DEPARTMENT OF JUSTICE

Reflections on the Past Year
At the Antitrust Division

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I would like to thank Global Competition Review and the organizers of this conference for inviting me to speak here today. It is a real privilege for me to be able to address this group as a member of the Antitrust Division of the United States Department of Justice. [1]

I joined the division just over one year ago as the Deputy Assistant Attorney General for Litigation. It has been an exciting year for me and a career highlight to be able to work with the many outstanding lawyers, economists and other professionals in the division. Every day they are called upon to address issues ranging from criminal enforcement to civil enforcement to merger control to antitrust policy to appellate advocacy to coordination with other agencies at state, federal and international levels. And they consistently rise to the occasion with dedication and in the finest tradition of public service.

I learned this right from my first month on the job. I arrived during a period of intense pretrial preparation for the division's litigated challenge to the US Airways/American Airlines merger and just several weeks before the start of trial in the Bazaarvoice case. I had the privilege of attending the first morning of the Bazaarvoice trial and then walking down the hall of the courthouse to watch opening statements in a criminal trial handled out of our San Francisco office.

I was immediately impressed, though not surprised, by the tireless work and superb lawyering of these litigation teams, as well as the teams working on dozens of other civil and criminal investigations and litigations throughout the division. And this was in the midst of a government shut-down and following a period of hiring freezes that had significantly depleted our resources.

For my remarks today, I have chosen to focus on the merger enforcement aspect of our mission, though much of what I say applies broadly across all of our areas of enforcement responsibility. I will share some of the insights I have gained from my first year on the job, discuss several remedies we have obtained in merger cases during this time, and hopefully draw a few lessons from all of this.

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[1] I am grateful to Ryan Danks, Daniel Haar, Anne McFadden, John Snyder and other colleagues who have assisted with research, drafting and review of this speech.

First, however, a short historical detour. Next month will mark one hundred years since the Clayton Act was signed into law. Section 7 of this statute is the origin of our "substantial lessening of competition" test and is the principal substantive law on which contemporary U.S. merger control is based.

The 1914 Clayton Act was a signature piece of antitrust legislation that grew out of President Woodrow Wilson's Progressive Movement. It took its name from Henry Delamar Clayton, Jr., a nine-term congressman from Alabama who introduced the bill in the House of Representatives. As an aside, Representative Clayton was appointed to the federal bench in May 1914 and left the Congress before the bill bearing his name became law.

The Clayton Act was intended to fill perceived gaps in the reach of the Sherman Act of 1890. As stated in a Senate Judiciary Committee Report on the proposed bill, the drafters set out to "prohibit and make unlawful certain trade practices which, … singly and in themselves, are not covered by the [Sherman Act] … and thus … to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation."[2] Of relevance to today's discussion, the Clayton Act prohibited anticompetitive stock acquisitions. Section 7 of the law provided, in pertinent part, that no corporation shall acquire the stock of another corporation where "the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition...."[3]

The Celler-Kefauver amendments of 1950 – also known at the time as the Antimerger Act – extended Section 7 to mergers and asset transactions in addition to stock acquisitions, and its prohibition was reframed to address transactions that may substantially lessen competition in any line of commerce in any section of the country rather than substantially lessen competition between the acquired and acquiring parties themselves.

[2] S. Rep. No. 63-698, at 1 (1914).

[3] Clayton Antitrust Act of 1914, § 7, Pub. L. 63-21, 38 Stat. 730 (1914).

There is no obvious precedent that we have been able to uncover on which the phrase "may be to substantially lessen competition" was based.[4] According to an analysis of the legislative history of the Clayton Act compiled by Mr. Breck McAllister and published by the ABA Antitrust Section in 1953, the phrase "substantially lessen competition" was included in the House version of the bill.[5] That version would have imposed criminal penalties under Section 7 but required proof that the effect of the acquisition at issue actually was to substantially lessen competition or create a monopoly.[6] The Senate opposed criminal penalties for violation of the Act but introduced the qualifier "may be" in its version of the bill, thus broadening the scope of the prohibition while limiting the consequences of a violation to civil remedies.[7] These changes were adopted by the conference committee and reflected in the version that was signed into law.

In his analysis of the statutory language, Mr. McAllister explained the challenge that was facing lawmakers a hundred years ago when they arrived at the final version of Section 7:

> It is not too difficult, as an exercise in statutory drafting, to prohibit all acquisitions of the business of one competitor by another competitor. It is extremely difficult to set down standards which will permit choices to be made by enforcement officials and courts that, on the one hand, will not be too harsh and severe and, on the other hand, will not sacrifice

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[4] The phrase did appear in a Harvard Law Review article discussing the Standard Oil and Tobacco cases just a couple years earlier. *The Standard Oil and Tobacco Cases*, 25 Harv. L. Rev. 31, 40-41 (1911-1912) ("Former cases decided that the [Sherman] Act forbade the substantial lessening of competition by agreement or combination, and that the function of the court was merely to decide if competition had been substantially lessened in such manner. [The Tobacco] case decides that the substantial lessening of competition is illegal only if in the opinion of the court the public is injuriously affected."). A similar phrase was also used in a revision to the Georgia Constitution in 1877, which provided that "the general assembly of this state shall have no power to authorize any corporation to buy shares, or stock, in any other corporation in this state, or elsewhere, or to make any contract of agreement whatever, with any such corporation, which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses, or to encourage monopoly; and all such contracts or agreement shall be illegal and void." I am not aware of any evidence, however, that either of these sources served as inspiration for the language in Section 7 of the Clayton Act.

[5] B. McAllister, *Where the Effect May Be to Substantially Lessen Competition or Tend to Create a Monopoly*, 3 A.B.A. Antitrust Section 124, 125 and n.5 (1953); *see also* H.R. 15,657, 63d Cong. § 8 (as passed by the House June 2, 1914) (including phrase "where the effect of such acquisition is to . . . substantially lessen competition"); H.R. 15, 657, 63d Cong. § 7 (as originally introduced in the House, April 14, 1914) (same except "lessen competition" rather than "substantially lessen competition").

[6] McAllister, *supra* note 5, at 125.

[7] *Id.; see* S. Rep. No. 63-698, at 43, 46, 62 (1914) (proposed revision by Senate Judiciary Committee striking criminal penalties "in view of the experimental state of this legislation"); 51 Cong. Rec. 14,464 (1914) (replacing "is" with "may be" on Senate floor).

> the legislative purposes in important respects if not frustrate them to a very considerable extent. It is not a simple task to strike a balance in a statutory phrase or formula.[8]

When I read this passage preparing for my remarks today, I thought it captured well the challenge we and our predecessors in the enforcement agencies have faced over the past century as we work to strike the right balance when determining what sorts of mergers violate the law.

The division's approach has obviously evolved significantly over time as we have learned from experience, as new economic tools have become available, as industry has changed, and as the courts have decided cases under Section 7. And since 1968, our framework for analyzing mergers has been set forth in publicly available guidelines, which have been updated periodically to reflect this evolution.

I will conclude the history lesson now and turn to two important aspects of our present day efforts that I have spent much of the past year thinking about: the evidence that guides our analysis and remedying anticompetitive transactions. As I discuss my observations about these topics, I want to make clear that much of the advocacy I have seen during my time at the division has been excellent. The antitrust counsel we deal with regularly are among the finest lawyers in any field. But I do want to share some candid thoughts about less effective approaches I have seen on occasion.

Evidence: The Building Blocks of Merger Analysis

Today, the starting point for our analysis of most mergers is the 2010 version of the Horizontal Merger Guidelines. And for me, the most important sentence in that document is the first sentence of section 2: "The Agencies consider any reasonably available and reliable evidence to address the central question of whether a merger may substantially lessen competition."[9]

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[8] McAllister, *supra* note 5, at 139-40.

[9] U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines (Aug. 19, 2010), §2. Evidence of Adverse Effects, *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html; *see also* U.S. Dep't of Justice & Federal Trade Comm'n, Commentary on the Horizontal Merger Guidelines (March 2006), at 17 ("The Agencies examine whatever evidence is available and apply whatever tools of economics would be productive in an effort to arrive at the most reliable assessment of the likely effects of proposed mergers."), *available at* http://www.justice.gov/atr/public/guidelines/215247.htm.

Any reasonably available and reliable evidence: it seems almost too elementary to say but merger enforcement is highly fact-specific and evidence is what drives our decisions. [10] Not rhetoric. Not public relations campaigns. Not editorials and commentary. Not form letters from third parties. Evidence. It drives our conclusions about whether a merger is likely to cause competitive harm, it drives our assessment of litigation risks, and it drives our decisions about whether to agree to a particular remedy. It is what we talk about when we get together internally to discuss an investigation and it is what we talk about when you leave the room after meeting with us.

Section 2 of the Guidelines lists some of the types and sources of evidence that we often find important, and I can tell you that in my year at the Antitrust Division, all of them have featured prominently in a number of our investigations.

It has always puzzled me when commentators try to generalize about the importance of certain categories of evidence in the context of merger cases. They ask, "what is the role of customer testimony?" or "how important are company documents?" The simple answer is that it depends on the facts of the case. Just as one cannot generalize about the importance of eyewitness testimony in a robbery case without knowing where the witness was at the time of crime, whether he had a clear view, whether he had good eyesight, etc.,[11] so too is it impossible to generalize about the importance of particular categories of evidence in merger cases.[12]

Take customer testimony. We often place considerable weight on what we hear from customers. Customers can provide invaluable information about how competition works in an industry, how their suppliers react to the presence of each other in bidding situations, whether

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[10] The types of evidence listed in Section 2.1 of the Guidelines include effects observed in consummated mergers, comparisons based on experience, market shares and concentration levels, extent of head-to-head competition and the role of merging parties in disrupting the market. The sources of evidence listed in Section 2.2 include the merging parties themselves, customers, other industry participants and observers.

[11] *See, e.g.*, My Cousin Vinny (1992).

[12] As noted in Section 1 of the Guidelines, merger analysis "is a fact-specific process through which the Agencies, guided by their extensive experience, apply a range of analytical tools to the reasonably available and reliable evidence to evaluate competitive concerns in a limited period of time."

rivals to the merging parties offer competitive products and prices, whether prospective entrants are likely to be qualified within a reasonable period of time, and the like.[13]

But customers can also lack critical knowledge about what drives competitive decisions by their suppliers, and they can have their own biases. This was the situation in the Bazaarvoice case, for example, where the court found that customer testimony regarding the effect of the merger on competition should be given little weight. Judge Orrick found that many customers lacked perspective on the economic and legal issues; were not privy to much of the evidence; had paid little or no attention to the merger; had varying levels of knowledge, sophistication and experience; and/or were biased.[14]

While we are on the topic of customer testimony, I would like to offer a couple thoughts about effective advocacy on behalf of third parties who want us to take their concerns about a merger into consideration. Merger enforcement is not a popularity contest. We do not speak to customers and other third parties because we are taking a poll on who likes the deal and who doesn't. We are trying to gather facts that will help us evaluate the competitive effects of the merger and decide whether we are likely to be able to prove it in court. Thus, while we are certainly interested in your bottom line, please come to us with detailed facts about how you have seen competition work and why you believe the merger will result in harmful effects to the market.

Also, while we understand and respect requests for confidentiality and anonymity – and will scrupulously honor them during our investigative process – we are also looking for witnesses to help us prove our case. I would encourage third parties who have serious concerns about a merger to let us know as early in the process as possible what they can offer in the way of evidence and witness testimony that might be of assistance to a court in understanding how the merger might affect the market at issue.

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[13] *See generally* 2010 Horizontal Merger Guidelines, *supra* note 9, § 2.2.2 Customers; 2006 Commentary, *supra* note 9, at 9.

[14] United States v. Bazaarvoice, 13-cv-00133, 2014 WL 203966 at *3-4, 2014-1 Trade Cases ¶78,641 (N.D. Cal. 2014).

Company documents are also extremely important to our analysis and they offer merging parties an excellent opportunity to convince us why their view of the world is correct. Not necessarily documents that benefitted from input from antitrust lawyers while a deal was being considered, but contemporaneous business records of a company's activities. Point us to business plans, internal presentations, bid lists, emails and other business records that corroborate your view. We are often persuaded by a party's argument when the party is able to point to credible, contemporaneous supporting documents.

But recognize that we need a complete picture and we will want to understand statements in your documents that contradict what you are telling us. We are naturally skeptical of attempts by parties to disavow unhelpful statements in their documents. That does not mean that any particular statement is necessarily dispositive on an issue – after all, company executives often have imperfect information themselves and have been known on occasion to exaggerate their own competitive strength – but you should take unhelpful documents seriously, because we do. We will obtain testimony under oath from the employees who created them, we will assess how they fit with other evidence in the case, and we will not hesitate to use them in pleading and proving our case at trial.

Increasingly, our review of merger transactions is marked by close cooperation with state and foreign enforcement officials. Where the merging parties agree to waive applicable confidentiality restrictions, we are able to share relevant business confidential information. There is also considerable public or otherwise non-confidential information that we can exchange with our enforcement colleagues. Particularly where it is aided by waivers, collaboration can enhance our understanding of market conditions and can benefit merging parties by reducing the potential for inconsistent remedies.

Economic evidence is critically important to what we do. We have approximately fifty PhD economists in the Antitrust Division and they play a vital role in all of our investigations and litigated cases. There is at least one economist, often more, assigned to each matter, and they are active participants in our internal deliberations. They bring an economic perspective to every discussion and help the lawyers think through how a particular merger is likely to affect the market. They also work with the available data to develop a better understanding of competition, formulate theoretical models, econometrically estimate effects, and evaluate economic work submitted by the parties. What a great benefit it is for lawyers in the division to have this extraordinary resource available to us.

On a personal note, for the past year I have had the great pleasure of sitting next door to Aviv Nevo, our former Deputy Assistant Attorney General for Economics, who recently left the division to return to academia. We were in and out of each other's office virtually every day, discussing pending investigations, economic theory, data techniques, expert witnesses and many other topics. He taught me a lot more economics than I taught him law. Aviv was a tremendous asset to the division during his time here and we are very fortunate to have a world-class economist like Nancy Rose stepping into that role.

A few words of caution about economic evidence, however. As the economists at the division frequently remind me, economic models are limited by how well they fit with the facts of a particular case. I have been struck by how often parties present us with economic work that does not hold up to scrutiny. This is especially so when the output of a model does not match the hard evidence in the case. If the merging parties frequently bid against each other, their documents show they discount to win business from each other, and we have sophisticated customers explaining that they get better prices by playing the two parties off each other, chances are we won't be persuaded by a model that purports to show they are not close competitors. Nor, I suspect, would a court.

Econometric evidence is a tool that can be very persuasive. But how persuasive it is depends on whether the assumptions are credible, whether the estimation method is valid, and whether limitations of the data have been respected. We are highly skeptical of work that we cannot probe and test on all of these dimensions. The good news is that a strong model – presented in a balanced way, based on sound principles, and supported by the facts of the case – can be immensely valuable to us and to you. We take them seriously and they can influence the outcome of an investigation.

Our focus on evidence permeates everything we do when we assess transactions under the Horizontal Merger Guidelines. Take entry, for example. Parties routinely assert that competitors are waiting in the wings to enter post-transaction. Section 9 of the Guidelines tells us, however, that entry must be likely, timely and sufficient to "deter or counteract any competitive effects of concern so the merger will not substantially harm customers." [15] As Section 9 further explains, we will "consider reasonably available and reliable evidence bearing on" these entry issues. This typically includes information developed through independent investigation, as well as information proffered by the merging parties.[16]

We will interview and take testimony from customers and potential entrants to hear what they say about the likelihood of entry. We will look at party and third-party documents to see whether they predict significant entry or even worry about it. We will look at the economics of entry and how it might affect a particular market. And we will ask how quickly entry is likely to occur, if at all, in response to a price increase; and how much customers might be harmed in the meantime. I have found in my time at the division that parties often raise entry arguments without bringing forward credible evidence to help us see this issue their way. And I have also found that the evidence we uncover often points in the opposite direction, that is, entry is difficult and unlikely in a particular market.

I have a similar observation about efficiencies. Just because a projected synergy or cost saving appears in a spreadsheet or investor presentation does not make it real. Section 10 of the Guidelines provides that "[e]fficiency claims will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means."[17] In my experience at the division, parties often fail to meet this standard.

Before discussing remedies, I would like to say a few words about the importance of candor in dealing with the division. On more occasions than I would have expected during my time here, the arguments advanced by party executives or their counsel have lost credibility because they were based on asserted facts that ignore or contradict important evidence. Not only does this make it difficult or impossible for us to credit these arguments during our internal deliberations, it can also result in significant additional work for us and for the parties. We welcome zealous and creative advocacy – I personally enjoy debating a novel theory or unusual

[15] 2010 Horizontal Merger Guidelines, *supra* note 9, § 9 Entry.

[16] *Id.*

[17] *Id.*, § 10 Efficiencies.

twist on how competition might work in a particular industry – but it is critically important for parties to get the facts right before presenting their arguments to us. Again, experienced antitrust counsel understand this.

Remedies: The Benefits of Realistic and Constructive Engagement

I turn now to the remedies I have seen during my time at the division. While we are always prepared to go to court to challenge an anticompetitive merger, success for consumers is not necessarily a blocked transaction. In many instances, the division can achieve success without expending the time and resources involved in protracted litigation through meaningful consent decrees that target only the anticompetitive portions of a deal. As Assistant Attorney General Baer has emphasized, "Litigation is not our preferred option."[18]

I begin with a couple recent success stories. The first is Landmark Aviation's acquisition of Ross Aviation in July of this year.[19] Landmark and Ross both provide fuel and related flight support services to general aviation customers by way of their fixed base operator assets, also known as FBOs, at various airports around the country. General aviation customers include charter, private, and corporate aircraft operators. There was an overlap at only one airport, Scottsdale Municipal Airport. The transaction would have combined the only two FBOs serving general aviation customers at that airport, likely resulting in higher prices and lower quality of services.

The parties offered very early in the initial HSR waiting period to remedy the Scottsdale overlap and went a step further by identifying a candidate divestiture buyer. We were able to investigate and rule out other potential issues in the transaction, review the adequacy of the proposed divestiture package and buyer, and negotiate a consent decree that allowed the parties to close their merger within sixty days of their initial HSR filing. The decree, which was filed in late July and remains subject to final court approval, was achieved without the need for a large

[18] Bill Baer, Remedies Matter: The Importance of Achieving Effective Antitrust Outcomes, Remarks as Prepared for the Georgetown 7th Annual Global Antitrust Enforcement Symposium (Sept. 25, 2013), *available at* http://www.justice.gov/atr/public/speeches/300930.pdf.

[19] Press Release, U.S. Dep't of Justice, Justice Department Requires Divestiture in Landmark Aviation's Acquisition of Ross Aviation (July 30, 2014), *available at* http://www.justice.gov/atr/public/press_releases/2014/307436.htm.

production of documents or data. The divestiture was successfully completed and customers at the Scottsdale Municipal Airport continue to get the benefit of competition for FBO services.

In July and August of this year, the division reviewed Tyson Food's proposed cash tender offer for Hillshire Brands Company.[20] This $8.5 billion acquisition combined Tyson, one of the world's largest meat companies, with Hillshire, a manufacturer and marketer of brand name food products. With cooperation from the parties, the division was able to conduct a very efficient but thorough investigation of potential competitive issues even before an HSR filing was made.

We were able to rule out competitive concerns in all products except one. Both companies are large purchasers of sows used for making sausage. Tyson's Heinold Hog Markets division buys sows from farmers, sorts them at buying stations, and resells and trucks them to sausage producers. Hillshire also buys sows from farmers but uses them to make sausage for its own product lines. Our investigation determined that the combined company would have accounted for more than a third of sow purchases from U.S. farmers – a highly fragmented group of sellers that depends on competition from a relatively small number of large buyers to get competitive prices – and the transaction likely would have substantially lessened competition in this buying market.

To resolve our concerns, the parties promptly offered to divest Tyson's Heinold Hog Markets division, which was a complete fix for the overlap of concern. We were able to investigate the sufficiency of this divestiture package in a relatively short period of time, and determine that it constituted a stand-alone business and that it would attract interest from qualified buyers. Accordingly, we entered into a proposed consent decree, subject to court approval, that requires Tyson to divest Heinold Hog Markets in its entirety to a buyer approved by the division within 90 days. Tyson is required to hold the divestiture business separate and preserve it in the meantime. The decree was filed with the court and the parties were able to close their merger within 30 days after making their HSR filing, and American farmers will continue to get the benefit of vigorous competition to buy their sows. The division was joined in

[20] Press Release, U.S. Dep't of Justice, Justice Department Requires Divestiture in Tyson Foods Inc. Acquisition of the Hillshire Brands Company (Aug. 27, 2014), *available at* http://www.justice.gov/atr/public/press_releases/2014/308299.htm.

its complaint and settlement by the states of Illinois, Iowa, and Missouri, each of which is a major pork-producing state.

I would now like to say a few words about up-front divestiture buyers. Because the division needs to ensure the effectiveness of divestitures, we sometimes insist that an up-front buyer be identified in the proposed final judgment. We are most likely to insist on this where the parties are proposing a divestiture of assets that do not constitute a stand-alone business, where we are uncertain that the divested business will remain competitive, or where there is a risk that the proposed divestiture might not attract qualified buyers. In such circumstances, constructive engagement with the division to identify an up-front buyer can benefit the merging parties, as well as competition.

Requiring an up-front buyer greatly reduces the risk to the division and consumers of a failed remedy. It provides more certainty that the buyer is capable of success and that the right group of assets has been identified for divestiture. Prompt divestiture to an up-front buyer also minimizes the risk of deterioration of the business to be divested and lost competition during a sale process. It also avoids post-consummation investigation costs and burdens.[21] Simply put, up-front buyers can offer more certainty of an effective remedy from our perspective. [22]

Over the past year, the division has required upfront buyers in cases involving markets for broadcast television spot advertising,[23] single-use sensors used in the manufacture of steel, [24] flour milling,[25] and as already mentioned, FBO services at airports.[26]

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[21] *See* U.S. Dep't of Justice, Policy Guide to Merger Remedies (June 2011), at 23, *available at* http://www.justice.gov/atr/public/guidelines/272350.pdf.

[22] The division's process for approving an up-front buyer is the same as the process for approving a buyer in a post-consummation divestiture except it must be completed before we enter into the consent decree. First, we must ensure that sale of divestiture assets to the proposed up-front buyer will not itself cause competitive harm. Second, we must be certain that the proposed up-front buyer has the incentive to use the divestiture assets to compete in the relevant market. Third, the division performs a "fitness" test to ensure that the proposed up-front buyer has sufficient acumen, experience, and financial capability to compete effectively over the long term. We will also review the terms of the sales contract between the parties' and the proposed up-front buyer to ensure that the parties' have not placed unreasonable restraints on the buyer's ability to use the assets to compete in the market or otherwise retain any control over the assets. *Id*. at 28-33.

[23] Press Release, U.S. Dep't of Justice, Justice Department and the Pennsylvania Office of Attorney General Require Divestiture from Sinclair Broadcast Group in Order to Proceed with Its Acquisition of Perpetual Corp. (July 15, 2014), *available at* http://www.justice.gov/atr/public/press_releases/2014/307134.htm.

Working with us to identify problems and solutions can save parties and the division time and resources while ensuring that customers are protected from the anticompetitive aspects of a proposed merger. As Assistant Attorney General Baer has emphasized, "early and constructive engagement with the division regarding remedies often allows the merging parties to close a transaction sooner and on terms they find palatable."[27]

For this engagement to bear fruit, however, the parties must be open to remedial steps that will effectively address the competitive concerns identified by the division. It is, of course, the parties' right to maintain, including through litigation, that a transaction does not threaten competition, or that a very limited remedy is sufficient. In some cases, evidence that the parties provide is sufficiently convincing that the division ultimately concludes that harm is unlikely and decides that no remedy is required. Often, however, parties ultimately end up agreeing to settlement terms that could have resolved the matter early on.

In the division's challenge to the merger of US Airways and American Airlines, it was necessary to litigate until the eve of trial to obtain a remedy that will adequately preserve competition. This transaction combined two of the five airlines with the largest national fleets, and two of the four legacy airlines. The merged entity also would have controlled 69% of the takeoff and landing slots at Washington Reagan Airport. The division, six states and the District of Columbia filed suit to block the proposed transaction in August 2013.[28]

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[24] Press Release, U.S. Dep't of Justice, Justice Department Requires Heraeus Electro-Nite LLC to Divest Assets Acquired from Midwest Instrument Company Inc. to Keystone Sensors LLC (Jan. 2, 2014), *available at* http://www.justice.gov/atr/public/press_releases/2014/302701.htm.

[25] Press Release, U.S. Dep't of Justice, Justice Department Requires ConAgra, Cargill, CHS, Horizon Milling to Divest Four Significant Flour Mills to Go Forward with Ardent Mills Joint Venture (May 20, 2014), *available at* http://www.justice.gov/atr/public/press_releases/2014/306051.htm.

[26] FBO Press Release, *supra* note 19.

[27] Baer Georgetown Speech, *supra* note 18, at 3.

[28] Press Release, U.S. Dep't of Justice, Justice Department Files Antitrust Lawsuit Challenging Proposed Merger between US Airways and American Airlines (Aug. 13, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/299960.htm; Remarks as Prepared for Delivery by Assistant Attorney General Bill Baer at the Conference Call Regarding the Justice Department's Lawsuit Challenging US Airways' Proposed Merger with American Airlines (Aug. 13, 2013), *available at* http://www.justice.gov/opa/speech/remarks-prepared-delivery-assistant-attorney-general-bill-baer-conference-call-regarding

In November, after several months of intense pretrial discovery, we obtained a remedy that required the parties to divest key assets at some of the largest, most capacity-constrained airports across the country. In particular, the parties agreed to divest 104 slots at Reagan National along with associated ground facilities, 34 slots at LaGuardia Airports along with associated ground facilities, and gates at airports in Chicago, Boston, Miami, Dallas and Los Angeles.[29] This is by far the largest set of divestitures ever obtained in an airline merger. The divestitures will provide non-legacy competitors, including Jet Blue, Southwest, and Virgin America, the opportunity to expand into or increase their presence at important constrained airports, bringing additional low-cost competition both to these airports and system-wide. As noted by Attorney General Holder, "the Department's ultimate goal [] remained steadfast through this process – to ensure vigorous competition in airline travel."[30] In April, the court found that the settlement was in the public interest and approved it without modification.[31]

Conclusion

So what should one take away from all of this? I hope you take away that advocacy before the Antitrust Division is most effective when it zeros in on key evidence that will help us understand why you believe a merger under review will not harm competition. Candor and completeness are essential. Submissions should be carefully vetted for accuracy before coming to us. Economic work should be well-founded, supported by the data, and consistent with other evidence in the case. We welcome a healthy discussion of theory, legal defenses and how to think about our own guidelines. But it begins and ends with the facts, the economics and the evidence in the case.

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[29] Press Release, U.S. Dep't of Justice, Justice Department Requires US Airways and American Airlines to Divest Facilities at Seven Key Airports to Enhance System-Wide Competition and Settle Merger Challenge (Nov. 12, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/301616.htm; Remarks as Prepared for Delivery by Assistant Attorney General Bill Baer at the Conference Call Regarding the Justice Department's Proposed Settlement with US Airways and American Airlines (Nov. 12, 2013), *available at* http://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-remarks-conference-call-regarding-justice

[30] Nov. 12, 2013 Airlines Press Release, *supra* note 29.

[31] Press Release, U.S. Dep't of Justice, Justice Department Statement on U.S. District Court Finding that Department's settlement with US Airways/American Airlines is in the Public Interest (April 25, 2014), *available at* http://www.justice.gov/opa/pr/justice-department-statement-us-district-court-finding-department-s-settlement-us.

If parties want to defend their merger through a litigated challenge, that is obviously their right and we respect it. But if they wish to resolve competitive concerns through an agreed remedy, they should bear several things in mind. Be forthcoming about potential areas of competitive concern. Propose clean divestitures that include all assets necessary for the purchaser to be an effective, long-term competitor. Be prepared for the possibility of needing to identify a qualified up-front buyer. And provide us the information we need to assess the proposed remedy. If parties do these things, we will work with them to get through the process as expeditiously as possible.

Thank you.