federal Trade Commission share responsibility for government enforcement of the federal antitrust laws. Sometimes this leads to unfortunate 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 are your agencies doing to resolve clearance disputes in a more effective way? Are you, as the Antitrust Modernization Commission suggested in 2007, developing a new merger clearance agreement, or do you believe Congress should act in this area, revising the Hart-Scott-Rodino Act to require more effective resolution of clearance disputes?

Answer: Over the years, the two agencies have developed a process for determining which agency will handle a particular matter, generally on the basis of which agency has the most current experience in the particular markets involved. This process enables both agencies to make the most effective use of enforcement resources and avoids duplicative investigatory requests on private parties. On occasion a matter arises in which both agencies believe each has more expertise. In these circumstances, and indeed in all others, the agencies share responsibility for deciding which of them will handle the investigation. The decision-making process is one that has been in place for some time. Since I became Assistant Attorney General, I and the FTC Chairman have pledged to ensure that decisions involving review of mergers and transactions are made expeditiously. We continue to work with the FTC to clear each matter as quickly and efficiently as possible, and I would be happy to work with you and Congress to consider new ideas for improving the process.

13. In April, the Justice Department and FTC jointly published for public comment a comprehensive revision of the Horizontal Merger Guidelines, a document that guides the agencies in reviewing mergers, and guides private parties in determining whether and how to structure mergers so that they are more likely to pass government scrutiny. Among other things, the proposed new Guidelines downplay the focus on market shares, concentration, and market definition. The proposed new Guidelines also increase the HHI thresholds – a measure of market

share -- that might suggest a merger could be problematic, and omit the reference to a two-year standard for "timely" entry into a market.

Do these revisions signal a change in enforcement policy at the agencies? Should merging companies and the lawyers who advise them now feel as if there is an even larger safe harbor in merger enforcement?

Answer: I am committed to enforcing section 7 of the Clayton Act against anticompetitive mergers. The Department will continue to pursue enforcement of section 7 based on sound analytical principles. The goal of the review of the Merger Guidelines is to take into account legal and economic developments that have occurred since the last significant guidelines revision in 1992 and to determine whether the current guidelines accurately reflect the current practice of merger review at the Department and the FTC. The HHI thresholds are meant to give guidance, and do not prevent us from challenging anticompetitive deals below the thresholds. We do not believe that the current HHI numbers have reflected actual practice. It is important that companies have guidelines to help them plan transactions and avoid violating the antitrust laws, and we believe that the adjustments, by better reflecting agency practice, will give better guidance.

14. The proposed revised Horizontal Merger Guidelines released in April states that "these Guidelines reflect the Congressional intent that merger enforcement should interdict competitive problems in their incipiency and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal." Should these Guidelines be adopted, how will you interpret them so that they address competitive problems "in their incipiency"?

Answer: 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." As a matter of antitrust legal doctrine, any merger case that does not allege a merger to monopoly is brought pursuant to the "may substantially lessen competition" language of Section 7 and thus falls within the "incipiency doctrine." We will interpret the Horizontal Merger Guidelines consistent with this legal doctrine. The current draft of the Guidelines notes that "certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal." The Department's merger enforcement will be consistent with that statement.

15. For over a year now, authors, publishers, and book sellers have been debating the merits of a proposed settlement that would allow Google to digitize millions of books currently under copyright. The Google book project has enormous potential to create a massive digital library of books available over the Internet, and preserve books for years to come. But this project also raises competition concerns, as noted by the Justice Department in its filing in the case, about whether the settlement will give Google rights that its competitors cannot get, therefore harming competition.

Does the Antitrust Division continue to be concerned about the antitrust implications of the proposed Google Books Settlement? Further, what risks do you think the settlement poses for American consumers?

Answer: The Division strongly supports a vibrant marketplace for the electronic distribution of copyrighted works, including in-print, out-of-print, and so-called "orphan" works. On February 4, 2010, the Department filed with the court a second Statement of Interest, setting forth our concerns with respect to the parties' proposed amended settlement agreement. Both that filing and the Department's initial Statement of Interest are available on the Antitrust Division's website, at *www.justice.gov/atr/cases/authorsguild.htm*. On February 18, 2010, the Department underscored the importance of the concerns expressed in those filings at the court's settlement fairness hearing; the court has not yet issued its ruling. The Division will continue to monitor this matter and advance consumer interests through the proper application of antitrust law.

16. Recent events have highlighted the importance of technology companies acting responsibly to ensure the privacy of users. Among other things, breaches of user privacy surrounding the collection of wi-fi data have generated a lot of interest from regulators around the world. One alternative to address this issue is through regulation, but some believe that competition policy and assuring a competitive market is preferable to regulation as a mechanism to address some or all of these concerns. Competition in these markets can incentivize firms to compete more on privacy protections. Does the Justice Department consider whether the lack of adequate privacy protections is a symptom of a lack of competition in search or other online markets? Is this something you can address?

Answer: The antitrust laws protect consumers against conduct or transactions that harm the competitive process and deny consumers the protections of competition. I agree that competition among search engines on privacy policies brings important benefits to consumers, and I believe that the antitrust laws provide an important set of tools for addressing conduct that can be used to harm consumers—whether it be Internet companies that are consumers of Internet gateway and platform services or consumers of applications and services distributed over the Internet. The Antitrust Division has been very active in its investigations to thoroughly review conduct and transactions that threaten harm to competition in these industries. When it is appropriate, the Division vigorously pursues enforcement actions to prevent conduct or transactions from harming consumers. The Federal Trade Commission has authority over unfair or deceptive acts or practices, which may provide an additional set of tools for addressing privacy issues, so I defer to the Commission to discuss how they have addressed these issues.

From Senator Russell D. Feingold

1. Many companies seeking approval of a merger argue that delay in approving the merger will result in jobs being lost. Do you think this is a legitimate concern? In your experience, don't most mergers, especially between competing companies, result in lay-offs in the short to medium term?

Answer: The Antitrust Division is mindful of the potential that delays in companies' ability to move forward with their transactions can have an impact on the parties' businesses and in the marketplace. Therefore, the Division's goal is to get to the right answers as quickly as possible with the least burdens necessary to make responsible enforcement decisions. The Antitrust Division has not systematically analyzed the extent to which mergers, acquisitions, or other transactions have impacted employment in the short, medium, or long term.

2. The Department recently reached a settlement that allowed the Ticketmaster and Live Nation merger to go forward. The settlement contains conditions that prohibit retaliation, forbid anticompetitive bundling, establish ticketing firewalls, and permit portability of customer information. What steps has the Department taken to ensure that the company is living up to these terms? Are there dedicated staff focused on implementing this agreement and improving competition in this industry? Have there been any claims of retaliation or anticompetitive behavior following the settlement?

Answer: The Department has worked diligently to ensure that the newly merged company complies with all conditions of the proposed settlement, including the prohibitions on retaliation and anticompetitive bundling and the requirements to establish a ticketing firewall and to permit portability of customer information. The Department has publicized the terms of the settlement so that music industry participants are aware of their rights and understand that the Department will investigate anticompetitive conduct they report. Public outreach efforts include a speech I gave on March 19, 2010, at the South by Southwest Music and Media Conference and Festival in Austin, Texas, work with non-profit public interest groups developing communication plans about the settlement, and meetings with music industry participants to ascertain whether the merged company is complying with the settlement's terms. The Department also has created a Compliance Committee to evaluate the merged company's compliance with the settlement. The Compliance Committee has monitored closely the merged company's efforts to implement an effective ticketing firewall, and it will audit compliance with the firewall regularly. In addition, the Committee follows up on claims that the merged company has violated the terms of the settlement or otherwise engaged in anticompetitive behavior.

3. (a) Over the past several years, there has been significant controversy over the potential for Internet providers to prioritize their own or an affiliated company's content. This concern about "net neutrality" has led the FCC to propose some open Internet principles and issue a notice of proposed rulemaking. To what degree can the Department using the antitrust laws also constrain this kind of discriminatory behavior? Is the Department looking at this issue?

(b) Are the current antitrust laws sufficient to police this sort of discriminatory behavior by an Internet service provider? If not, what changes would the Department recommend that would enable it to more effectively address these practices?

(c) To what degree does the Department take into account the history of a company's competition violations or other indications it may be willing to leverage its market power in an anti-competitive manner when reviewing a merger proposal? For example, is the Department able to consider allegations that Comcast may have violated net neutrality principles when conducting its merger review?

(d) Has the Department considered imposing conditions as part of a merger settlement that will help ensure net neutrality?

Answer: The antitrust laws protect consumers against conduct or transactions that harm the competitive process and deny consumers the protections of competition. We believe that the antitrust laws provide an important set of tools for addressing discriminatory conduct that can be used to harm consumers—whether it be consumers of Internet gateway and platform services who seek faster and more reliable Internet infrastructure development, or consumers of applications and services distributed over the Internet, who seek innovative new products and services brought to them by novel business methods. The current antitrust laws are sufficient to keep such conduct in check, though it is important in telecommunications and other industries with regulatory regimes that the courts do not narrow the appropriate reach of antitrust enforcement. We do not believe that the current law prevents the Department from prosecuting anticompetitive behavior in any industry, but if this turns out not to be true in any of our matters we will work with Congress to make sure we have the tools we need. The Antitrust Division has been very active in its investigations to thoroughly review conduct and transactions that threaten harm to competition in these industries. When it is appropriate, the Division vigorously pursues enforcement actions to prevent such discriminatory behavior from harming consumers. As part of its investigations, the Division considers all information relevant to determining whether the conduct in question raises competitive concerns. In addition, the Department continues to work with the Federal Communications Commission on its broadband policy, and supports its principles to preserve and promote the open and interconnected nature of the public Internet. Finally, while I cannot comment specifically about any pending investigation, the Department considers a wide variety of factors when assessing a transaction's likely competitive effects—including the involved firm's past competitive behavior—and also has the ability to seek a wide variety of potential remedies in those situations where we conclude a transaction poses likely competitive harm.

4. The Department recently took action to block the acquisition of two milk bottling plants by Dean Foods, but the Department's filing was focused almost exclusively on the impact this merger will have on consumers, rather than the impact on farmers, and the reduction in outlets for their milk. Has the Department examined the potential harm to farmers and other small businesses if this merger were to go through?

Answer: Since the Department's challenge to Dean Foods Company's acquisition of Foremost Farms USA's Consumer Products Division currently is pending, I refer you to our public filings in the litigation. Generally, when the Department investigates a transaction's potential harm to competition in the agricultural sector, we contact numerous farmers and small businesses to assess thoroughly the impact that the transaction will have, and take account of their concerns.

5. The USDA has established a Dairy Industry Advisory Committee (DIAC) to examine both the long and short term challenges facing the industry. I believe many of these challenges have some relationship with competition. What steps has the Department taken to reach out to the DIAC to involve any interested members with the upcoming workshop on dairy competition and to present a summary of the workshop findings and information on dairy competition in general?

Answer: A central goal of the agriculture workshops we are conducting with the U.S. Department of Agriculture is to listen to and learn from parties with real-world experience in the agriculture sector. We have been active in reaching out to all stakeholders in this sector. The Department has worked through the office of the Secretary at USDA and through the dairy program in USDA's Agricultural Marketing Service to make sure we are fully informed what is being presented to the DIAC, and that, in turn, they are apprised of what is going on in the workshops. We have also invited a number of witnesses who have presented ideas to the DIAC or who sit on the DIAC to serve on panels at the workshops.

From Senator Charles E. Grassley

1. I'm pleased that the U.S. Justice Department and the U.S. Department of Agriculture are conducting workshops across the country to look at competition issues in the agriculture sector. As you know, I'm concerned about increased consolidation in agriculture and possible anti-competitive and abusive practices in the industry.

    a. What have you learned from these workshops?
    b. What do you expect to come out of these sessions?
    c. Do you believe that these workshops have improved coordination between the Justice and Agriculture Departments on agriculture competition matters?
    d. 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?
    e. Will the Justice Department be more pro-active in policing anti-competitive behavior in agriculture? What kind of assurances can you give me that the Antitrust Division is taking competition concerns in the agriculture sector seriously?

Answer: Competition issues affecting agriculture have been a priority for me since I was confirmed last spring. As I told this Committee at its field hearing last September in St. Albans, Vermont, the Antitrust Division is carefully evaluating the relevant market conditions, informed by input from those in the agricultural community who live with these developments every day. We have heard concerns from Congress, farmers, and consumers about changes in the agricultural marketplace, including increasing concentration and vertical integration. In the joint workshops we intend to examine the dynamics of competition in agriculture markets, review the state of the law and current economic learning, and provide an opportunity for farmers, ranchers, consumer groups, processors, the agribusinesses, and other interested parties to provide examples of potentially anticompetitive conduct. The goals of the workshops are to promote dialogue among interested parties and foster learning with respect to the appropriate legal and economic analyses of these issues, as well as to listen to and learn from parties with real-world experience in the agriculture sector. Through the dialogue established in these workshops, the Department and USDA hope to be able to learn how we can work together to ensure that antitrust enforcement and regulatory actions are as effective as possible. We will approach the matters that come before the Division and the upcoming workshops without any preconceptions and cannot promise any particular answers or results. I can assure you, however, that we are committed to a careful and comprehensive examination of the marketplace.

2. United Airlines and Continental Airlines recently announced that the two companies would be merging. I want to make sure that air service to Iowa is not adversely impacted. Many times consumers in smaller communities and rural areas are the hardest hit by these mergers.

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

Answer: You can be assured that the Antitrust Division will conduct a thorough investigation of the proposed transaction, including its effects on Iowans, and take any action necessary to ensure that the transaction does not harm consumers or competition in the airline industry.

3. At the Subcommittee hearing last week, Senator Hatch spoke about competition issues relating to college football and asked whether they are significant enough to warrant the attention of our antitrust enforcement agencies. I share these concerns and believe that if there are antitrust violations, the Justice Department should ensure that the antitrust laws are enforced and consumers are not harmed, regardless of whether the matter involves sports and entertainment issues.

    a. Will the Antitrust Division continue to look into any antitrust violations that may exist with regard to the Bowl Championship Series?
    b. What information can you provide about any current inquiries relating to this matter?

Answer: The Department of Justice is reviewing materials submitted to us, including materials from Senator Hatch, to determine whether to open an investigation into the legality of the current system under the antitrust laws. Importantly, and in addition, the Administration also is exploring other options that might be available to address concerns with the college football post-season. These include encouraging the NCAA to take control of the college football post-season at the FBS level (as it does at other football levels and with regard to other sports), asking a governmental or non-governmental entity or a commission to study the benefits, costs and feasibility of a playoff system, asking the Federal Trade Commission to examine the legality of the current system under consumer protection laws, exploring whether other agencies may be able to play a role, and legislative efforts aimed at encouraging adoption of a playoff system.