DEPARTMENT OF JUSTICE

"BE CAREFUL WHAT YOU WISH FOR: SOME THOUGHTS ON THE MERGER REVIEW PROCESS"

Address by

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Good morning ladies and gentlemen. It is my great pleasure to be here with you today and to share the podium with my good friend and mentor, FTC Chairman Tim Muris. I am particularly pleased to present this, my first public address as Assistant Attorney General of the Antitrust Division, to the Antitrust Section of the American Bar Association. The long-standing dialogue between the Division and the antitrust bar has been beneficial in stimulating critical examination of important issues of antitrust law and practice. Thank you, Ky, and other members of the Section leadership, for providing me this opportunity to share my initial perspectives on the future direction of the Antitrust Division, and to do so among friends and colleagues with whom I have spent most of my career.

It was quite an honor to be selected to head the Antitrust Division of the country that invented antitrust law and made it a cornerstone in the effort to promote and preserve an efficient free market economy. In assuming this position, one cannot help but reflect upon the amazing accomplishments of those who have held it before me:

- Bill Baxter and Doug Ginsburg, who brought modern micro-economic theory into the mainstream of antitrust doctrine;
- Jim Rill, whose vision and statesmanship in the area of international antitrust laid the framework for modern enforcement in an increasingly global economy;
- Anne Bingaman, whose boundless and infectious enthusiasm brought life to Jim's vision of aggressive enforcement directed against multinational cartels; and

- Joel Klein, whose civil enforcement initiatives fearlessly confronted some of the most complex issues of the so-called New Economy.

Having been in office for less than two months, it is far too early to even think about what sort of legacy I might leave behind. I, however, will be completely satisfied if future observers look upon my tenure at the Antitrust Division as one in which our organization served as a formidable enforcer of the antitrust laws, and did so in a fair, consistent, and transparent manner. In other words, my first order of business has been to focus on our core mission: effective enforcement of the antitrust laws.

To that end, my first few weeks at the Antitrust Division have been spent on the fundamentals of the agency — our structure, our deployment of resources, our investigative techniques, our programs for recruiting and training staff — a bottom-up and top-down evaluation of what we do and how we do it. I also have spent a considerable amount of time assembling an extraordinary team of individuals — all of them experienced, talented antitrust practitioners — who complement the exceptional career leadership with which you all are familiar.

Debbie Herman, one of the most effective young partners at my former law firm, Jones Day, joins the Division as the Deputy Assistant Attorney General for civil enforcement. Hew Pate, recently referred to by *USA Today* as "an elegant guy," joins us as the Deputy Assistant Attorney General for civil enforcement in the regulated industries. Hew, who practiced at Hunton & Williams, brings to the Division a wealth of expertise in the fields of antitrust and intellectual property litigation. Debbie and Hew were able to ease into their new jobs with relatively simple matters — GE/Honeywell for Debbie and the United/US Airways deal for Hew. Jim Griffin, who

is leading the Division to what will be a record year of cases, fines and sentenced incarceration, will continue in his capacity as Deputy Assistant Attorney General for criminal enforcement. Michael Katz will be joining us in September as the Deputy Assistant Attorney General for economic analysis. Currently a member of the faculty at the University of California-Berkeley, Michael is one of the leading academic micro-economists in the nation and is widely acknowledged as a thought-leader in the fields of technology and network competition.

International antitrust issues will continue to be a high priority for the Division over the coming years. Recognizing the need for constant focus on that area, I am restructuring deputy responsibilities to have one Deputy Assistant Attorney General dedicated almost exclusively to international matters. I hope that appointment will be completed in the next few weeks, as we move into an active fall season of international consultations and multi-national enforcement projects. I would very much like the Division to be at the forefront of making substantive and procedural convergence more than just an often-stated aspiration.

Rounding out the additions to the front office staff are four attorneys who will serve as Counsel. Both David Wales and Peggy Ward have been at the Division for a little over a month and a half now. Dave and Peggy come to us from Shearman and Sterling and Jones Day, respectively, where they each had ample opportunity to develop and sharpen their skills as antitrust lawyers. Joseph Gibson, a veteran of the House Judiciary Committee, will serve as legislative counsel, and joining our team in a few weeks will be John Mitnick, an experienced antitrust lawyer from Atlanta.

While I am on the topic of personnel, I would like to acknowledge publicly the contributions of John Nannes, who left the Division last Friday. John, of course, held down the

fort while I was awaiting confirmation, and did so with unerring style, grace and commitment to the public interest. His thoughtful advice, guidance and, most of all, his friendship have been invaluable to me during this period of transition.

In thinking about the "transition" and what, if any, implications this organizational change might have on the Division, let me just say clearly and unequivocally that the Division's current mission is no different today than it was under my predecessors. The core values of antitrust law, as interpreted by the courts, remain constant. Under the rule of law, it is those values, not the predispositions of the person holding my job, that dictate the enforcement agenda. Anyone who is expecting a major shift in enforcement policy is likely to be disappointed. Nevertheless, the hallmark of any successful and enduring organization is the willingness to engage in a periodic re-evaluation of the means and methods by which it strives to achieve its mission. As we all know from our practices, all institutions must constantly adapt. In my remaining time today, I would like to discuss one area where our re-evaluation has led us to make some changes.

For quite some time now, the Division's approach to merger enforcement has been a subject of critical discussion. Private practitioners, including me when I was on the other side of the table, have been known to criticize the seemingly unnecessary burdens imposed by the HSR process and the reluctance of agency staffs to focus on and discuss in specific terms particular areas of competitive concern. At the same time, Division attorneys complain that merging parties can be less than fully forthcoming with necessary information and sometimes play tactical games to manipulate the compressed time periods dictated by the statute.

Having spent time on both sides of the table, I can say without any reservation that both sides are right. The fact of the matter is that the element of surprise is the most highly over-rated

commodity in modern merger enforcement practice. Very often, both sides seem overly committed to tactics and strategies that, in the end, merely cancel each other out, while imposing unnecessary burdens on the process. As many of you know, I have spent most of my career on one side or the other of the merger enforcement process. To borrow a page from the hunt for the infamous Buffalo Bill in the *Silence of the Lambs*, "the first victim is always the one you know best." As such, my first initiative will be in the area of the merger enforcement process.

I truly believe that the agencies and the private bar could do a much better job in the merger enforcement process if we acknowledge our contributions to the problem and work to minimize the tactical maneuvering and gamesmanship. Both sides would benefit from an orderly review period that has greater procedural certainty. With these thoughts in mind, the Antitrust Division has undertaken to explore ways in which we can improve the process.

As such, commencing shortly after Labor Day, the Division will implement a new program for conducting merger investigations under Hart-Scott-Rodino. The goals of the program are to more quickly identify critical legal and economic issues regarding the proposed transaction, facilitate more efficient and more focused investigative discovery, and provide for an orderly process for the evaluation of the evidence. Ultimately, the program should allow the Division to deploy its investigative resources more efficiently and, where possible, reduce the investigative burden upon parties proposing transactions. This effort does not purport to be a re-invention of the wheel. Rather, it is an attempt to expand upon and institutionalize reforms that already have been implemented successfully in certain investigations, but have not yet taken root as standard operating procedures.

The program has two parts: (1) aggressive use of the initial HSR waiting period to identify

possible competitive issues and routes of inquiry; and (2) early consultations with parties to negotiate, where possible, specific procedural agreements for the investigation. Under the program, the Division's chiefs, in consultation with the relevant Deputy Assistant Attorney General, will be authorized to commit the Division to such agreements, subject to the parties' performance of their obligations. Among other things, the Division, in appropriate cases, may commit to time tables for reaching interim investigative conclusions, articulating specific competitive concerns or making final enforcement decisions regarding the proposed transaction. The parties, on the other hand, will be asked to make specific procedural undertakings with regard to the submission of information and compliance with particular investigative requests. In the end, both sides will be able to proceed with greater certainty as to how the matter will be conducted.

Each merger investigation presents unique challenges. Consequently, we will not be imposing any single model for procedural agreements. The chiefs and deputies, however, will have considerable discretion as to how, if at all, a procedural agreement should be structured. Key factors will include the complexity of the transaction under review, the Division's expertise in the markets and issues under investigation, the volume, types and availability of information required to make an appropriate law enforcement decision, and the likelihood of litigation in the event of an adverse prosecutorial decision. In some instances, it may not be possible to reach a procedural agreement at all.

Potential models for procedural agreements might include the following:

- In matters where the Division has considerable industry experience and one

or two key issues are likely to be dispositive, the Division may be willing to focus almost exclusively on those issues during the precomplaint investigation, subject to appropriate timing and procedural protections for the Division in the event of a challenge to the transaction.

- The Division may be willing to commit to providing substantive status reports to the parties at important junctures of the investigation, subject to the parties' willingness to provide needed information on a timely basis.

- The Division may enter into detailed investigative schedules culminating in a date certain for the ultimate enforcement decision by the Assistant Attorney General.

One model that will not be employed is asking parties to make major substantive concessions in exchange for a reduced discovery burden.

Recognizing that no one has a monopoly on good ideas, we, of course, invite counsel to propose alternate models keyed to the specific issues under investigation in a particular matter, and our chiefs will be open to any proposal that will serve the dual purposes of focusing the investigation while protecting the Division's law enforcement prerogatives.

The ultimate success of this program will depend upon the parties' willingness to recognize the Division's legitimate investigative needs and to work with our staffs to meet those needs in a flexible manner. Parties, of course, remain free to simply comply with HSR second

requests as they have done in the past and to hold the Division to the specific requirements of the Act. We, however, believe that a flexible approach to procedural agreements will introduce more order into the investigative process, eliminate needless tactical maneuvering, and reduce both public and private investigative burdens.

I will be very interested to see how the bar reacts to this initiative. While everyone always says that they want a focused investigation directed at the true issues in dispute, more focused investigations likely will lead to more effective merger enforcement. In this regard, I am reminded of the old axiom, "Be careful what you wish for, because you just might get it." For the next thirty days or so we will be refining this program within the Division, and expect to have a more detailed explanation available on the Division's web site in the near future.

This effort is just part of the Division's ongoing process of self-assessment and evaluation, a process that preceded my arrival and one that I am confident will continue long after my tenure at the Division comes to an end. And while such reforms are largely the result of initiatives originating within the Division, we welcome and encourage the private bar and business community to engage us in an ongoing dialogue regarding the ways in which we all can improve the process.

Thank you again for your time and consideration.