



DEPARTMENT OF JUSTICE

STATEMENT

OF

**THOMAS O. BARNETT
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION
U.S. DEPARTMENT OF JUSTICE**

BEFORE THE

**COMMITTEE ON SMALL BUSINESS
U.S. HOUSE OF REPRESENTATIVES**

HEARING ENTITLED

**“SMALL BUSINESS COMPETITION POLICY: ARE MARKETS OPEN FOR
ENTREPRENEURS”**

PRESENTED ON

SEPTEMBER 25, 2008

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Chairwoman Velázquez, Ranking Member Chabot, and Members of the Committee, thank you for the opportunity to discuss how the Antitrust Division works to maintain a competitive marketplace in the American economy, to encourage our nation's firms to work more efficiently, foster innovation, and promote consumer welfare.

Competitive markets provide the environment necessary for entrepreneurship and innovation. They cultivate the initiative and intelligence that characterize our economy's strong base of small business. Justice Thurgood Marshall said it most eloquently in an oft-cited Supreme Court case: “Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.” *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

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, it has strengthened the competitiveness of American businesses in the global marketplace, and it has made this country the world's center for innovation. For this country to continue its position in the vanguard of new technology, new business methods, and new ways of serving consumers, small businesses must be able to profit from their ingenuity and resourcefulness. Thus, the antitrust laws are central to maintaining the best commercial environment for a strong small business sector.

One of the central benefits of competition is its positive effect on innovation. In today's technology-driven world, innovation is the mainspring of the strength and vibrancy of our nation's economy. Innovation allows new firms to enter into markets dominated by incumbents, and is critical for incumbent firms who want to continue their previous market successes and stimulate consumer demand for new products. Thus, competition drives innovation. Without competition, there would be little pressure to introduce new products or new production methods.

The Antitrust Division pursues its mission of protecting competition and the economy through an enforcement program that emphasizes pursuing illegal cartels, blocking or modifying anticompetitive mergers, and preventing business practices that unreasonably restrain competition or lead to the unlawful creation or abuse of monopoly power.

Cartels

First, the detection, prosecution, and deterrence of cartel offenses such as price fixing, bid rigging and market allocation are the highest priority of the Antitrust Division. Section 1 of the Sherman Act condemns these offenses because 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—including small businesses—and American consumers. The most obvious benefit of competition is that it results in goods and services being provided to consumers at competitive prices. But it is important to remember that producers are also consumers. They must buy raw materials and energy to produce their products, transportation services to receive supplies and ship their products, computer equipment to keep track of their inventories, construction services to build their plants and warehouses, and so forth. Thus, small businesses are often directly affected by the harm caused by price-fixers and market allocators. These cartels can, and have, controlled the price and availability of the essential inputs small businesses need to transact business and make products.

In the current year alone, to date, the Division has obtained more than \$700 million in court-awarded criminal fines from criminal cartel price-fixers. A large part of this sum was made up of fines and convictions for a global price-fixing conspiracy for cargo shipments—important channels for getting inputs to the businesses, or for businesses to get their products to stores and consumers. In the last year, the Division has also pursued conspiracies to rig bids or fix prices among commercial heating and air conditioning services, electrical contractors, commercial blasting agents, and in multiple sectors in the energy industry, raising the prices for inputs that small businesses depend on to stay in the marketplace.

Mergers

Second, the Division aggressively enforces Section 7 of the Clayton Act, which prohibits mergers that may substantially lessen competition or tend to create a monopoly. The Division continues to block mergers that threaten harm to businesses and consumers, and in recent years it has brought enforcement actions and obtained divestitures in a number of industries important to small business, such as banking, telecommunications, and various advertising media. While many of the Division's cases involve national firms, these cases can be significant for small business because of the local nature of the competitive impact.

For example, last November the Division reached an agreement in a bank merger that required divestiture of five branch offices after concluding that the merger would adversely affect competition in local markets for commercial banking services including small business loans and other specialized services. The Division has also been active in ensuring that radio, newspaper, and billboard advertising—methods of reaching customers on which many small businesses depend—stay competitive. Last year, the Division filed suit to break up a merger between two newspapers that would have created a monopoly in a local market. For many small businesses, there are no effective substitutes for local newspapers as a medium for reaching their customers, and this merger likely would have led to an increase in their advertising rates. Also this year, the Division required the nation's largest operator of radio stations to divest stations in four cities before moving forward with an acquisition that likely would have resulted in higher prices and reduced levels of service for radio advertising. These divestitures will assure continued competition for radio advertising in those local markets. And, earlier this year the Division also required two of the nation's largest newsprint manufacturers to divest a newsprint

mill to ensure that businesses across the nation that rely on newsprint enjoy the benefits of competition. In 2006, the Division required Divestitures in the AT&T/Southwestern Bell and Verizon/MCI mergers specifically aimed at preserving competition for business customers in over 700 hundred buildings located in 19 different metropolitan areas.

Other notable merger enforcement actions in the past year that benefited small business consumers include lawsuits to block and require divestitures in a type of paperboard commonly used to make folding cartons for commercial packaging, construction aggregates used as inputs in a variety of construction applications, coated steel sheets used for the manufacture of cans for food, aerosols, paints, and other products, inputs used in the steelmaking industry, and numerous agricultural commodities and inputs.

Monopolization

Also very important to small business is Section 2 of the Sherman Act, which gives the Division the authority to prevent business practices by a monopolist that undermine competition. Potential examples of such conduct can include certain instances of predatory pricing or bidding, refusals to deal, tying, exclusive dealing, bundled discounts, and loyalty discounts. The Division seeks to hear from small businesses having information or concerns of conduct that may be harmful to competition.

In recent years the Division has made it a top priority to develop clear and objective standards that will apply in Section 2 matters and to advance the state of the art in thinking about unilateral conduct. Indeed, the Division and the Federal Trade Commission conducted a series of hearings, spanning over 11 months and concluding in May 2007, during which the agencies received submissions and heard from 28 different panels and 130 panelists, including important

participation from the business community Very recently, on September 8, 2008, the Antitrust Division released a report “Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act,” which culminated many years of discussion and inquiry into the contours of this important area of antitrust law. We believe that a better understanding of the many practices and strategies that can impede the competitive process will be an important tool for increasing our enforcement capacity in this area and helping to protect America's small businesses.

Competition Advocacy

In addition to its law enforcement role, the Antitrust Division regularly seeks to promote competition through broader advocacy efforts. Competition advocacy includes providing advice and analysis concerning a variety of matters, such as legislation and regulation at both the federal and state levels, Supreme Court cases, and international efforts. The Division believes that robust competition advocacy is an important part of our mission to protect competition. For example, the Division’s competition advocacy efforts have helped small business in the real estate brokerage industry, where the Division has provided states with guidance on how rules regulating realtors have made it difficult or impossible for some innovative new business models to enter the market.

The Division also has provided assistance to bar organizations and states to ensure that the definition of the practice of law does not restrain competition between lawyers and non-lawyers for many services where specialized legal knowledge and training is not demonstrably necessary to protect the interests of consumers. Most notably, in many states both lawyers and non-lawyers compete to provide real estate closing services to consumers.

Small businesses also rely on telecommunications services in order to conduct their business and serve their customers. The Division watches the telecommunications industry closely for appropriate competitive advocacy opportunities, and last year provided guidance on how states could make it easier for new competitors to enter markets for video services.

In all of the Division's activities—enforcement against cartels, mergers, and monopolization that can harm competition, and competition advocacy to promote the interests of American consumers—the Division frequently is in contact with small businesses. In our merger investigations, we usually interview customers to see what the real-world effect of the merger will be in the market, and the information we receive from small businesses is often crucial to our review. Whether it is conducting interviews to determine the effects of a proposed merger, or receiving information about potentially anticompetitive practices in an industry, complaints from small businesses continue to be among the best sources of information for our enforcement. We take such information very seriously and vigorously pursue any that indicate a violation of the antitrust laws.

Conclusion

If firms are allowed to misuse market power to eliminate competition, or if groups of firms are allowed to collude to prevent competition by fixing prices or allocating customers, or if anticompetitive mergers increase prices, reduce output or stifle innovation, our economy will suffer. And because the success of virtually any small business depends greatly on the general condition and health of the economy, unchecked anticompetitive behavior that hurts the economy also hurts small business. Thus, although it is important to understand the consumer benefits of antitrust policy, it is also important to note that the central role of antitrust in maintaining a competitive marketplace also benefits small businesses.

Perhaps more than any other society on earth, the United States is dependent on the willingness of its people to take risks in pursuit of success. The antitrust laws help to sustain our nation's entrepreneurial spirit and to preserve the freedom to innovate by ensuring that markets are open, that new entrants can compete, and if they build a better mouse trap, that they have the chance to succeed. The importance of this role can't be overstated: in keeping markets contestable, the antitrust laws enrich our social fabric as well as our nation's economy.

Thank you for this opportunity to share my thoughts with the Committee on the importance of competition and antitrust enforcement to keeping markets open to small business.