DEPARTMENT OF JUSTICE

STATEMENT of

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Antitrust, Business Rights and Competition Subcommittee

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Good morning, Mr. Chairman and members of the Subcommittee. It is a pleasure for me to appear before you today on behalf of the Antitrust Division of the Department of Justice.

I would like to talk to you today about the current state of antitrust, including some areas of important focus for antitrust enforcers, some recent enforcement initiatives, Antitrust Division budget and staffing, and a proposal that may assist overall antitrust enforcement.

IMPORTANCE OF ANTITRUST

Sound antitrust enforcement is vital to America's economic health. American consumers and businesses benefit from the kind of free-market economy that antitrust enforcement engenders. Protecting against anticompetitive actions helps consumers obtain more innovative, high-quality goods and services at lower prices, and enhances the worldwide competitiveness of American businesses by promoting healthy rivalry, encouraging efficiency, and ensuring a full measure of opportunity for all competitors.

As markets increasingly become global in nature, vigorous antitrust enforcement will help ensure that American businesses have the necessary incentives and ability to compete successfully on a global scale.

Antitrust enforcement has rightly enjoyed substantial bipartisan support through the years. And it is extremely important to antitrust enforcement that this strong, cooperative bipartisan support continue in the years ahead.

We are at an exciting and important time in the antitrust field, and antitrust enforcement is more crucial than ever in benefiting consumers and businesses and protecting them from illegal anticompetitive actions. Antitrust enforcement also is more challenging than ever. Increased globalization, a growing economy undergoing rapid technological change, and deregulation are all combining to lead firms to be increasingly involved in mergers as well as other strategic business arrangements, many of them somewhat novel. While most mergers and other business alliances foster efficiency and thus bring increased benefits to consumers and businesses, some result in market power and decrease competition. That is why we look at these arrangements carefully, to protect American consumers from those that threaten competition.

CURRENT CHALLENGES FOR ANTITRUST

Antitrust enforcement probably has never before been as time-consuming, as complex, or as central to the functioning of our economy as it is today. Five factors especially account for these conditions:

- increasing globalization of markets
- increasing emphasis on antitrust enforcement in other countries

- increasing technological advances that can transform major industries in relatively short time frames
- increasing deregulation and the advent of competition in deregulated markets; and
- increasing number of mergers

Let me briefly touch on each of these.

- **Globalization of Markets**

The increasing globalization of markets presents many challenges for an antitrust enforcer. First, in analyzing markets it is especially important to define accurately the market in which competition is occurring. A merger or other activity that may appear to violate the antitrust laws if the market is presumed to be national in scope may be permissible if the market actually is international in scope. This is because the broader geographic scope of the market is likely to result in additional competitors being included within the market, which is one of the main indicators for whether a merger can go forward without harming competition and consumers.

A second challenge resulting from globalization is the need to ensure that our jurisdiction is sufficient to protect U.S. consumers against anticompetitive actions by foreign companies. Last March, we received a critically important ruling from the First Circuit in United States v. Nippon Paper Industries Co. Ltd.,

reaffirming that Congress gave us jurisdiction to prosecute anticompetitive activities that take place off U.S. soil but have significant effects here; last month, the Supreme Court denied certiorari in the case. This ruling firms up our ability to combat effectively the anticompetitive activity that increasingly takes place in the international marketplace to the detriment of U.S. consumers and businesses.

Third, at a very basic level, the increasing globalization of markets leads to increased complexity in investigations, making it more difficult, time-consuming, and costly to pursue an investigation to its ultimate conclusion. Often, we must seek assistance from competition authorities in other countries in order to obtain crucial evidence.

- **Global Antitrust Enforcement**

The increasing importance of antitrust in other countries and the increasing enforcement presence of foreign competition authorities likewise creates some difficult challenges, but also many opportunities, for an antitrust enforcer. A good example of the kind of challenge that I have in mind was the Boeing/McDonnell-Douglas merger -- where U.S. and European Union authorities reached sharply differing conclusions regarding the merger. While that kind of sharp divergence is unique in our experience, we need to establish and cultivate good relations with foreign enforcers and understand each other's enforcement policies and

practices, so that this kind of conflict is minimized, if not eliminated altogether. Given the understandable concerns about national sovereignty, navigating these waters will not be easy.

At the same time, the increase in antitrust enforcement by other nations also presents opportunities for American enforcers. Because of jurisdictional limitations imposed by national sovereignty, effective enforcement in the global economy may require action by more than one country's antitrust authority. In addition, referrals of matters among antitrust enforcement agencies around the globe can help conserve enforcement resources.

A crucial step in these matters is negotiating and implementing "positive comity" agreements with other antitrust authorities. Under such agreements, the antitrust agency of one country makes a preliminary determination that there are reasonable grounds for an antitrust investigation, typically in a case in which a corporation appears to have been denied access to the markets of another country. It then refers the matter, along with the preliminary analysis, to the competition authority whose home markets are most directly affected by the matter under investigation. After consultation, the referring country can accept the conclusions, seek to modify them, or pursue its own action.

Such an approach has many helpful aspects. First, competition authorities have a great stake in taking such complaints seriously. Second, such a process maximizes the likelihood that the kind of evidence necessary to properly decide

such cases can be obtained. Finally, this process can defuse trade tensions by providing a sensible, systematic approach to fact-gathering, reporting, and bilateral consultation among competition authorities.

We currently have positive comity agreements in place with the European Union and Canada. We are very close to concluding an enhanced agreement with the EU, outlining a formal protocol for such cases, and we are working diligently to reach agreements with other competition authorities as well.

Let me give you an example of a positive comity agreement in action. Last year we made our first formal request under our positive comity agreement with the European Union. We requested an investigation into possible anticompetitive conduct by several European airlines that may be preventing U.S.-based computer reservation systems from competing effectively in certain European countries. This matter is being actively pursued by EU competition authorities.

- **Technological Evolution**

Similarly, as sophisticated technological advances permeate more and more industries, the job of an antitrust enforcer becomes increasingly complex. It is important to understand both the technology at issue, and its likely effects, in order to reach the proper competitive conclusions. But this is not always easy and sometimes requires us to devote significant time to develop the specific

technological expertise. Technology can also bring industries previously considered separate and distinct into the same competitive marketplace, as we are increasingly likely to see in the field of communications, where, for example, telephone and cable -- or, who knows, maybe wireless -- appear headed for direct competition with each other at some point.

These dynamic economic considerations have important ramifications for how we analyze mergers as well as other conduct. The existence of rapidly changing technology is, of course, always a challenge in a court case where future effects are at issue. The defendants to an enforcement action will often argue that emerging technology will change their industry in such a fashion as to prevent any possible anticompetitive effect. We need to critically evaluate such contentions in our investigations, and rebut them in court when they are incorrect.

- **Deregulation and the Introduction of Competition**

Deregulation and the advent of competition in important industries also presents major challenges to antitrust enforcers. For example, the Telecommunications Act of 1996, which has the goal of bringing increased competition to the communications industry. The Act will ultimately completely restructure the telecommunications marketplace, and as we are seeing, bringing competition to segments of an industry in which regulated monopolies have long

held sway will not be fully accomplished overnight. We appreciate the instrumental part played by members of the Judiciary Committee in ensuring that the Antitrust Division would remain centrally involved in protecting and promoting competition in this industry, and we intend to see that the responsibilities set out for the Division in the 1996 Act are carried out as they were intended.

We have an important role in advising the Federal Communications Commission on section 271 long-distance entry applications. The FCC has decided four such applications thus far, SBC/Oklahoma, Ameritech/Michigan, BellSouth/South Carolina, and BellSouth/Louisiana. We have advised the FCC on each of these applications, setting forth in great detail our competitive analysis. I believe that our evaluations in these matters have greatly assisted the FCC and the applicants. Our analysis has helped establish a framework for bringing increased competition to consumers, and we will continue to work with consumers, industry, and regulators to make the process work.

Of course, the antitrust laws continue to apply fully to the communications industry, and we intend to ensure that all companies in the industry adhere to them. The 1996 Act has resulted in a substantial increase in the number of radio mergers, for example, and we have brought several actions seeking to prevent anticompetitive results in that area.

Another industry where the role of competition is increasing is the electric power industry. Actions to introduce retail market competition have already been

taken in a number of states, and Congress is currently considering federal legislation to assist in restructuring this industry. It is important to ensure that any such restructuring be consistent with fundamental competitive principles. There may be lessons from our experience with telecommunications deregulation that we can apply in the electricity context, although there are also important differences between the two industries. As Congress moves forward in this area, I would welcome the opportunity to work with your Subcommittee. As you know, the Administration has been engaged for many months in an interagency process to develop a comprehensive electric power industry restructuring proposal that addresses all key issues, including market power concerns as well as environmental concerns. In any event, I believe that after restructuring we probably will see more mergers in this industry, just as we have in telecommunications, and we will need to ensure that any such mergers do not violate the antitrust laws.

- **Merger Wave**

The last factor I mentioned in my list is the continuing merger wave. In Fiscal Year 1996, a total of 3,094 transactions were filed with us under the Hart-Scott-Rodino Act, the most in our history. Fiscal Year 1997 set yet another record, with 3,702 HSR filings. And the rate has continued to escalate. This fiscal year, as of the end of last month, the latest figures available, 1548

transactions have been filed, a rate more than a third higher than the rate last fiscal year**.** In contrast to the merger wave of the 1980s, which was primarily motivated by financial considerations, today's mergers are primarily motivated by business strategy. This means that more than ever before, the mergers raise competitive questions that need to be reviewed carefully to ensure that the mergers will not harm competition and consumers.

This merger wave presents significant challenges to an antitrust enforcer, including how to keep up with the influx of mergers, how to effectively review them in a timely fashion without imposing substantial unnecessary costs on businesses or sacrificing consumer interests, and how to resolve cases when anticompetitive concerns exist after the investigation. I believe we have taken a number of important steps in these regards -- such as speeding review of matters that do not raise serious anticompetitive concerns, focusing our investigation of any matter raising anticompetitive concerns at its earliest stages, and working closely with parties regarding our concerns, so that they can take steps to alleviate them. And we need to be ever watchful, of course, that we are doing the best we can with the resources we have.

As you can see from this lengthy list, it is indeed an exciting and important time for antitrust and for antitrust enforcers. The challenges are many, and the workload is correspondingly heavy. I would now like to spend a short time

detailing some of our workload for the past year, and some of what can be expected in the future.

RECENT ENFORCEMENT INITIATIVES

I have been serving as head of the Antitrust Division for almost a year and a half, much of that time as Acting AAG. During that time, the Division has taken many important enforcement initiatives. I would like to highlight just a few of them for you -- first in criminal enforcement, then in merger enforcement, then in civil non-merger enforcement, and finally in international enforcement.

Criminal Enforcement

In the area of criminal enforcement, we have moved more strongly than ever against hard-core antitrust violations such as price-fixing and market allocation. As a result, in the previous fiscal year alone, criminal fines totaling $205 million dollars were secured in cases brought by the Antitrust Division. This total is five times higher than during any previous year in the Division's history. Moreover, in the first five months of the current fiscal year, we have already secured nearly $110 million in criminal fines, and we expect to secure another $20 million before the end of this month.

Our criminal enforcement work is increasingly international in focus. Over the past 18 months, the Division has had remarkable success in cracking

international cartels, securing the conviction of the major conspirators, and obtaining record-breaking fines [see Attachment A].

International cartels typically pose an even greater threat to American businesses and consumers than domestic conspiracies, because they tend to be highly sophisticated and extremely broad in their impact -- both in terms of geographic scope and in the amount of commerce affected by the conspiracy. The massive international cartels uncovered in citric acid, lysine, and sodium gluconate ("the food and feed additives investigations") are prime examples. The criminal purpose behind the conspiracies investigated and prosecuted by the Division has been to carve up the world market by allocating sales volumes among the conspirators and agreeing on what prices would be charged to customers around the world, including in the United States.

International cartels victimize a broad spectrum of U.S. commerce, costing American businesses and consumers hundreds of millions of dollars a year. For example, citric acid, which is used in products ranging from soft drinks and processed food to detergents, pharmaceuticals, and cosmetics, is found in virtually every home in the United States. Sales in the United States during the course of the citric acid conspiracy were over $1 billion. In the lysine conspiracy, prices went up approximately 70 percent in less than three months during the first year of the conspiracy; in another conspiracy currently under investigation, prices increased over 60 percent during the course of the conspiracy. In another

conspiracy we uncovered, oil and gas companies were forced to pay higher prices to conspirators in the marine construction cartel. And in another, the United States Navy was found to have paid inflated prices to conspirators in the marine transportation cartel. In each of these cases, American consumers -- and, in cases where the U.S. government is the victim, American taxpayers -- foot the bill.

The international cartels uncovered by the Division have been governed by precise and elaborate agreements among the conspirators to ensure that each understood its role in eliminating competition and increasing prices in the varied markets of the world where the goods and services were sold. The cartel agreements, which were formed by high-level executives and carried out through conspiratorial meetings around the globe [See Attachment B], included the following features: agreed-upon prices; agreed-upon volumes of sales worldwide; agreed-upon prices and volumes (market share allocation) on a country-by-country basis; exchanges among the conspirators of all types of otherwise competitively sensitive information, such as monthly sales figures by geographic area, prices charged (or bid) to customers in particular geographic areas, and prices to be charged (or bid) to specific customers; and sophisticated mechanisms to monitor and police the agreements.

Let me give you two specific examples of ways in which these cartels eliminated any incentive on the part of the conspirators to "cheat" on the

agreement by actually engaging in competition. In the citric acid cartel, the conspirators devised a compensation system whereby the cartel members reviewed the sales of each conspirator at the end of each year, and any company that had sold more than its precisely allotted share in one year was required in the following year to make amends to the cartel by purchasing the amount it was in excess from another conspirator that had not reached its volume allocation target in that proceeding year. In the marine transportation cartel, the conspirators, in addition to agreeing on which customers each would service, also agreed to pool their revenues from all jobs and then divide them up according to a complex formula.

International enforcement of U.S. antitrust laws is essential to protect U.S. consumers from the unbridled greed of these cartels. Enforcement of our criminal antitrust laws against international cartels that prey on American businesses and consumers is a top priority of the Antitrust Division. International cartels cannot and will not be permitted to act with impunity at the expense of the American people.

To date, investigations in the food and feed additives industry have resulted in criminal charges against 10 companies and 15 individuals, convictions against defendants from 7 countries on 3 continents, and nearly $210 million in fines agreed to or imposed in the past 18 months -- including a $100 million fine imposed on Archer Daniels Midland Company and a $50 million

fine imposed on Haarmann & Reimer Corporation, the U.S. subsidiary of the German-based pharmaceutical giant Bayer AG. Investigations in the marine construction and transportation industries have resulted in the conviction of three companies, from the Netherlands, Belgium, and the United States, as well as three foreign executives from those firms. The firms agreed to plead guilty and to pay a total of $65 million in criminal fines -- the second largest criminal antitrust sanction in antitrust history, Archer Daniels Midland being the largest.

Just this week, we charged a U.S. subsidiary of a Japanese firm with participating in an international cartel to fix the price and allocate market shares worldwide for graphite electrodes used in electric arc furnaces to melt scrap steel. The company has agreed to plead guilty, cooperate in the Division's ongoing investigation, and pay a fine of $29 million. Total sales of graphite electrodes in the United States during the term of the conspiracy were well over a billion dollars. Additional charges, with the potential for precedent-setting fines, are expected.

The Division's case statistics demonstrate our current emphasis on international enforcement. Of the roughly $313 million in fines secured since the beginning of FY 1997, over 90 percent was in connection with prosecution of international cartel activity. When you compare the number of cases involving foreign defendants since the beginning of FY 1997 with figures from FY 1991, just seven years ago, the comparisons are staggering. For example, in FY 1991,

only 1% of the corporate defendants in the cases brought by the Division were foreign, and there were no charges brought against a foreign individual defendant during that fiscal year. And in the four previous years, from FY 1987-1990, the Division did not bring a single case against a foreign corporation or a foreign individual. In stark contrast, in FY 1997, 32 percent of the corporate defendants in our cases were foreign-based and 32 percent of the individual defendants were foreigners; in the current fiscal year thus far, 46 percent of corporate defendants and 30 percent of individual defendants have been foreign.

To date, all but one of the defendants that have agreed to pay fines above $10 million were foreign-based companies or their subsidiaries engaging in international cartels.

Notwithstanding our recent success, I am convinced that these prosecutions represent just the tip of the iceberg. At present, more than 25 U.S. antitrust grand juries -- nearly one-third of the Division's criminal investigations -- are looking into suspected international cartel activity. The subjects and targets of these investigations are located on five continents and in over 20 different countries. In more than half of the investigations, the volume of commerce affected over the course of the suspected conspiracy is well above $100 million; in some of them, the volume of commerce affected is over $1 billion per year.

The Division believes that the only effective deterrent against international cartels -- the largest and most harmful antitrust conspiracies -- is to impose large

fines on offenders who are caught and prosecuted. Large fines are crucial to ensuring that companies cannot dismiss our antitrust laws as something they can flout with little repercussion when and if their violations are discovered, essentially writing off the antitrust penalties as an incidental cost of doing business. I will have more to say about that objective in a minute.

The investigation and prosecution of international cartels creates a number of imposing challenges for the Division. In many cases, key documents and witnesses are located abroad -- out of the reach of U.S. subpoena power and search and seizure authority. In such cases, national boundaries may present the biggest hurdle to a successful prosecution of the cartel. For that reason, we are aggressively pursuing cooperation agreements with foreign competition authorities to step up cooperation aimed at hardcore cartels.

In addition, we have been working over the past year in the Organization for Economic Cooperation and Development (OECD) to emphasize the importance of enforcing national competition laws against hard-core cartels, and to encourage OECD members toward more systematic and effective anti-cartel enforcement cooperation. We introduced a proposal along these lines last fall, and last Friday, I met with my counterparts on the OECD Committee on Competition Law and Policy, and we forwarded to the OECD Council for its Ministerial meeting in May our recommendation that member countries have competition laws that effectively prohibit and deter hard-core cartels, with

effective sanctions and enforcement institutions and procedures, and that OECD countries cooperate in combating such cartels. More specifically, the proposed recommendation would encourage member countries to enter into mutual assistance agreements that would permit the sharing of evidence with foreign antitrust authorities, to the extent permitted by national laws, and would encourage members to take another look at provisions in their laws that stand in the way of these cooperative efforts. I am optimistic that there is widespread support among OECD members for this important initiative.

Merger Enforcement

In the area of merger enforcement, we have been as active as ever. As I said earlier, in the recently ended fiscal year we received a record number of merger filings. A record $959 billion in U.S. merger transactions took place in 1997, a 45-percent increase over the previous year, which was itself a record breaker at the time. International mergers increased significantly as well. In the midst of all this merger activity, we brought 31 merger challenges in the recently ended fiscal year, which tied the record for the most in any year in our history. So far this fiscal year, we have brought 11 more.

But, at the same time, our enforcement record shows that we carefully review these mergers so as not to hinder procompetitive, efficiency-enhancing transactions from going forward. The majority of mergers do not threaten to

harm competition and consumers; often, they can increase efficiency, improve research and development, and lower prices to consumers. Because of these benefits, even when we do have reason to believe a merger as proposed may be anticompetitive, we look for a way to prevent the anticompetitive aspects of that merger from going forward, while not prohibiting parts of the deal that do not raise anticompetitive concerns.

A prime example of this approach is our action with respect to two acquisitions last year by Raytheon -- the defense electronics division of Texas Instruments, and General Motors' Hughes Aircraft subsidiary. In the Texas Instruments matter, we reached a settlement that allowed the acquisition to go forward, but required Raytheon to sell the Texas Instruments business that produces a key component for radar systems. I believe that the merger as originally proposed would have resulted in significantly higher prices paid by the Department of Defense -- and ultimately by taxpayers -- for advanced military radars used in major weapons systems. We examined a number of even narrower possible alternative remedies, such as allowing Raytheon to acquire the radar systems component business unit from TI, but requiring Raytheon to then license the technology to other competitors; but we ultimately concluded that the narrower alternatives would be band-aid solutions that would be insufficient to cure what we saw as a very serious competitive problem. So we

opted instead to require major surgery, the largest post-war divestiture ever in the defense industry.

We also concluded that the other Raytheon acquisition, of Hughes Aircraft, would harm competition if it went forward as proposed. We insisted on a broad range of remedies, including divestiture of two defense electronics businesses to preserve competition in sophisticated technology for U.S. weapons systems. For another weapons system that both Hughes and Raytheon were competing for development and production of at the time of the merger, a new anti-tank missile for the Army, we required Raytheon to establish procedures to prevent the two competing teams of employees from sharing information with each other, thereby preserving the independence of these teams in the competition. And as an additional remedy, Raytheon agreed to set firm prices with the Air Force on certain air-to-air missiles for which Raytheon and Hughes had given competing bids before the merger.

Is important to note that the range of partial remedies that we were able to fashion in the Raytheon/TI and Raytheon/Hughes cases will not necessarily work in all cases. We must and will be prepared to go to court to challenge an anticompetitive merger in its entirety, if necessary.

Civil Non-merger Enforcement

In the area of civil non-merger enforcement, we have worked hard to establish important principles that have wide applicability and to ensure that industries important to our economy are not being harmed by anticompetitive means. Last summer, in Rochester Gas & Electric, we brought an enforcement action against an electric utility for inducing a potential competitor to enter into a contract designed to prevent the competitor from providing low-cost electricity to consumers. We have brought a number of actions against health care plans for putting anticompetitive "most-favored-nation" clauses into contracts, which impede efforts of competing health care plans to obtain the most affordable health care for their members. We have also brought an action against a major medical supply corporation for intellectual property licensing practices that deter effective competition.

Last fall, as you know, we brought a contempt action against Microsoft charging it with violating the terms of our August 1995 settlement. In the 1995 settlement, Microsoft had agreed to refrain from certain practices that we believed restrained competition in violation of the Sherman Act. One of those practices was conditioning the sale of Microsoft's operating systems software on the purchase of other Microsoft products.

In our latest enforcement action, we have charged Microsoft with violating the 1995 settlement by requiring personal computer manufacturers to license

Microsoft's Internet browser, called the Internet Explorer, as a condition of licensing Microsoft's Windows 95. Unfettered competition in Internet browser technology has the potential to create a competitive personal computer market environment in which business and consumer applications could work regardless of which operating system is installed on the computer. It is therefore important that Microsoft not be permitted to use its current operating systems monopoly to stifle competition in Internet browsers.

The district court has granted a preliminary injunction forbidding Microsoft from bundling the Explorer with its Windows 95 operating system, and has referred the question to a special master for further analysis. In the meantime, there was a dispute over Microsoft's initial approach to complying with the court's injunction. Microsoft announced that it would offer only two alternatives to Windows 95 bundled with the Explorer -- a dated, significantly inferior version of Windows, or an inoperable version of Windows 95. We went back to court, and Microsoft has agreed to comply with the preliminary injunction by offering a fully functional version of Windows 95 with only the Explorer removed.

These recent enforcement actions demonstrate that we will not tolerate private agreements designed to thwart the introduction of competition in important industries. We also have important on-going enforcement priorities in banking/commerce, communications, airlines, musical licensing, and health care,

to name just a few of the other important industries that we are currently looking into.

International Competition Policy Advisory Committee

As I indicated a minute ago, our enforcement work is increasingly international, whether it be criminal matters, merger matters, or civil non-merger matters. In view of the far-reaching effects of economic globalization on the American economy, American businesses, and American consumers, the Department of Justice has recently established the International Competition Policy Advisory Committee. Its mission will be to provide the Antitrust Division with outside expert advice to help us in our continuing efforts to internationalize basic antitrust principles and make them the foundation for commercial relationships among nations.

We have appointed a variety of distinguished experts to the advisory committee, including its co-chairs, former Assistant Attorney General for Antitrust Jim Rill and former International Trade Commission Chairwoman Paula Stern. I have asked them to concentrate on three key issues. First, how can we build an international consensus that horizontal cartel agreements must be condemned and challenged by competition enforcement authorities around the world? Second, at a time when increasing numbers of mergers involve international transactions that directly affect competition in more than one country, how can

the various competition enforcement authorities best coordinate their merger review efforts to achieve results that are fair, both for the parties to these mergers and for the countries affected by them? And third, how can we ensure that as our international trade agreements remove governmental impediments to free trade, those impediments are not replaced by anticompetitive schemes on the part of private firms to impede market access? I strongly believe that getting the right answers to these questions is essential to the maintenance of free and fair international commerce, which greatly benefits the U.S. economy.

While the advisory committee is just getting underway -- they are holding their first meeting today; I spoke with them this morning -- its ultimate recommendations will be of great assistance to the Department of Justice as we continue our efforts to expand the understanding and importance of competition policy as it relates to the burgeoning commercial relationships between the United States and its international trading partners.

ANTITRUST DIVISION BUDGET AND STAFFING

As you can see, our workload is expanding, its complexity is increasing, and its importance to American businesses and consumers has never been greater. To continue to effectively carry out our mission, we need increased resources.

For the current Fiscal Year, the Antitrust Division's budget is $93,495,000, providing for a total appropriated staffing level of 831 positions. We sincerely appreciate the support of this Subcommittee in providing the Division these resource levels. Sufficient staffing is vitally necessary to our mission. I would note, however, that this level is still significantly lower than the staffing levels of the Antitrust Division in 1980 (when we had 982 employees), a time when the economy was significantly smaller and less complex -- there were far fewer mergers then, and the international dimensions of enforcement were almost non-existent.

In light of our tremendous ongoing workload and its projected expansion, the President's FY 1999 budget for the Antitrust Division is $98,275,000, which includes increases to handle cost-of-living expenses as well as to hire a modest number of additional attorneys, paralegals, and other critical support. This modest increase is especially needed in light of the enormous tasks facing the Antitrust Division in the near future.

We are in the midst of a continuing wave of strategic mergers, and are contending with increasing globalization in markets. We are being forced to deal with increased complexity in antitrust analysis, given lightening-paced leaps in technology, and we are grappling with the increased role of the Antitrust Division in preserving and protecting competition in important industries now becoming subject to competition to an extent they have never seen before. It is clear that

increased resources are necessary to successfully meet these challenges. I want to assure you that we are frugal with our spending, and we are working hard to implement the Government Performance and Results Act, which should have positive effects in further emphasizing efficiency.

Our mission is absolutely critical and I do not think that any fair assessment of what we are doing and its importance to the economy can lead to any other conclusion. I believe that increased resources are necessary.

ANTITRUST PROPOSAL

I mentioned a minute ago the importance of hefty criminal fines to ensure that antitrust penalties are not written off as a mere minor cost of doing business. The methodology adopted by the U.S. Sentencing Commission appropriately calculates fines for antitrust offenses based on a percentage of the volume of commerce affected by the conspiracy. In an increasing number of our corporate prosecutions involving very large volumes of commerce, however, the objective of the Sentencing Commission methodology -- making the punishment fit the crime -- is thwarted by the $10 million statutory maximum fine established in the Sherman Act. In such cases, the only alternative to a fine statutorily capped at $10 million is for the offending corporation to be sentenced under the "twice-the-gain or twice-the-loss" alternative sentencing provision, 18 U.S.C. § 3571(d). The Division has resorted to this provision on eight occasions to secure

fines greater than $10 million in negotiated plea agreements. Unfortunately, proving actual gain to the conspirators or loss to the victims from an antitrust offense is extremely difficult. On six occasions, we have had to settle for the $10 million statutory maximum when the Sentencing Commission rationale may have justified a greater fine.

Increasingly, the danger is that for the largest, most harmful antitrust conspiracies -- typically conspiracies involving international cartels and foreign corporations -- the standard methodology adopted by the Sentencing Commission for calculating antitrust fines is mooted in favor of a truncated fine calculation that tends, in effect, to be more and more lenient towards bigger and bigger offenders. The current statutory scheme provides less deterrent effect for firms harming the largest volume of commerce and causing the greatest injury to U.S. firms and consumers -- a perverse result.

This makes a big difference in the seriousness with which the most egregious violators regard their potential liability during plea negotiations. In many instances where conspiracies have involved hundreds of millions, or even billions of dollars of commerce, the defendants in plea negotiations have been more than willing to write a check for the statutory maximum $10 million to the U.S. Treasury. Such a fine makes only a small dent in the tens-upon-tens of millions of dollars that they may have gained as a result of the illegal cartel.

Raising the Sherman Act ceiling would help rectify this problem and ensure that corporations that commit antitrust offenses involving hundreds of millions or billions of dollars in U.S. commerce are punished just as severely, in relative terms, as local firms that commit antitrust offenses involving far lesser sums. That will ensure that the old adage "crime does not pay" continues to be meaningful for even the largest offenders. Our recent experience suggests that $100 million would be a more appropriate statutory maximum. I would welcome the opportunity to work with the Subcommittee on such legislation.

CONCLUSION

The Antitrust Division is working hard to carry out its responsibilities to protect competition in the marketplace. We have an excellent, committed, professional staff of public servants that is prepared and trained to do the best job possible for American consumers and businesses. We look forward to meeting the ongoing challenge to ensure that businesses can compete on a level playing field and that consumers are benefited by competition that produces low prices, high quality, and innovative goods and services.

Sherman Act Violations Yielding A Fine Of $10 Million Or More

Defendant	Product	Fine (Million $)	Geographic Scope	Country
Archer Daniels Midland	Lysine & Citric Acid	$100	International	U.S.
Haarmann & Reimer Corp.	Citric Acid	$50	International	German Parent
HeereMac v.o.f.	Marine Construction	$49	International	Netherlands
Showa Denko Carbon, Inc.	Graphite Electrodes	$29	International	Japan
Dockwise N.V.	Marine Transportation	$15	International	Belgium
F. Hoffmann-LaRoche, Ltd.	Citric Acid	$14	International	Switzerland
Jungbunzlauer International	Citric Acid	$11	International	Switzerland
Akzo Nobel Chemicals, BV & Glucona, BV	Sodium Gluconate	$10	International	Netherlands
ICI Explosives	Explosives	$10	Domestic	British Parent
Dyno Nobel	Explosives	$10	Domestic	Norwegian Parent
Mrs. Baird's Bakeries	Bread	$10	Domestic	U.S.
Ajinomoto Co.	Lysine	$10	International	Japan
Kyowa Hakko Kogyo, Ltd.	Lysine	$10	International	Japan

Addendum to Testimony of Joel I. Klein Before the Senate Antitrust, Business Rights and Competition Subcommittee February 26, 1998

On the afternoon of February 25, 1998, the Antitrust Division filed a one-count Information charging Fujisawa Pharmaceutical Co., Ltd., a Japanese company, and Akira Nakao, the associate executive director of the chemical division at Fujisawa, with participating in a two-year international conspiracy to fix prices and allocate market shares of sodium gluconate sold in the United States and elsewhere. Pursuant to plea agreements, both defendants will plead guilty, and Fujisawa has agreed to pay a $20 million fine.

Because this case was filed so recently, the Division was unable to incorporate this case and agreed-upon fine into the written testimony and other materials submitted to this committee.

This case continues the trend in criminal antitrust enforcement towards prosecution of large multinational, often foreign-based, firms for participation in international cartels that affect a huge volume of commerce. The Division has now secured fines of greater than $10 million on nine occasions. Of the roughly $335 million in fines secured since the beginning of FY 1997, over 90% was in connection with prosecution of international cartel activity. In 12 of the 15 instances in which a fine of $10 million or greater was secured, the defendant was either a foreign company or a subsidiary of a foreign company.

Finally and perhaps most importantly, the need for an increase in the current Sherman Act statutory maximum fine is illustrated by the fact that in 13 of the 15 instances in which the Division has secured a fine of $10 million or greater, the volume of commerce affected by the conspiracy was over $67 million -- the point at which the current $10 million statutory maximum prevents a court from imposing even a minimum fine called for by the Sentencing Guidelines.

Defendant	Product	Fine (Million $)	Scope	Country
Archer Daniels Midland	Lysine & Citric Acid	$100	International	U.S.
Haarmann & Reimer Corp.	Citric Acid	$50	International	German Parent
HeereMac v.o.f.	Marine Construction	$49	International	Netherlands
Showa Denko Carbon, Inc.	Graphite Electrodes	$29	International	Japan
Fujisawa Pharmaceuticals	Sodium Gluconate	$20	International	Japan
Dockwise N.V.	Marine Transportation	$15	International	Belgium
F. Hoffmann-L aRoche, Ltd.	Citric Acid	$14	International	Switzerland
Jungbunzlauer I nternational	Citric Acid	$11	International	Switzerland
Akzo Nobel Chemicals, BV & Glucona, BV	Sodium Gluconate	$10	International	Netherlands
ICI Explosives	Explosives	$10	Domestic	British Parent
Dyno Nobel	Explosives	$10	Domestic	Norwegian Parent
Mrs. Baird's Bakeries	Bread	$10	Domestic	U.S.
Ajinomoto Co.	Lysine	$10	International	Japan
Kyowa Hakko Kogyo, Ltd.	Lysine	$10	International	Japan