

**Responses of Assistant Attorney General Bill Baer
To Questions Submitted for the Record
Senate Judiciary Committee Subcommittee on Antitrust, Competition Policy, and
Consumer Rights Hearing: “Oversight of the Enforcement of the Antitrust Laws”
March 9, 2016**

Questions from Subcommittee Chairman Lee

- 1. Last fall our Subcommittee held a hearing on the proposed mergers between Anthem and Cigna and between Aetna and Humana. When discussing possible remedies for health insurance plan mergers, some commentators propose divesting covered lives in areas that would see anticompetitive increases in market concentration.**
 - **However, given that nothing prevents consumers from leaving their new provider and returning to the one from which they were divested, is this really an adequate remedy?**

Answer: As you know, I cannot comment on pending matters, but I can say that in all merger reviews the Antitrust Division carefully considers whether a remedy will be successful at preserving or restoring competition lost due to the transaction. I believe we should only agree to negotiated divestitures where we are confident that the competitive dynamic existing before the merger will be preserved or enhanced. We should not settle Clayton Act violations unless we have a high degree of confidence that a remedy will fully protect consumers from anticompetitive harm. With respect to evaluating the effectiveness of potential remedies in health insurance markets, we recognize that consumers have the right to switch providers. That reality would need to be factored into our antitrust assessment.

- 2. One of my ongoing concerns relates to competition in high tech markets with evolving business models, such as online video distribution. In situations like these, it is not uncommon to see market incumbents attempt to thwart disruptive innovation that may benefit consumers, but threatens their legacy business model.**
 - **What is your agency doing to protect competition in these cutting edge industries?**

Answer: Competition plays an important role in promoting innovation in high tech markets. When threatened by innovative competitors, incumbent firms look for ways to protect their revenues and margins. That is to be expected. The question is how they respond. In many cases, incumbents respond by upping their game and competing on the basis of price or quality. They invest in the research and development necessary to develop innovative, next-generation products to compete with the disruptive innovator. But in the face of new competitive threats some incumbents may respond in ways that do not promote consumer welfare and resort to conduct that violates the antitrust laws. The Antitrust Division’s obligation is to detect and challenge such conduct. For example, we challenged a conspiracy between Apple and five publishers to thwart a new business model that dramatically reduced prices of e-books. By successfully challenging their conspiracy to increase the prices of e-books, we restored full-throated competition and helped secure well over \$500 million in credit refunds to injured

consumers. That translates into refunds of roughly \$7 per bestseller bought online in the conspiracy period.

Mergers also can threaten to enhance the power of incumbents at the expense of competition. For example we were concerned that the Comcast-Time Warner Cable merger risked making Comcast an unavoidable gatekeeper for Internet-based services, such as over-the-top video. That deal was abandoned after we made clear our intention to challenge it in federal court.

3. Another cutting edge market in which it is important to promote and protect competition is the much-discussed “sharing economy.”

- **What is your agency doing to adapt your antitrust analysis to these young and evolving markets to ensure that incumbents and legacy competitors don’t stifle innovation?**

Answer: New and innovative businesses have embraced the concept of a “sharing economy” and injected new competition into many markets. These businesses present competition issues that are similar to any other disruptive technology. As discussed in my answer above, our antitrust laws protect disruptive innovators from unlawful exclusionary behavior by established competitors. We will continue to work diligently to ensure that we appropriately account for the impact of new technologies on the competitive dynamics in markets we analyze.

4. I’ve heard concerns that in some industries foreign firms are acquiring a growing percentage of the market and that these firms, though technically separate entities, are possibly all acting under the influence of their government.

- **How should American antitrust enforcers approach the acquisition of American companies by foreign state-owned or state-controlled entities?**
- **Do these situations present higher risks of potentially collusive or concerted behavior or call for any changes to the way we calculate market concentration?**

Answer: The Antitrust Division analyzes the acquisition of American companies by foreign state-owned or state-controlled entities in a manner consistent with its approach to other mergers, applying the Horizontal Merger Guidelines. The express language of Section 7 of the Clayton Act reaches the stock and asset acquisitions of persons engaged in trade and commerce “with foreign nations.” The antitrust agencies do not discriminate in the enforcement of the antitrust laws on the basis of the nationality of the parties. Indeed, we urge our foreign counterparts to apply their competition laws even-handedly. That ensures U.S. firms have a level playing field around the world. Outside of the antitrust context, the Committee on Foreign Investment in the United States (CFIUS) may review a proposed acquisition of a U.S. firm by a foreign entity in order to determine the effect of such a transaction on national security.

In analyzing the potential for collusion, the Antitrust Division takes into account many factors, including incentives that firms may have as a result of other ownership interests. The Antitrust Division’s analysis accounts for any entities that may be able to assert control or influence, whether they are domestic or foreign. One example is the GE/Electrolux merger: although

Kenmore was a separate company, its cooktops and ovens were manufactured by Electrolux. We took that into consideration in evaluating the extent to which Kenmore actually served as a competitive check on the merging parties, and we concluded that it did not.

5. There are increasing tensions and concerns internationally with regard to how antitrust laws are being enforced. Some suggest that there are poor transparency, flawed analytical frameworks, and questionable remedies.

- **What are you doing to address these concerns?**

Answer: We are working hard at the Department of Justice, together with our colleagues at the Federal Trade Commission, to form an international consensus on transparency, procedural fairness, and even-handed application of antitrust principles. Much of my public speaking and international engagement is directed at furthering these goals. See, e.g., “Cooperation, Convergence, and the Challenges Ahead in Competition Enforcement,” my remarks for the Georgetown Law Ninth Annual Global Antitrust Enforcement Symposium on September 29, 2015, available at www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-remarks-ninth-annual-global-antitrust. We have led the effort at the Organisation for Economic Co-Operation and Development (OECD) Competition Committee to secure “a broad consensus” on “the need for, and importance of, transparency and procedural fairness in competition enforcement.” [OECD COMPETITION COMMITTEE, PROCEDURAL FAIRNESS AND TRANSPARENCY: KEY POINTS 5 \(2012\)](#). Similarly, the International Competition Network (ICN), consisting of competition enforcers from about 130 agencies, has adopted guidance that aims to promote fair and informed enforcement across all institutional frameworks. ICN GUIDANCE ON INVESTIGATIVE PROCESS (2015), available at www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf.

There is bilateral progress as well. For example, as part of the broader U.S.-China Strategic and Economic Dialogue in June 2014, and the U.S.-China Joint Commission on Commerce and Trade in December 2014, the United States and China publicly recognized that antimonopoly law enforcement should address harm to competition and should not promote individual competitors or industries. We also continue to work with other federal government agencies in an effort to engage with the Chinese on administrative law reform to promote greater transparency. In addition, the Chinese government made detailed commitments regarding procedural fairness, transparency, and nondiscrimination in the enforcement of their now eight years old Anti-Monopoly Law.

Bilateral cooperation on merger reviews provides an additional opportunity to address issues of transparency and process. Antitrust Division attorneys and economists regularly consult with foreign colleagues on issues of process, timing, and substance affecting merger investigations. In the last five years we have worked with other enforcers in 40% of our merger challenges; last year alone, we cooperated with 16 different foreign enforcers in 14 different investigations.

That said, while we have made progress, more work needs to be done, and we are committed to continuing progress in this important area.

6. In some countries, it appears that antitrust enforcement is a tool of native interests used to target foreign firms, force tech transfer, and extract other concessions to the benefit of domestic competitors.

- **What are you doing to coordinate with the broader US government, particularly with USTR and Commerce, to confront these protectionist practices?**

Answer: As noted above, the Antitrust Division is a strong proponent of the principle that antitrust enforcement is a law enforcement function and that decisions should be based solely on the competitive effects and consumer benefits of the transaction or conduct being reviewed. To that end, we work with our sister antitrust agency, the Federal Trade Commission (FTC), and other U.S. government agencies, to ensure that enforcement decisions are not used to promote domestic or industrial policy goals, protect state-owned or domestic companies from foreign competitors, or create leverage in international trade negotiations. We participate with both the United States Trade Representative (USTR) and the Department of Commerce in a variety of interagency working groups aimed at this goal and over the past several years have actively engaged on competition policy issues in the U.S.-China Joint Commission on Commerce and Trade. Further, with the FTC and USTR we drafted and negotiated the Competition Chapter in the Trans-Pacific Partnership and are working with the trade agencies on competition issues in the on-going Transatlantic Trade and Investment Partnership negotiations. We also participate in the USTR-led Trade Policy Staff Committee and provide antitrust advice on issues arising in that forum as appropriate.

Questions from Senator Tillis

- 1. The MillerCoors brewery in Eden, North Carolina has been a long-time employer for the Rockingham County community and surrounding areas. MillerCoors made an announcement to close the brewery shortly before merger talks between SAB and ABI became public. The closure of the brewery will have implications for the economic vitality of the region and for the families who will be directly impacted by the impending loss of jobs. I understand that businesses must sometimes make difficult decisions in the short term to preserve their long term viability in what are increasingly competitive markets. I also recognize, however, the impact the decision to close the Eden brewery will have on the local community and the employees of the brewery. My understanding is that it is so far unclear as to whether MillerCoors will sell the brewery or keep it closed—arguably keeping it out of the hands of a competitor.**

As a part of what is no doubt a thorough and exhaustive review, will the Department of Justice be examining the closure of the Eden brewery as part of the Anheuser-Busch InBev/SAB Miller merger?

Answer: Without commenting specifically on an ongoing investigation, the Antitrust Division is committed to evaluating all aspects of a merger to determine whether it risks reducing competition. We consider all facts relevant to the proposed transaction's effect on competition, including the significance of the parties' past, present, and future capacity to whether the transaction will create or enhance the merged company's incentive and ability to exercise market power or otherwise harm consumers or competition. Actions taken to reduce output would be part of that analysis.

Questions from Senator Franken

- 1. Last September, at an antitrust hearing on the health insurance deals, I asked the CEOs of Aetna and Anthem whether they would commit to passing on any savings from the mergers to their customers in the form of lower premiums. Neither were willing to make that commitment. Do you agree that this should be an important factor in your evaluation of whether these deals will benefit consumers?**

Answer: I cannot comment on a pending matter, but in general, I can say that in evaluating the legality of mergers under the antitrust laws, the antitrust agencies consider the extent to which claims of merger-specific cost savings will be passed on to consumers. The agencies' Horizontal Merger Guidelines make it clear that the merging parties must substantiate efficiency claims and show they are unique to the merger. Moreover, where a merger's costs savings inure only to the shareholders and the merger risks a reduction in competition, we will seek to challenge that transaction. As I said at the Subcommittee's hearing, our job is to confront transactions where maximizing shareholder value is being done at the expense of the American consumer.

- 2. As you know, I was a vocal opponent of Comcast's proposed acquisition of Time Warner Cable, and I appreciate the tough stance that the DOJ and FCC took on that deal. But I remain concerned about any further consolidation in the cable and broadband markets. One of the areas that I have spent considerable time examining is the effectiveness of conditions that can be placed on these deals to curb harmful behavior.**

Mr. Baer, as you review Charter's proposed acquisition of Time Warner Cable and Bright House Networks, how will you ensure that any contemplated conditions are reliable and enforceable? For example, if you were to prohibit Charter from engaging in behavior that could stifle online video distribution, how would you ensure Charter's compliance? Are you contemplating any steps here that you may have not used in prior reviews?

Answer: For a remedy to be successful, the Antitrust Division must be able to effectively enforce it. As the Supreme Court noted decades ago in *International Salt*, if a remedy does not deliver what it was designed to achieve, then the government "has won a lawsuit and lost a cause." Our Policy Guide to Merger Remedies explains that we base remedies on the application of economic and legal analysis to the particular facts of each case. That means that we do not merely copy past relief proposals, but craft remedies that will be enforceable and effective. We monitor the effectiveness of consent judgments on an ongoing basis, often requiring parties to provide compliance reports, and we include our right to request documents or require the parties to notify us, in order to keep tabs on how the remedy is working and whether the parties are keeping up their end of the deal. This panoply of tools gives us confidence that we can monitor compliance and that we can take steps to ensure that the remedy as crafted is successful.

On April 25, 2016, the Antitrust Division filed suit to block Charter's acquisition of Time Warner Cable and at the same time announced a settlement with the parties. The settlement forbids the merged company ("New Charter") from entering into or enforcing agreements that limit or create incentives to limit programmers from providing content to online video distributors (OVDs). This provision will ensure that New Charter will not have the power to choke off OVDs, an important source of disruptive competition, and deny consumers the benefits of innovation and new services. The Complaint and Proposed Final Judgment are available at www.justice.gov/atr/case/us-v-charter-communications-inc-et-al. The Division's merger review considered whether any negotiated remedy would be successful at preserving or restoring competition lost due to the transaction, and in this case the Antitrust Division concluded that the proposed settlement meets this standard. We will closely monitor developments in the industry and work with the Federal Communications Commission to vigorously enforce compliance with the proposed settlement to ensure that New Charter does not use the influence it will have as one of the nation's largest multichannel video programming distributors to restrict or discourage programmers from licensing their content to OVDs.

- 3. Three years ago, as the Supreme Court was preparing their ruling in the *American Express v. Italian Colors* case, I asked you both about the importance of private antitrust enforcement. The decision in that case has since made it much harder for small businesses to file private antitrust enforcement actions and instead they are forced to arbitrate their claims. Can you explain how antitrust enforcement has changed since that decision? Do you continue to have concerns about business' ability to bring antitrust claims to court?**

Answer: The Antitrust Division has not conducted an in-depth analysis of private arbitration of antitrust cases following *American Express v. Italian Colors*. However, we continue to be concerned that mandatory arbitration agreements could deprive parties of an effective opportunity to challenge monopolistic conduct under the Sherman Act. As the Department said in its brief as amicus curiae before the Supreme Court in *American Express v. Italian Colors*, it is important that private parties have a meaningful avenue to bring antitrust actions. For over a century our legal system has relied on a combination of federal, state, and private enforcers to combat anticompetitive conduct, where each of these three enforcers play different, yet complementary, roles.

- 4. As you know, this subcommittee held a hearing in December to gain a better understanding of the proposed merger of Anheuser Busch Inbev (ABI) and SABMiller. Among other things, the hearing highlighted how the increased global market power of the new ABI-SABMiller could result in increased control over critical commodities markets worldwide. In addition to the review of essential materials and inputs like hops, barley, rice and corn, the impact on marketing, including modern digital platforms, on-the-street promotions, and traditional advertising, should also be considered.**

Mr. Baer, what consideration is being given to the impact that the merger could have on these various inputs, including its impact with regard to marketing? What is being done to ensure that the global buying power that results from this transaction will not be used to harm competition when it comes to critical commodities, including marketing and promotions? Are any conditions being considered to address these concerns?

Answer: While I cannot comment on a pending matter, as part of any investigation, the Antitrust Division considers carefully all competitive effects, including concerns that market power could be used to harm sellers of inputs (either materials or services) to the merged company. As stated in the Horizontal Merger Guidelines, “Enhancement of market power by buyers, sometimes called ‘monopsony power,’ has adverse effects comparable to enhancement of market power by sellers.” The Guidelines instruct the DOJ and FTC to “employ an analogous framework to analyze mergers between rival purchasers that may enhance their market power as buyers.” For example, the central concern in our challenge to Tyson Foods’ acquisition of Hillshire Brands was that the merged firm would have buyer power in the sow market. Our remedy required the divestiture of Tyson’s sow purchasing business in order to preserve competitive options for farmers selling sows. You can be sure that the Antitrust Division will take appropriate action if it finds the potential for harm to competition, either on the buyer or seller side, that violates the antitrust laws.

Questions from Senator Blumenthal

- 1. Will you review this subcommittee's record on the ABI-Miller merger, and consider prohibiting the company for terminating or renegotiating contracts based on the merger?**

At the Subcommittee's December 8th hearing on the ABI / Miller merger, Mr. Carlos Brito, CEO of ABI, was asked to provide reassurance that his company would not terminate or renegotiate any existing distribution contracts as a result of the merger.

He responded, "Yes, I can commit. As a result of the transaction there will be no such thing." In Questions for the Record submitted as part of that hearing, Molson Coors CEO Mark Hunter committed that his company would not use the merger as a justification for terminating or renegotiating any existing distribution contracts as well.

- a. Mr. Baer, I know that you cannot discuss pending mergers. Nonetheless, I would ask that you review the transcript of this Subcommittee's hearing and consider holding Mr. Brito and Mr. Hunter to their word. They have indicated that they will not cancel or renegotiate their contracts with wholesalers. Can you commit to reviewing their statements as DOJ determines how to proceed with respect to this merger?**

Answer: Yes. At the oversight hearing I made a commitment to review the transcript of the Subcommittee's hearing on that matter and I will honor it.

- 2. What is the DOJ's position on airlines withholding data from third-party websites that offer competitive fares?**

Senator Schumer and I have both received reports that allege airlines are freezing out third-party price comparison websites. These sites allow consumers to make an informed decision by comparing fares and flight options in one place and serve as a catalyst for price competition among the airlines. In fact, due to the incredible level of consolidation, these websites are one of the only places where airlines actually have to compete.

It appears that airlines have been withholding flight data from third-party sites, which has the effect of pushing consumers to the airlines own website, where the airlines are better able to charge add-on fees and other costly extras due to the lack of transparent price competition.

At least one airline, Lufthansa, announced that it would charge consumers a fee for booking through a third-party. Making comparison shopping more difficult for consumers seems to serve no purpose other than stifling competition to the

detriment of travelers. Experts have noted that the combination of airline concentration coupled with attempts to steer consumers away from comparison sites is likely to lead to higher fares and make market entry for smaller airlines more difficult. All of this, of course, would serve to strengthen the major airlines market power beyond the extraordinary level it is today.

- a. Given the unprecedented level of consolidation among the airline industry, can you assure me the Justice Department will scrutinize refusals to provide information to third parties in a way that could harm competition?**

Answer: The Antitrust Division has been active in protecting competition in the airline industry in recent years. We sued to block the American/US Airways merger, reaching a settlement that improves competition at numerous airports, and we sued to block United Airlines' acquisition of slots at Newark Airport, a transaction United abandoned on April 6, 2016. The Antitrust Division is concerned anytime firms take actions that may harm competition, and to the extent that airlines' interactions with third-party price comparison websites raise competition issues under the antitrust laws, we will review them. In addition, we will continue to coordinate with the Department of Transportation (DOT), which has consumer protection authority in this area. I note that DOT solicited comments on a number of activities involving interactions between airlines and third-party websites in its May 23, 2014, proceeding on the transparency of airline ancillary fees and other consumer protection issues.

3. What do DOJ and FTC do to encourage regulations in service of competition by other federal agencies?

Both of your agencies have a set of tools for encouraging and facilitating competition. I see it as part of our job to ensure you use those tools fully. That means you must block mergers where appropriate, prosecute criminal conduct when it occurs, and when all else fails break up companies that have grown too large and dominant.

But even if DOJ and the FTC do everything under the antitrust laws, we are not left with perfect markets. Competition is not like a light switch that is either on or off. Even when companies are not strict monopolies, they may lack adequate incentives to serve consumers. If consumers do not have the tools they need to pick the best product, market forces will not fully maximize consumer wellbeing.

It is my view that other federal agencies routinely promulgate regulations that have important implications for competition. DOJ and the FTC can help build high-functioning markets by working with other agencies to ensure that rulemaking is done with an eye to competition.

- a. What do your respective agencies do to encourage other federal agencies to encourage competition?**
- b. In your view, can rulemaking by agencies play an important role in building competitive markets?**

Answer: The Antitrust Division works with other agencies, on both a formal and informal basis, to encourage competition and to help them adopt policies and rules that promote competition. For example, in 2013 the Federal Energy Regulatory Commission (FERC) conducted a proceeding to change its regulations under the transparency provisions of the Natural Gas Act. The Antitrust Division provided comments on the record in order to help ensure that these regulations would facilitate market monitoring and promote efficient production and investment decisions while minimizing the risk of anticompetitive coordination. A full list of our comments to other agencies can be found at www.justice.gov/atr/comments-federal-agencies.

Agency rulemakings and other actions can play an important role in building competitive markets. For example, agencies can help promote competition by lowering barriers to entry, increasing market transparency, and eliminating the sources of inefficient costs to society. The Federal Communications Commission (FCC)'s spectrum auctions rules for the 600 MHz incentive auction are designed to promote vigorous competition and innovation in the wireless market for the benefit of consumers. The rules create a significant reserve of spectrum to ensure that carriers, other than those that currently hold the majority of low-frequency spectrum, have a meaningful opportunity to acquire the spectrum necessary to foster a competitive wireless market. The Antitrust Division participated in the rulemaking proceedings and supported the FCC's efforts to promote competition. In another example, the Federal Aviation Administration (FAA) recently removed slot constraints at Newark Liberty International Airport. The FAA's

action opens up Newark Airport to more robust competition by eliminating a barrier to entry and increasing capacity for existing carriers. The FAA's action achieves the outcome we sought when we sued in November 2015 to block United Airlines from increasing its dominant share of slots from 73 percent to 75 percent: protecting consumers from United's plan to enlarge its monopoly at Newark. On April 6, 2016, United Airlines abandoned its proposed acquisition of slots.

In 2013, the Department of Justice and U.S. Patent and Trademark Office (USPTO) issued guidance related to the relief available to patent holders in infringement actions that involve standard essential patents encumbered by a commitment to license on fair, reasonable, and non-discriminatory or reasonable and non-discriminatory (F/RAND) terms. The guidance recommended caution in the granting of certain injunctions by federal courts or exclusion orders by the International Trade Commission, while strongly supporting the protection of intellectual property rights and the ability of patent holders who make F/RAND commitments to receive appropriate compensation that reflects the value of the technology contributed to the standard. This was an important action to help ensure competition in numerous markets that depend on voluntary standard-setting and standard essential patents, as well as to maintain incentives for innovators to participate in standards-setting activities and for technological breakthroughs in standardized technologies to be fairly rewarded.

The President recently recognized the role federal agencies can play in promoting competition in issuing the Executive Order, "Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy," on April 15, 2016. The Executive Order states that competitive markets "must be a shared priority across the Federal Government," and calls on executive departments and agencies to contribute to increased competition through, among other things, pro-competitive rulemaking and regulations, and by eliminating regulations that create barriers to or limit competition. The Executive Order is available at www.whitehouse.gov/the-press-office/2016/04/15/executive-order-steps-increase-competition-and-better-inform-consumers.

Questions from Senator Hatch

- 1. I'd like to begin with a question about foreign antitrust enforcement. In some instances, antitrust enforcement in other countries is shaped by considerations apart from promoting competition. In fact, one could argue that some countries use antitrust enforcement as a tool to target foreign firms, force foreign competitors to transfer technology, and extract other concessions to benefit domestic businesses. What are you doing to coordinate with other U.S. agencies, particularly USTR and the Commerce Department, to confront protectionism by foreign antitrust authorities? Will you make this issue a priority?**

Answer: This is a priority for the Antitrust Division and needs to remain one. We are a strong proponent of the principle that antitrust enforcement decisions should be based solely on the competitive effects and consumer benefits of the transaction or conduct being reviewed. To that end, we work with our sister antitrust agency, the Federal Trade Commission (FTC), and other U.S. government economic agencies, to ensure that enforcement decisions are not used to promote domestic or industrial policy goals, protect state-owned or domestic companies from foreign competitors, or create leverage in international trade negotiations. We participate with both the United States Trade Representative (USTR) and the Commerce Department in a variety of interagency working groups aimed at this goal and over the past several years have taken a significant role in discussing China's competition policies through the U.S.-China Joint Commission on Commerce and Trade. Further, with the FTC and USTR we drafted and negotiated the Competition Chapter in the Trans-Pacific Partnership and are working with the trade agencies on competition issues in the on-going Transatlantic Trade and Investment Partnership negotiations. We also participate in the USTR-led Trade Policy Staff Committee and provide antitrust advice on issues arising in that forum as appropriate.

- 2. The Department and the Commission frequently use divestitures as a way to reduce the anticompetitive effects of a merger. There's been criticism in some quarters recently about the efficacy of divestitures, with some groups suggesting that divestitures aren't effective because they don't account for changing market conditions two or three years down the line. I'm not sure I agree with these criticisms, but I wanted to give you an opportunity to comment. Do you believe that divestitures are effective means for reducing the potential anticompetitive effects of a merger? Why or why not?**

Answer: The Antitrust Division thoroughly reviews every offer to settle, but we have learned to be skeptical of settlement offers consisting of behavioral remedies or asset divestitures that only partially remedy the likely harm. We will not settle unless we have a high degree of confidence that a remedy will fully protect consumers from anticompetitive harm both today and tomorrow. In doing so, we are guided by the Clayton Act and the Supreme Court, which instruct us to not only stop imminent anticompetitive effects, but also to be forward-looking and arrest potential restraints on competition "in their incipiency." Settlements need to preserve the status quo ante in markets where there is a risk of competitive harm. Where complex transactions pose antitrust risks in multiple markets, our confidence that settlements will preserve competition diminishes. For example, we recently filed suit to challenge Halliburton's acquisition of Baker Hughes after

rejecting divestiture proposals that fell far short of replicating the competition lost due to the deal. Consumers should not have to bear the risks that a complex settlement may not succeed. If a transaction simply cannot be fixed, then we will make clear our intention to challenge it, as we did in the proposed mergers between Electrolux and GE, Tokyo Electron and Applied Materials, and Chicken of the Sea and Bumble Bee.

In some circumstances, a well-structured settlement can improve competitive conditions. As I note in my testimony, our settlement in Anheuser-Busch InBev/Grupo Modelo required the companies to divest all of Modelo's assets, including brewing capacity that served the U.S. market, to an independent, fully integrated, and economically viable competitor, and now this outcome is paying off for the American consumer: Constellation, the new owner, has begun offering new products, bringing competition to segments of the market where Grupo Modelo had not previously competed, and also is increasing capacity, planning to nearly triple production at one brewery and build an additional brewery.

3. I have a question about the Charter-Time Warner merger. As I understand things, the merger doesn't really meet any of the standards that would normally warrant a move by the Department to challenge the merger. I've heard some critics express concerns, however, that a post-merger Charter could work in concert with Comcast—one of Charter's competitors—to exclude new entrants and undermine the ability of online video distributors to offer a viable alternative to cable services. What authority is there under existing law for the Department to challenge a merger, not on the basis that the merger itself will produce anticompetitive effects, but that the merged entity might somewhere down the line collude with a non-party to reduce competition? That is, if a merger doesn't trigger the standard thresholds for challenge, what authority is there to challenge the merger nonetheless, or to impose conditions, on the basis of what another actor in the market might do?

Answer: In general, in determining the legality of a merger or acquisition under the antitrust laws, the agencies apply the analysis contained in the Horizontal Merger Guidelines. Part 7 of the Guidelines specifically identifies the increased possibility of collusion following a merger as a competitive concern we will review. The guidelines instruct us to examine “whether a merger is likely to change the manner in which market participants interact, inducing substantially more coordinated interaction,” and seek evidence to determine whether market conditions may be more vulnerable to coordinated conduct.

The Department challenged Charter's acquisition of Time Warner Cable and entered into a settlement with the parties on April 25, 2016. Our complaint alleges that, as a result of the merger, the merged company (“New Charter”) would have greater incentive and ability to impose or broaden contractual restrictions on programmers that limit their ability to distribute their content through online video distributors. The settlement forbids New Charter from entering into or enforcing agreements that limit or create incentives to limit programmers from providing content to online video distributors. This provision will ensure that New Charter will not have the power to choke off online video providers, an important source of disruptive competition, and deny consumers the benefits of innovation and new services.