DEPARTMENT OF JUSTICE

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OVERVIEW OF 2010 ANTITRUST ENFORCEMENT

Remarks as Prepared for the
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Good afternoon. It is a pleasure to join you today as you consider the regulatory and legal implications of mergers and acquisitions.

I joined the Antitrust Division after many years in private practice as well as after serving on corporate Boards of Directors. Like you, I advised companies as they navigated the legal and regulatory processes and procedures potentially triggered by proposed business combinations. It is this background that helps inform my view that balanced legal and economic theories should inform antitrust analysis and enforcement. It also reinforces my belief that transparency and fairness in the Antitrust Division's merger review—as well as in all of the Division's antitrust enforcement activities—are essential. And, it is these values that underlie my approach to antitrust enforcement.[1]

I plan to focus my remarks today on three areas. First, I want to touch on the recently updated Horizontal Merger Guidelines, which as revised provide more accurate guidance about the antitrust agencies' enforcement analyses in merger reviews. Second, I plan to provide you with some recent examples of the Division's enforcement activities. I think you will see from these enforcement actions that the Division aims to efficiently and effectively identify and resolve our anticompetitive concerns and keep markets competitive, while at the same time the Division avoids creating unnecessary roadblocks, burdens, or delay for transactions that do not create anticompetitive markets. Finally, I will highlight a few of the Division's non-merger-related enforcement activities, both civil and criminal.

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[1] Christine Varney, *Procedural Fairness* (September 12, 2009), available at http://www.justice.gov/atr/public/speeches/249974 htm.

I. Merger Enforcement

The Antitrust Division investigates the competitive effects of a proposed transaction. The specific Clayton Act standard of review is whether the "effect of [an] acquisition may be substantially to lessen competition, or to tend to create a monopoly."[2] Our concern in a merger review is the competitive market structure, and our job is to prevent anticompetitive harms.[3]

The main guideposts for the Antitrust Division's merger analyses are found in the Horizontal Merger Guidelines. These Guidelines were first issued by the Department of Justice more than 40 years ago and then jointly released with the FTC in 1992. The Guidelines outline the principal analytical techniques, practices, and enforcement policies of both antitrust agencies under the federal antitrust laws with respect to horizontal mergers and acquisitions—i.e., mergers of actual or potential competitors.[4]

Underlying the Guidelines is the principle that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise.[5] A merger will be determined to enhance market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives. In determining how a merger will likely change a firm's behavior, the

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[2] 15 U.S.C. §18.

[3] Christine Varney, *The Ticketmaster/Live Nation Merger Review and Consent Decree in Perspective* (May 18, 2010), *available a t* http://www.justice.gov/atr/public/speeches/263320 htm.

[4] DOJ/FTC Horizontal Merger Guidelines (August 19, 2010), available at http://www.justice.gov/atr/public/guidelines/hmg-2010 html.

[5] *Id*.

agencies primarily focus on how the merger affects conduct that would be most profitable for the merging firm.[6]

The Guidelines were developed to promote greater clarity, transparency, and insight about the agencies' review by describing, in a publicly available document, the principal analytical techniques and the main types of evidence on which the agencies rely to predict whether a horizontal merger may substantially lessen competition.[7] Eighteen years had passed since the previous Guidelines were issued, and the public guidance was no longer an accurate reflection of agency practice.[8] The Guidelines contained gaps between the agency merger analysis they described and actual agency review; and this, in turn, led to business uncertainty with the potential to create unnecessary surprise—something we clearly want to avoid.[9] In recognition of the potential gaps, we embarked last year on a process to update the Guidelines—including through public workshops and a review of public comments. In August, together with the FTC, we released revised Guidelines that accurately describe the agencies' current approach to merger review.[10]

I encourage each of you to consult these Guidelines as you advise clients who are considering or undertaking mergers. They represent guidance to more than just the members of

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[6] *Id*.

[7] *Id*. *See also* Christine A. Varney, *Our Progress Towards International Convergence* (Sept. 24, 2009), *available at* http://www.justice.gov/atr/public/speeches/254577 htm

[8] Christine Varney, *International Cooperation: Preparing for the Future* (Sept. 21, 2010), *available at* http://www.justice.gov/atr/public/speeches/262606 htm.

[9] Christine Varney, *An Update on the Review of Horizontal Merger Guidelines* (Jan.26, 2010), *available at* http://www.justice.gov/atr/public/speeches/254577 htm.

[10] Press Release, *Department of Justice and Federal Trade Commission Issue Revised Horizontal Merger Guidelines* August 19, 2010, *available at* http://www.justice.gov/atr/public/press_releases/2010/index.html.

the antitrust bar who regularly appear before the Division—rather they serve to inform the entire legal and business community about how the antitrust agencies analyze mergers so that business executives and their lawyers considering potential transactions may make more accurate predictions about likely enforcement decisions and plan their business decisions accordingly.

II. Recent Merger Enforcement at the Antitrust Division

With these revised Guidelines as a backdrop, I want to turn to the Division's 2010 merger review and enforcement actions. In FY 2010 merging parties completed 1200 Hart-Scott-Rodino Act (HSR) filings.[11] This represents an increase from 2009 when 713 HSR filings were made in the entire year (and a year in which there was a 59% decrease in filings from fiscal year 2008).[12]

In the substantial majority (just over 98%) of the proposed transactions that were brought before the Division through HSR filings, the Division was able to quickly review the transactions' potential competitive effects and determine that no further action was warranted at that time—thereby, allowing the transaction to clear the Division's merger review process. This efficiency of review, where appropriate, allows business to proceed with lawful transactions without unnecessary delay.

In the remaining just under two percent, the Division identified potential antitrust concerns and, consequently, requested additional information to determine whether enforcement

[11] Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, amended the Clayton Act by adding a new Section 7A, 15 U.S.C. §18a. In general, the HSR Act requires that certain proposed acquisitions of voting securities or assets must be reported to the Commission and the Antitrust Division prior to consummation and then the parties must wait a specified period before they may complete the transaction. *Hart-Scott-Rodino Annual Report, Fiscal Year 2009.*

[12] *Id.*

action was appropriate. In those cases where that additional information and analysis led the Division to determine that enforcement was indeed required, the Division then sought to identify a tailored resolution that targeted our competitive concerns, and permitted parties to proceed with the remaining parts of their transaction that did not threaten competition.

This philosophy of targeted solutions to keep markets competitive is typified in our recent closure of the Division's investigation into the proposed merger of UAL Corporation, the parent of United, and Continental.[13] The proposed UAL/Continental merger would have combined the airlines' largely complementary networks and resulted in overlap on a limited number of routes where United and Continental offer competing nonstop service. The largest overlap routes were between United's hub airports and Continental's hub at Newark airport. The Newark overlap raised competition concerns because Continental has a high share of service at Newark where there is limited availability of slots—making entry by other airlines particularly difficult. After the Division raised these concerns, the parties agreed to transfer 36 Newark slots to Southwest, a low-cost carrier that currently has limited service into the New York metropolitan area and no presence at Newark. This resolution of the Division's competitive concerns was reached for the benefit of consumers but without creating obstacles to a transaction that was otherwise lawful under the antitrust laws.

The Division took a similarly tailored approach to its settlement of the Ticketmaster/Live Nation acquisition. The remedy in that settlement imposes structural and behavioral remedies—

[13] Press Release, *United Airlines and Continental Airlines Transfer Assets to Southwest Airlines in Response to Department of Justice's Antitrust Concerns* (August 27, 2010), *available at* http://www.justice.gov/atr/public/press_releases/2010/262002.htm.

that is, remedies that relate to the structure of the industry and the behavior of the merging parties. Those remedies require Ticketmaster, the world's largest ticketing company, to license its ticketing software to its competitor AEG and divest recently acquired ticketing assets, as well as comply with 10-year, anti-retaliation provisions that prohibit anticompetitive bundling. [14] Together, these provisions will preserve competition in primary ticketing and maintain incentives in the industry to innovate and discount.

The Division also is committed to going to court to block mergers that will substantially reduce competition. One such enforcement action that is currently ongoing involves the nation's largest dairy processor. In that case, the Division filed suit to undo the 2009 merger of Dean Foods and Foremost Dairy.[15] The Division alleges that the merger reduced competition for milk sold to schools, grocers, and retailers in Illinois, Michigan, and Wisconsin. Through its lawsuit the Division seeks to restore that competition so that the affected retailers will pay lower prices for their milk. The Division aims to achieve that goal not only by undoing the 2009 deal but also by obtaining an order that requires Dean to notify the Department before it undertakes any future acquisition involving a milk processing operation.[16]

Also in 2010, the Department announced a settlement that required Bemis Company, Inc. to divest certain assets used in the production and sale of flexible packaging for natural cheese and fresh meat in order to proceed with its acquisition of the Alcan Packaging Food Americas

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[14] Press release, Remarks as prepared for delivery by Assistant Attorney General Christine Varney at Ticketmaster/Live Nation Pen-and-Pad Briefing (January 25, 2010), *available at* http://www.justice.gov/atr/public/press_releases/2010/254581.htm.

[15] Press release, Justice Department files lawsuit against Dean Foods Company, *available at* http://www.justice.gov/atr/public/press_releases/2010/254435.htm.

[16] *Id.*

business from Rio Tinto plc, the UK-based parent company of Alcan Corporation.[17] The proposed transaction would have combined two of the leading U.S. manufacturers of flexible-packaging rollstock for chunk, sliced, and shredded natural cheese packaged for retail sale and flexible-packaging shrink bags for fresh meat.[18] This aspect of the combination represented only a small portion of the overall transaction, which was valued at $1.2 billion, but would have eliminated the significant competition between Bemis and Alcan that existed in the markets for flexible packaging for chunk, sliced, and shredded natural cheese packaged for retail sale and would have reduced competition substantially in the already highly concentrated market for shrink bags for fresh meat.[19] The settlement required the divestiture of the entire business that produced the relevant product, which includes all of the intangible and non-plant tangible assets associated with those products, as well as two of the four plants currently producing those products.[20] The divesture preserved the existing competition in the relevant market, which allows for lower prices, higher quality and more innovation, benefiting consumers.[21]

There have been other instances where the the Division's merger review has led parties to abandon an anticompetitive transaction. For example, Blue Cross-Blue Shield of Michigan had proposed to purchase Physicians Health Plan of Mid-Michigan, which would have given Blue Cross control of nearly 90% of the commercial health insurance market in the Lansing, Michigan

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[17] Press Release, *Justice Department Requires Divestitures in Order for Bemis Company Inc. to Proceed with Its Acquisition of The Alcan Packaging Food Americas Business - Divestitures Will Preserve Competition for Flexible Packaging for Natural Cheese and Fresh Meat* (Feb. 24, 2010), available at http://www.justice.gov/atr/public/press_releases/2010/index10 htm.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

area and resulted in higher prices, fewer choices, and a reduction in the quality of commercial health insurance plans purchased by Lansing area residents and their employers.[22] In addition, the acquisition would have given Blue Cross the ability to control physician reimbursement rates in a manner that could harm the quality of health care delivered to consumers. We informed the parties that we would file an antitrust suit to block the transaction, and the parties then abandoned the deal.

Of course, and as I suggested at the outset of this discussion, the Antitrust Division also has expeditiously closed matters upon determining that the proposed transaction did not threaten consumers. For instance, the Justice Department did not challenge either the combination of Oracle and Sun[23] or the collaboration between Microsoft and Yahoo!.[24] Unnecessary delay in merger review is simply unacceptable and the Division acts expeditiously to avoid such delay. [25]

II. Non-Merger Enforcement

I would now like to turn your attention to two other important aspects of the Division's work—non-merger-related civil and criminal enforcement, which are critical elements of our mission to preserve a competitive market.

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[22] Press release, *Blue Cross Blue Shield of Michigan and Physicians Health Plan of Mid-Michigan Abandon Merger Plans*, (March 8, 2010), *available at* http://www.justice.gov/atr/public/press_releases/2010/256259 htm.

[23] Press Release. "*Department of Justice Antitrust Division Issues Statement on the European Commission's Decision Regarding the Proposed Transaction Between Oracle and Sun"*, (November 9, 2009), available at http://www.justice.gov/atr/public/press_releases/2009/index html.

[24] Press release, *Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of the Internet Search and Paid Search Advertising Agreement Between Microsoft Corporation and Yahoo! Inc.*, (Feb. 18, 2010), *available at* http://www.justice.gov/atr/public/press_releases/2010/255377.htm.

[25] Christine Varney, Statement before the Subcommittee on the Courts and Competition Policy, Committee on the Judiciary, U.S. House of Representatives (July, 27, 2010), *available at* http://www.justice.gov/atr/public/testimony/260809 htm

A. Civil Non-Merger Enforcement

One such matter involves the electricity market in New York City. In that case, we have proposed a settlement, currently under court review, with KeySpan Corporation, for violating the antitrust laws through an agreement that restrained competition. As alleged in the complaint, KeySpan, which had been the largest seller of electricity capacity in the New York City market, and a financial services company entered into an agreement in January 2006 that gave KeySpan a financial interest in the electricity capacity sales of its largest competitor, Astoria.[26] By providing KeySpan revenues from its competitor's capacity sales, as well as its own, the agreement with the financial services company had the anticompetitive effect of eliminating KeySpan's incentive to sell its electricity capacity at lower prices. This financial derivative agreement likely resulted in a price increase for retail electricity suppliers and, in turn, an increase in electricity prices for consumers. The settlement before the court requires KeySpan to pay $12 million to the United States.

In another proceeding and settlement before the courts, we allege that a group of Idaho orthopedic surgeons conspired to gain more favorable fees and other contractual terms by agreeing to coordinate their actions, including by organizing a boycott of Idaho's workers compensation system (essentially refusing to treat injured workers) and threatening to withdraw from healthcare plans offered by Blue Cross of Idaho.[27] This in turn caused the state of Idaho and other healthcare consumers to pay higher fees for orthopedic services. Our proposed consent decree would enjoin that conduct.

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[26] Complaint at 4, 26, United States v. KeySpan, Corp., (S.D.N.Y. 2010) (No. 10-cv-1415) (filed Feb. 22, 2010), *available at* http://www.justice.gov/atr/cases/f255500/255507.htm.

[27] Press Release, *Idaho Orthopedists Charged with Engaging in Group Boycotts and Denying Medical Care to Injured Workers* (May 28, 2010), available at http://www.justice.gov/atr/public/press_releases/2010/259181 htm.

In September, the Department announced a settlement of charges brought against six high-tech companies for entering into agreements that restrained competition between the companies for highly skilled employees.[28] In the high-tech sector, where there is a strong demand for employees with advanced or specialized skills, high-tech companies recruit employees by "cold calling" them at other companies. The six companies charged in the complaint engaged in a practice of agreeing not to cold call any employee at the other company and, consequently, prevented the companies from directly soliciting each other's employees. This diminished competition overall and access to better job opportunities for the affected employees. The proposed settlement prohibits the companies from entering, maintaining or enforcing any agreement that in any way prevents any person from soliciting, cold calling, recruiting, or otherwise competing for employees and also requires the companies to implement compliance measures.

B. Criminal Enforcement

Finally, I would like to touch upon our criminal program, which remains an important aspect of our enforcement work and one through which we continue to uncover and prosecute cartels that inflict significant competitive harm. In Fiscal Year 2010, the Department filed 60 criminal cases and imposed more than $550 million in criminal fines for illegal conduct. In these cases, 21 corporations and 63 individuals were charged. In addition, 29 individuals received jail

[28] Press Release, *Justice Department Requires Six High Tech Companies to Stop Entering Into Anticompetitive Employee Solicitation Agreements* (Sept. 24, 2010), available at http://www.justice.gov/atr/public/press_releases/2010/index10 htm.

sentences that totaled more than 26,000 jail days, an overall increase in jail sentences for individuals—76% of sentenced defendants received jail sentences in 2010 as compared to only 37% in the 1990s. The criminal cases from which these statistics derive were brought against firms and individuals in a variety of industries, including air transportation services, liquid crystal display panels, financial services, Internet services for disadvantaged schools and libraries, packaged ice, environmental services, and post-Hurricane Katrina remedial work.

For example, the Justice Department's ongoing investigation into price fixing in the air transportation industry has resulted in the imposition of more than $1.6 billion in criminal fines, in charges brought against a total of 18 airlines and eight executives, and in prison sentences imposed on four executives.

We also have an ongoing investigation into the municipal bonds industry in which we have already obtained seven guilty pleas. This investigation is being conducted by the Antitrust Division's New York Field Office, the FBI and IRS Criminal Investigation. The Division also is coordinating its investigation with the Securities and Exchange Commission, the Office of the Comptroller of the Currency, and the Federal Reserve Bank of New York.

The Division also has an ongoing investigation into price fixing in the LCD industry TFT-LCD panels are used in computer monitors and notebooks, televisions, mobile phones and other electronic devices. Companies directly affected by the LCD price-fixing conspiracy are some of the largest computer and television manufacturers in the world, including Apple, Dell and Hewlett Packard. As a result of the Division's ongoing enforcement investigation, more than $890 million in criminal fines have been obtained to date and 19 executives and seven companies have been charged.

Criminal enforcement at the Division relies heavily on its Leniency Program, which is the Division's most important investigative tool for detecting cartel activity. Through this Leniency Program, a corporation can avoid criminal conviction and fines, and individuals can avoid criminal conviction, prison terms, and fines, by being the first to confess participation in a criminal antitrust violation, fully cooperating with the Division, and meeting other specified conditions.[29] In order to take advantage of the Leniency Program, we encourage businesses to establish and maintain effective compliance programs through which employers rigorously instruct their employees about the requirements of the antitrust laws and set up internal controls to protect against cartel activity. Similar to our other enforcement policies, the Division provides numerous policy statements to assist companies set up such programs and to take advantage of the Leniency Program.[30]

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I want to close today with the theme I touched upon when I opened my remarks—the Antitrust Division is committed to transparency and fairness in its merger review through a clear articulation and application of its analytical framework as presented in the 2010 Horizontal Merger Guidelines. This approach should enable predictability, certainty, and efficient business behavior that enhances competition in the market.[31] I know, first-hand, how important this certainty and predictability can be. I also know competition is enhanced when antitrust enforcement is rigorous and consistent.

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[29] Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters (November 19, 2008), *available at* http://www.justice.gov/atr/public/criminal/239583 htm.

[30] *See* Leniency Program Public Documents, *available at*: http://www.justice.gov/atr/public/criminal/leniency.htm.

[31] Christine Varney, *Antitrust Immunities* (March 18, 2010), *available at* http://www.justice.gov/atr/public/speeches/263320 htm.

The Division provides guidance through many publicly available guidelines in both the civil and criminal arena. These include the Horizontal Merger Guidelines I described today as well as other reports, policy statements, and letters to the business community that together describe an antitrust regime that is responsive to market realities.[32] Through these materials and our enforcement activities, we seek at the Division to provide clear guidance as to the legal and economic analytical framework under which we operate and in that way toavoid unpredictable antitrust enforcement.

Thank you.

[32] *Id.*