DEPARTMENT OF JUSTICE

STATEMENT

OF

THOMAS O. BARNETT
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

OVERSIGHT OF THE UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST DIVISION

PRESENTED

MARCH 7, 2007

Good afternoon, Mr. Chairman and members of the Subcommittee. It is a pleasure for me to appear before you today on behalf of the Department of Justice and the dedicated professionals of its Antitrust Division. I appreciate this opportunity to highlight the Division's accomplishments, answer your questions about our work, and listen to your thoughts about what I believe has been our sound and vigorous enforcement of the antitrust laws.

As this Subcommittee fully appreciates, competition is the cornerstone of our Nation's economic foundation. Antitrust enforcement promotes and protects a robust free-market economy, by helping ensure that anticompetitive agreements, conduct, and mergers do not distort market outcomes. It has helped American consumers obtain more innovative, high-quality goods and services at lower prices; and it has strengthened the competitiveness of American businesses in the global marketplace. Antitrust enforcement has enjoyed substantial bipartisan support through the years, and we appreciate this Subcommittee's active interest in—and strong support of—our law enforcement mission.

Last month I marked one year since my confirmation as Assistant Attorney General of the Antitrust Division, and I am pleased to report that this past year was full of outstanding accomplishments in the Division. In many areas we have achieved record levels of enforcement, benefiting American consumers and businesses. The first part of my testimony today will review recent developments in the Division's three core enforcement programs: criminal, merger, and civil non-merger. Following that I will describe some ongoing competition policy initiatives at the Antitrust Division aimed at benefiting consumers and businesses and strengthening the foundation for effective antitrust enforcement, both here and around the world.

The Antitrust Division pursues its mission through an enforcement hierarchy that emphasizes pursuing illegal cartels, anticompetitive mergers, and preventing civil non-merger conduct that unreasonably restrains competition or leads to the unlawful creation or abuse of monopoly power. Within each area, the Division strives to identify and pursue vigorously violations of the antitrust laws, to increase transparency so that private parties can better predict our enforcement actions, and to reduce the time and cost associated with our investigations. The Division's criminal program detects, punishes, and deters price fixing, bid rigging, market allocations, and other cartel behavior—the kinds of conduct that the Supreme Court recently described as the "supreme evil of antitrust." The Division's merger review program prevents anticompetitive mergers, acquisitions, and other combinations that can lead to higher prices, lower quality and fewer choices for consumers. Finally, our civil non-merger program prevents unreasonable restraints of trade or the unlawful creation or abuse of monopoly.

Cartel Enforcement

The detection, prosecution, and deterrence of cartel offenses—such as price fixing, bid rigging and market allocation—continue to be the highest priority of the Antitrust Division. There is no plausible procompetitive rationale for this behavior. The Division places particular emphasis on combating international cartels that target U.S. markets because of the breadth and magnitude of the harm they inflict on American businesses and consumers. This enforcement strategy has succeeded in cracking dozens of international cartels, securing convictions and jail sentences against culpable U.S. and foreign executives, and obtaining record-breaking corporate fines.

The Division has made significant strides in the prosecution of individuals involved in cartel offenses. In this regard, the Division thanks the Subcommittee for its efforts in increasing the criminal fines and statutory maximum sentences for Sherman Act offenses in 2004 as well as in making antitrust offenses a predicate crime for wiretapping authority last year. The most effective way to deter and punish cartel activity is to hold the most culpable individuals accountable by seeking jail sentences. Antitrust offenders are being sent to jail with increasing frequency and for longer periods. This Subcommittee's efforts will help us continue this important trend that benefits American consumers and businesses.

The Division achieved significant victories in its cartel enforcement efforts over the last year. The Division obtained the second highest amount of fines in the Division's history, achieved the longest sentence for a foreign national in an international antitrust case, and made significant progress toward its first extradition of a foreign national for an antitrust offense. Already this year, we are on a record pace in jail time imposed on Antitrust Division defendants.

During Fiscal Year 2006, the Division obtained over $473 million in criminal fines from 20 corporations and 20 individuals. The Fiscal Year also yielded 5,383 jail days imposed for price fixing, bid rigging, fraud, and related anticompetitive behavior. The current Fiscal Year is off to a strong start, with 18 individuals sentenced to a total of 12,890 days in jail in less than half a year.

Some of our recent criminal prosecutions include the following:

Dynamic Random Access Memory—The Division's continuing high-profile investigation of the DRAM cartel has yielded total fines of more than $732 million, and courts imposed 2,760 days of jail time for individual defendants. In FY 2006, the Division obtained an $84 million fine against Japanese manufacturer Elpida Memory Inc., and secured guilty pleas from four executives of Korean manufacturer Hynix Semiconductor Inc. and four executives of Korean manufacturer Samsung Electronics Co., Ltd. More recently, on February 14, 2007, a Korean national and current president of Samsung's U.S.-based subsidiary was sentenced to pay a criminal fine of $250,000 and to serve 10 months in jail—the longest sentence for a foreign national in an international antitrust case. Over the full course of the investigation, this matter has yielded charges against four companies and 18 individuals, of which 11 are foreign nationals who have served or agreed to serve time in U.S. prisons.

Ready-Mixed Concrete—Five companies and 10 executives have been convicted of, or pled guilty to, conspiring to fix prices in the ready-mixed concrete industry in the U.S. Midwest. The Division, with its investigation continuing, already has obtained almost $35 million in fines, including a $29.2 million dollar fine against Irving Materials, Inc., an Indiana ready-mixed concrete producer -- the largest fine ever obtained in a domestic cartel investigation. Additionally, each of the 10 executives who have been sentenced will serve between five and 27 months of incarceration.

Nationwide E-Rate Investigation—The Division actively is pursuing a nationwide investigation of bid rigging and fraud in the E-Rate program. Congress created the E-Rate program to help needy schools and libraries connect to the Internet. In February 2006, Premio Inc. pled guilty to

charges of bid rigging and fraud regarding the E-Rate program, and in May 2006, the Division indicted two individuals and two companies on fraud and money laundering charges related to E-Rate work in Michigan. In total, the Division thus far has charged 14 individuals and 12 companies in connection with the schemes to defraud the E-Rate program and schools. Defendants have been sentenced to more than 4,000 days in prison and have agreed to pay criminal fines and restitution totaling approximately $40 million.

Other markets where the Antitrust Division has brought recent criminal prosecutions include: wholesale plumbing supplies; painted aluminum products; magazine paper; parcel tanker shipping; freight forwarding; natural gas pipeline construction; foam-filled marine fenders and buoys; spun yarn, used to manufacture items such as athletic socks and printed T-shirts; acrylonitrile-butadiene rubber, used in hoses, belting, cable, o-rings, seals, adhesives, and sealants; and chemicals, such as hydrogen peroxide, with industrial applications in the electronics, energy production, mining, cosmetics, food processing, textiles and pulp and paper manufacturing industries, and sodium perborates, used in detergents.

We are determined to bring antitrust violators to justice; and we also want the level of our enforcement activity, including the fines and sentences, to send a powerful and unmistakable deterrent message to those in our country and around the world who would victimize American consumers and the American marketplace.

Merger Enforcement

Merger enforcement continues to be one of the Antitrust Division's core priorities. The Department is committed to challenging mergers that the evidence developed in a thorough investigation evaluated pursuant to rigorous economic analysis demonstrates will harm U.S. consumers and businesses. Indeed, the numbers tell the story. The Division filed 10 merger enforcement actions in district court in Fiscal Year 2006, and an additional six transactions were restructured by the parties in response to a Division investigation. This marks the highest level of merger enforcement activity since the end of 2001—a time when the Department was reviewing twice as many mergers during the merger wave of that era.

The Division has obtained divestitures or other relief to prevent harm to competition from mergers in numerous industries, including newspapers, dairies, telecommunications, and banking, among others. Additionally, in April 2006, the Division also obtained a settlement in which QUALCOMM Inc. and Flarion Inc. agreed to pay $1.8 million in civil penalties for violating premerger waiting period requirements.

A number of our most significant merger actions include the following:

Mittal Steel/Arcelor—In 2006, the Mittal Steel Company launched a hostile $33 billion takeover of Arcelor S.A., a transaction that would combine the world's two largest steel producers. The Division was able to determine during the initial Hart-Scott-Rodino (HSR) waiting period that the transaction raised competition concerns in the $2.3 billion U.S. market for tin mill products. These are finely rolled steel sheets that are normally coated with tin or chrome and used in many consumer-product applications, such as sanitary food cans and general line cans for aerosols, paints and other products.

In August 2006, the Division announced that it had concluded that Mittal's proposed acquisition of Arcelor would adversely affect competition in the $2 billion tin mill products market in the eastern United States by eliminating constraints on the ability of producers to coordinate their behavior and thereby increase the price of tin mill products to can manufacturers and other customers. The Division filed suit to block the transaction, and at the same time filed a consent decree.

To remedy the Division's concerns, the proposed consent decree required Mittal to divest a steel mill that supplied tin mill products to the eastern United States. Mittal's first obligation was to attempt to divest Dofasco Inc., a Canadian Company owned by Arcelor. However, the proposed consent decree anticipated the possibility that Mittal might be unable to sell Dofasco because Arcelor had, in an attempt to defeat Mittal's hostile takeover bid, placed legal title to Dofasco into a Dutch foundation. Therefore, if the sale of Dofasco could not be carried out as required, the proposed consent decree gave the Department the right to select for divestiture either Mittal Steel's Sparrows Point mill or its Weirton mill, located in Weirton, W.Va.

The Department determined after a thorough review that, between these two facilities, the divestiture of Sparrows Point would most reliably remedy the anticompetitive effects of the acquisition, and required Mittal to divest it to a buyer acceptable to the Department. The Department found that Sparrows Point is a profitable and diversified facility that has the capacity to produce more than 500,000 tons of tin mill products annually. Sparrows Point currently operates as an integrated facility that produces the steel slabs used in the manufacture of tin mill products and, unlike the Weirton mill, would not have to develop new sources of supply for this critical input upon its separation from Mittal Steel.

Maytag/Whirlpool—When the Division investigates a merger, we typically look first at the numbers, the merging parties' likely market shares and the degree of concentration in the market. If those numbers are high in a particular case, we may make an initial presumption that there is a problem with the transaction. But that presumption is rebuttable based on the specific facts of any individual case. We proceed to examine the evidence that is developed during the investigation, customer statements and documents, deposition testimony, and internal documents and data from the companies as well as from third parties. These investigations can take many months and require analysis and review of millions of documents and exceedingly voluminous data. Based upon the evidence, we then decide whether our initial presumption is warranted.

Last March, the Division decided not to challenge the merger of home appliance manufacturers Maytag Corporation and Whirlpool Corporation. Our investigation focused on residential clothes washers and dryers, although we considered the impact of the merger across the entire range of products offered by the two companies. We found that, despite the two companies' relatively high share of laundry product sales in the U.S., any attempt to raise prices likely would be unsuccessful. Maytag and Whirlpool represented two well-known brands in the industry, but rival appliance brands such as General Electric, Frigidaire, and Kenmore were also well established, and newer brands such as LG and Samsung had quickly established themselves in recent years in the U.S.

More generally, it became clear that washers and dryers that are made in Mexico and Asia are being shipped, or could be shipped, to the United States. Further, the large retailers that collectively account for almost two-thirds of all home appliance sales in the United States—stores like Sears, Lowe's, The Home Depot, and Best Buy—have the ability to foster

major shifts in share toward or away from any particular supplier. This was confirmed by events in the marketplace. Best Buy, for example, had significant success with LG laundry products following their introduction in May 2003. In early 2005, Best Buy discontinued selling Maytag laundry products altogether and replaced some of the discontinued models with LG products. Home Depot has also been selling LG laundry products since June 2005, and LG now accounts for a significant percentage of laundry sales at both retailers.

Ultimately, we concluded that the presence of strong rival suppliers that had the ability to expand sales significantly, combined with customers who could respond to proposed price increases by increasing the share of those rival suppliers, in conjunction with large cost savings and other efficiencies that the parties were able to substantiate—and that should benefit consumers—all indicated that the transaction was not likely to harm consumer welfare. Thus, any initial presumption had been rebutted, and we closed our investigation.

Exelon/PSEG—In the energy industry, last year the Division investigated the proposed merger of Exelon Corporation and Public Service Enterprise Group Inc. The $16 billion merger would have combined the assets of two of the largest electricity generators in the mid-Atlantic region and would have created one of the largest electricity companies in the United States.

Huge variations in the marginal cost of running different kinds of generators affect the competitive dynamic in the wholesale market for electricity. The marginal costs of running a hydroelectric dam generator or nuclear power plant are substantially less than the marginal costs of running coal-fired steam turbine generators or gas-fired combustion turbine generators. The prevailing price in the market is determined by the least efficient plant necessary to meet demand. As a result, it is possible for an electricity company with a relatively small market

share to have a greater ability to exercise market power due to the combination of generation plants it owns.

The combination of plants owned by a particular supplier affects its incentive and ability to exercise market power by withholding output from selected plants to drive up the market-clearing price. The Exelon/PSEG merger would have combined a firm that had significant low-cost nuclear and hydroelectric generating capacity (owned by Exelon) with a firm that had significant higher-cost coal-fired steam turbine capacity (owned by PSEG).

The Division concluded that the combined firm would have significantly more incentive and ability to withhold output from selected high-cost plants than either firm had independently before the merger. Under the terms of a proposed consent decree, the merged firm would have been required to divest six electricity plants in Pennsylvania and New Jersey that provide more than 5,600 megawatts of generating capacity and that included key generating units in the mid-range of the fuel curve—units that often were on or near the margin and thus would have enhanced the ability of the merged firm to exercise market power. Exelon later abandoned its effort to acquire PSEG.

Telecommunications—The telecommunications industry has kept the Division very busy during the last few years, and it looks likely it will continue to do so. The Division has recently investigated the mergers of Verizon and MCI, SBC and AT&T, the new AT&T and BellSouth, Sprint and Nextel, and Cingular and AT&T Wireless, among others. The Division took action to challenge portions of these transactions to protect competition, and decided not to challenge others after concluding that they were not likely to result in a substantial lessening of competition.

The Division's Verizon/MCI and SBC/AT&T investigations resulted in consent decrees early in Fiscal Year 2006. The Division investigated all areas in which the two sets of merging firms competed, including residential local and long distance service, Internet backbone services and a variety of telecommunications services provided to business customers. With the exception of the local private line service that was the subject of the consent decrees, the Division concluded that the transactions would not harm competition and would likely benefit consumers due to existing competition, emerging technologies, the changing regulatory environment, and exceptionally large merger-specific efficiencies.

The decrees require the parties to divest portions of certain local fiber-optic network facilities in order to protect competition in the market for facilities-based local private line service to certain business customers in a number of metropolitan areas. Like all Antitrust Division consent decrees, the Verizon/MCI and SBC/AT&T decrees are subject to the Tunney Act, which requires a determination by a federal district court that entry of the decrees is in the public interest. The decrees are currently before the U.S. District Court for the District of Columbia. That court must determine whether the decrees, designed to prevent the competitive harm the United States alleged in its complaint, are in the public interest.

DFA/Southern Belle—Late last year, the Antitrust Division, along with the Commonwealth of Kentucky, announced a consent decree that required DFA to divest its interest in the Southern Belle dairy resulting from a lawsuit in U.S. District Court challenging DFA's acquisition of its interest in the Southern Belle dairy. The complaint charged that the acquisition reduced competition for school milk contracts in 100 school districts in Kentucky and Tennessee because it gave DFA significant partial ownership interests in two dairies—the Southern Belle dairy and

the nearby Flav-O-Rich dairy—that competed against each other for such contracts. As a result, the acquisition reduced the number of independent bidders for school milk contracts from two to one in 45 school districts in eastern Kentucky, and from three bidders to two in 55 school districts in eastern Kentucky and Tennessee.

The day before filing their motions for summary judgment, the defendants modified their ownership agreements to reduce DFA's legal rights to exercise control over Southern Belle. Without addressing the ownership arrangement that had been in effect for two years, the district court granted summary judgment to the defendants, holding that the government failed to establish a mechanism by which the acquisition was likely to affect competition adversely in the school milk markets under the defendants' modified agreement. We appealed that decision to the Sixth Circuit, arguing among other things that the acquisition as it existed for two years violated Section 7 of the Clayton Act and that the defendants' modifications did not remedy that violation.

In October 2005 the Sixth Circuit reversed the district court's summary judgment to DFA and remanded for trial. Agreeing with the Division, the court of appeals concluded that the district court should have addressed the original ownership arrangement and that the government presented sufficient evidence to survive summary judgment on that issue. The court held that DFA's fifty percent ownership of the two competing dairies and the closely aligned interests of the dairies' managements could lead to anticompetitive behavior, violating Section 7 even in the absence of DFA rights to control the two competitors' decisionmaking. On remand, the Division aggressively prepared for trial and reached a consent decree with DFA shortly prior to trial requiring the divestiture.

Merger Review Process and Transparency

Bringing enforcement actions is the most well-known aspect of the Division's merger activities, but it is not the only one. The Division also seeks continually to improve its merger review process and its merger enforcement transparency. Improving in these areas improves overall merger enforcement and benefits American consumers and businesses.

In December 2006, the Division announced a revision to its Merger Review Process Initiative. The Process Initiative helps us identify and devote increased resources to those transactions that should be challenged while at the same time spending fewer resources on transactions that are not anticompetitive. That is good government.

Thanks to the Hart-Scott-Rodino (HSR) premerger review process that Congress enacted in 1976, today most federal merger challenges occur before deals close, when effective injunctive relief is available, structural relief is more practical and effective, and harm to consumer welfare has not yet occurred. The HSR Act gives the Antitrust Division and the FTC an opportunity to examine most large transactions before they close. Our goal is to identify quickly both transactions that threaten harm to competition and those that do not threaten competition, devoting our resources to challenging the former while letting the latter proceed.

Merger analysis itself has evolved significantly since the HSR Act was passed. There was a time when the Supreme Court affirmed decisions blocking mergers based largely on market share and a perceived unwritten guiding principle that the government always won. Times have changed. Courts have shifted their focus from a static analysis of market shares and concentration toward a fuller analysis of the future competitive process in the relevant market. We certainly closely look at market shares and HHIs, but we also closely examine the

competitive process for unilateral or coordinated effects, entry, and efficiencies as well. We frequently employ the increasingly sophisticated economic tools that have been developed by the antitrust community, such as regressions, merger simulations, diversion ratios, and critical loss analyses. While our advances in economic analysis can help us make better enforcement decisions, they often require significant quantities of data and information to conduct properly.

Consequently, the second request process can be costly and time-consuming. Indeed, there has been an explosion in the volume of documents and information produced by parties in response to second requests. While there was a time when the production of a few hundred boxes of documents was a large production, now we talk in terms of gigabytes, terabytes, and millions of pages of documents. In the Verizon/MCI and AT&T/SBC mergers, for example, the Division obtained approximately 25 million pages of documents alone.

Given the tremendous increases in review burdens on both the Antitrust Division staff and parties to proposed mergers, it behooves us to seek ways to limit those burdens, while at the same time retaining our ability to effectively assess and challenge anticompetitive mergers. The first step in that direction was the Division's 2001 Merger Review Process Initiative, which included means of improving our ability to identify those transactions that do not threaten harm to competition during the initial HSR waiting period without issuing a second request. The Initiative also provided means to improve the efficiency of our review process after a second request issues.

The Initiative worked. Notwithstanding the significant number of enforcement matters last year, the Division has improved its ability to close investigations of transactions that are not anticompetitive. Since the Initiative was announced, for matters that do not lead to an

enforcement action, the average number of days between the opening of a preliminary investigation and the closing of the investigation (either before or after issuance of a second request) has fallen from about 93 days to 57 days. The average length of second request investigations dropped from 213 days for the two years before the Initiative to 154 days during the last two years, a drop of over 25 percent.

While the 2001 Initiative has resulted in investigations that are more focused and efficient, it was clear that improvements could still be made. Therefore, the Division announced last December a number of significant refinements that build on the successes of the 2001 Initiative. Many of the changes formally adopt merger investigation procedures already successfully used by Antitrust Division staff, such as commonly used second request modifications and a revised Model Second Request that accounts for problems that have arisen in past investigations.

We are committed to continued improvements in the merger review process. At the same time, we will not forgo getting the information we need to successfully challenge anticompetitive mergers. If we proceed to a judicial challenge, the courts expect the Division to present a thorough and detailed empirical analysis of a challenged merger's likely anticompetitive effects, and they expect us to do so promptly after the complaint is filed. We fully intend to meet that expectation to protect U.S. consumers and businesses from anticompetitive mergers

Turning to transparency, transparency is readily achieved when the Division brings an enforcement action. Theories and evidence of anticompetitive harm are available to the public through complaints, press releases, and competitive impact statements. The public often has as

much, if not greater, interest, however, in why the Division decides not to bring an enforcement action in particular cases. While confidentiality restrictions place significant limits on what the Division may say publicly about its HSR investigations, we have been active and intend to remain active in issuing closing statements in mergers that we do not challenge after extensive investigations. These statements describe our rationale for the enforcement decision within confidentiality limits. Thus, for example, we issued closing statements detailing our rationales for not challenging the AT&T/Bellsouth and Maytag/Whirlpool mergers. We will continue to do so where appropriate to help the public better understand our actions.

The Division's transparency efforts also have included the release of a joint DOJ/FTC Commentary on the Horizontal Merger Guidelines in March 2006. The Commentary is the latest chapter in the agencies' ongoing efforts to provide guidance to the antitrust bar and businesses regarding how the agencies enforce Section 7 of the Clayton Act.

The analytical framework and standards used to analyze the likely competitive effects of mergers are embodied in the Horizontal Merger Guidelines, which the Division and the FTC jointly issued in 1992 and revised in 1997. The Commentary, which is available on both agencies' websites, explains how the Division and the FTC have applied particular guidelines provisions relating to market definition, competitive effects (including coordinated interaction and unilateral effects analysis), entry conditions, and efficiencies. Included throughout the Commentary are summaries of actual mergers that the agencies analyzed under the Merger Guidelines.

Civil Non-Merger Conduct

Civil non-merger enforcement is based on anticompetitive conduct under the Sherman Act. Although it can involve unreasonable restraints of trade under Section 1 of the Sherman Act, it more frequently implicates single-firm conduct under Section 2 of the Sherman Act. Enforcement of Section 2 of the Sherman Act presents some of the most difficult challenges in antitrust law today. An important part of the Division's mission is to advance development of antitrust law in procompetitive ways. Sound antitrust enforcement policy requires prosecution of exclusionary conduct that reduces output and increases prices while at the same time striving to avoid condemnations that chill procompetitive behavior.

Determining when unilateral conduct is unlawful under Section 2 has proven difficult because the aggressive, unilateral behavior typcially at issue in Section 2 cases often resembles the healthy, aggressive competition that the antitrust laws seek to promote. The antitrust laws should encourage vigorous competition—even by companies with a large share of the relevant market. Because the current state of the law does not always define clearly what is lawful and what is not, uncertainty can chill procompetitive behavior while undermining deterrence of anticompetitive conduct. For this reason, the Antitrust Division, in conjunction with the FTC, is holding hearings to help advance our own thinking about unilateral conduct, better inform our judgment about when it is appropriate for the United States to bring enforcement actions under Section 2 of the Sherman Act, and help us to develop clear and objective standards that will apply in Section 2 matters.

A number of prominent practitioners and economists have participated in these hearings, and the Antitrust Division is grateful to them for agreeing to share their insights. We also

received important participation from the business community, consumer groups, and business historians. The hearings have focused on predatory pricing, predatory buying, refusals to deal, tying, exclusive dealing, bundled loyalty and market share discounts, misleading and deceptive practices, market definition and market power, and remedies. There were also hearings on foreign antitrust enforcement, empirical studies, business history and strategy, and business and academic perspectives on single-firm conduct.

Some of our most recent significant enforcement efforts in this area include: Dentsply—The Division brought suit against Dentsply alleging monopolistic practices in the false teeth industry. Dentsply had used its monopoly power to erect a barrier to effective entry, expansion, and competition in the United States market for false teeth. Dentsply repeatedly blocked its competitors from developing networks of dental laboratory dealers necessary to compete effectively in the market. Dentsply's anticompetitive actions precluded many dealers selling Dentsply's teeth from supplementing their product lines by adding competing tooth brands, even in response to the requests of their dental lab customers. At the same time, competing tooth suppliers wanted to sell their teeth through those dealers to become more effective competitors to Dentsply.

On April 26, 2006, the District Court entered a Final Judgment enjoining Dentsply from preventing distributors from adding competitors' products to their offerings, conditioning the sale of its teeth or other products to any dealer based on the dealer's sale of competing brands or its consideration of whether to sell competing brands, or coercing dealers to drop competing tooth brands in order to become authorized Dentsply tooth dealers.

Real Estate Services—The Division's enforcement against anticompetitive agreements included its extensive efforts to stop anticompetitive practices in the real estate services industry, including its lawsuit against the National Association of Realtors (NAR). For many people, the purchase or sale of a home not only represents the fulfillment of the American dream but is their single most significant personal financial transaction. The Division has focused its enforcement activities to ensure that the industry and consumers can take advantage of newer business models. In addition, the Division, often in collaboration with the FTC, has vigorously pursued competition advocacy efforts by commenting on the detrimental competitive effects of various legislative and regulatory proposals that limit competitive alternatives at the state level. I will discuss these efforts in greater detail later on.

In September 2005, the Division (I am recused from this matter) filed suit after NAR promulgated rules that would limit competition from real estate brokers who use the Internet to serve their customers. The lawsuit alleges that NAR's policy prevents consumers from receiving the full benefits of competition and threatens to lock in outmoded business models and discourage discounting

NAR has hundreds of affiliated Multiple Listing Services (MLS) across the country—one in virtually every community. Each MLS maintains a database to which member brokers contribute the property listings of the customers they represent. A broker participating in an MLS thus has access to all or nearly all of the property listings in the local market and can distribute those listings to customers. Some brokers have recently begun delivering listings to customers via the Internet, through what are known as Virtual Office Websites, or VOWs. In an effort to protect high commissions (which have increased by over 50% in recent years), real

estate brokers have instituted efforts to foreclose competition from VOWs and other innovative brokerage models.

NAR's recent VOW policies include an "opt-out" provision that allows brokers to prevent Internet-based competitors from providing the same listing information over the Internet that other brokers can provide from their offices. The Division's lawsuit also challenges a NAR membership rule that denies access to MLS listings to brokers that operate referral services. This rule effectively prevents two brokers from working together in what can be a more innovative and efficient way, with one attracting new business and educating potential buyers about the market, and the other guiding the buyer through home tours and the contract and closing processes.

In November 2006, a U.S. District Court denied NAR's motion to dismiss. The lawsuit is proceeding.

Competition Advocacy

In addition to its traditional law enforcement role, the Antitrust Division regularly seeks to promote competition through advocacy efforts. Competition advocacy includes providing advice and analysis concerning a variety of matters, including Supreme Court cases, international efforts, and legislation and regulation at both the federal and state levels. Anticompetitive constraints imposed by government action can have a much broader negative impact on consumers than any single cartel or merger -- potentially affecting entire sectors of the economy -- but are generally exempt from direct challenge under the antitrust laws. Moreover, governmentally-imposed restraints are likely to be more durable than private restraints because market forces are less likely to overcome them. The Division believes that robust competition

advocacy is an important part of our mission to protect competition on behalf of American consumers.

The Division is focused and active on the international front. With more and more countries adopting antitrust enforcement regimes, the Antitrust Division has made a particular priority of strengthening international cooperation and promoting antitrust policy convergence. In the last year, the Division pursued these goals by continuing to work closely with multilateral organizations around the world, and by working to develop and maintain strong bilateral relationships with enforcement agencies in other countries.

Two organizations stand out for their recent work in achieving consensus on important antitrust issues: the International Competition Network (ICN), which the Division and the FTC helped to launch in 2001, and the Organization for Economic Cooperation and Development (OECD).

The ICN provides an opportunity for senior antitrust officials and non-governmental advisors, from both developed and developing countries, to work together to achieve practical improvements in international antitrust enforcement. In just over five years, the ICN has grown from 14 founding members into a global network of 100 members from 88 jurisdictions. In 2006, the Division was heavily involved in the ICN's Unilateral Conduct Working Group, which announced plans to focus on the objectives of single-firm enforcement and the standards for analysis of dominance (monopolization).

The OECD's 30 member countries share a commitment to democratic government and market-based economies, and the OECD provides an appropriate forum for governments to seek

answers to common problems, identify best practices, and coordinate policies. The Division has been closely involved in all phases of the OECD's competition work. In 2006, I chaired the OECD's Competition Committee Working Party on International Cooperation & Enforcement, where, among other work, I led roundtables on issues affecting all three major areas of antitrust enforcement: cartels, merger review, and unilateral conduct.

The Division remains committed to developing strong, productive bilateral relationships with its foreign counterparts. Improving the already strong relationship with the European Commission remains a priority, and the Division continues to work closely with its counterpart in Brussels on a wide range of cartel, merger, and other enforcement and policy matters. For example, in February 2006, the Division confirmed publicly that it was coordinating with the EC and other foreign competition authorities in investigating potentially anticompetitive practices in the air cargo industry. The Division also attended numerous meetings with its sister agencies in the governments of United States trading partners, such as Japan and Korea. Further, U.S., Canadian, and Mexican agencies created working groups on unilateral conduct and intellectual property.

The Division also is closely following China's efforts to enact its first comprehensive antitrust law. The Division has reviewed several draft versions of China's antimonopoly law, and met with relevant Chinese Government officials periodically to discuss the draft law in detail. In September 2006 I met with the Vice-Chairman of the Standing Committee of the National People's Congress, as well as various other key Chinese government officials involved in the antimonopoly law drafting process, to discuss sound competition policy and to provide our comments on the bill. In addition, my deputy for international matters held working-level

discussions with the relevant Chinese Government counterparts on several occasions last year and will be visiting China again this Spring to continue those discussions. Division officials also moderated discussions on the draft antimonopoly law with Chinese Government officials in a U.S.-China Legal Exchange Program hosted by the Commerce Department that was held in Seattle, Cleveland, and Washington, D.C. in December 2006. The Division will continue to promote sound antitrust analysis and international cooperation abroad.

On the domestic front, the U.S. Supreme Court has taken an active docket of antitrust and competition-related cases in the past year, and the Division has assisted the Solicitor General in submitting the views of the United States as *amicus curiae*. In 2006, the court issued decisions in *Texaco Inc. v. Dagher*, stating that "rule of reason" analysis generally governs pricing decisions by joint venturers; *Illinois Tool Works Inc. v. Independent Ink, Inc.*, holding that the mere fact that a tying product is patented does not support a presumption of market power for purposes of antitrust tying analysis; and *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc*., clarifying the standards for secondary-line price discrimination claims under the Robinson-Patman Act. In each case, the Court reached the conclusion urged by the United States. Later in 2006, the Division assisted in briefs filed in *Weyerhaeuser Co. v. Ross Simmons Hardwood Lumber Co., Inc.*, regarding the standards governing buyer-side predatory pricing. In a decision issued just last month, the Supreme Court issued a unanimous decision consistent with the United States' position.

The Division also assisted in briefs filed in *Bell Atlantic Corp. v. Twombly*, concerning pleading standards for antitrust civil conspiracy claims; and *Credit Suisse First Boston Ltd. v.*

Billing, considering the test for implied immunity from the antitrust laws based on the operation of securities regulations and statutes. These cases remain under review by the Court.

The Division, together with the FTC, also educates policymakers and the general public about the benefits of competition in a variety of markets. One market we have devoted substantial efforts to is the real estate market. The Division provides assistance and information to entities considering rules—such as rules that prohibit rebates to consumers or that undermine online brokerage models—that would inhibit some types of competition that can lower the cost of buying or selling a home.

During 2006, several states modified proposed or existing laws and regulations to enhance competition to the benefit of consumers. Delaware, Ohio, Tennessee, and Wisconsin all passed bills that included a waiver provision to enable individual consumers to choose not to purchase unwanted types of real estate brokerage services. The West Virginia Real Estate Commission, the Tennessee Real Estate Commission, the Kentucky Real Estate Commission, the South Dakota Real Estate Commission, and the State of South Carolina all lifted bans on consumer rebates and other inducements to consumers in real estate transactions. The result is that consumers in these states now have the potential to save thousands of dollars on the purchase of a home.

The Division is also engaged in a broader effort to ensure that all American consumers will continue to benefit from competition in the real estate services industry. A well-attended workshop in October 2005, jointly sponsored by the Antitrust Division and the FTC, was a key part of that effort. Participants from brokerage firms, NAR, local realtor associations, fee-for-service and internet referral brokers, and buyers' brokers spotlighted the competitive issues

facing this industry. The Division will continue to maintain its enforcement and advocacy efforts in this area to ensure that consumers enjoy the benefits of better service, increased choice, and lower prices resulting from competition.

Conclusion

I would emphasize in closing that none of what I have discussed could have been accomplished without the dedicated career staff of the Antitrust Division, and in fact it is because of their experience, talent, and dedication to the mission of protecting consumers that we have been able to achieve the successes we have—both in terms of quantity and quality.

Given the important role we assign to competition in our nation's economy, the Antitrust Division must be a vigorous, formidable, and effective enforcer of our laws. While I am pleased with all that we have accomplished thus far, I recognize that the hallmark of any successful organization is the continuing desire to improve. In that regard I look forward to working with this Subcommittee and its staff.

Mr. Chairman, that completes my prepared remarks. I would be pleased to respond to the Subcommittee's questions at this time.