DEPARTMENT OF JUSTICE

ANTITRUST ENFORCEMENT AT THE DOJ —
ISSUES IN MERGER INVESTIGATIONS AND LITIGATION

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Good morning. It is a pleasure to be here in New York this morning at the Milton Handler Annual Antitrust Review. Before I begin, I would like to take a moment to recognize the organizational efforts of the Antitrust Committee of the New York City Bar, and in particular, Bill Rooney, whose diligence and tenacity helped make this event a reality.

Bill asked me if I could join this panel on fairly short notice, but I readily agreed. I mentioned that I thought the audience might enjoy hearing about some of our ongoing efforts and initiatives, and about procedural issues related to merger investigations and litigation. Bill replied: "Well that sounds great, but we were hoping that the panelists at the Handler event would deliver a speech of lasting importance on topics of a more jurisprudential nature." To which my response was, "Trying to deliver a grand vision of lasting importance for the future of antitrust enforcement sounds like a good way to earn the title of the most pompous and short-lived Acting Assistant AG." So, let me disclaim any such intent at the outset.

Instead, I would like to divide my time into two segments — first, I will spend a few moments talking about some of our ongoing enforcement and policy initiatives; second, I will discuss some of the important procedural issues that the Division and private parties face in the context of merger investigations and litigation.

I. Ongoing Enforcement and Policy Initiatives

We are in a transition period at the Antitrust Division these days. Charles James left his post as Assistant Attorney General in late November, followed by William Kolasky's departure as the Deputy Assistant Attorney General for International Enforcement in early December. As many of you know, Michael Katz, the Deputy Assistant Attorney General for Economic Enforcement, is planning to leave the Division in early 2003. We have made a few management changes to deal with these departures. Deborah Majoras is now the Principal Deputy with responsibility for all six of the Division's civil litigating sections and more. Ed Hand, the Chief of the Foreign Commerce Section, has agreed to serve as the Acting Deputy Assistant Attorney General for International Enforcement. We expect to bring on board a new Deputy for Economics Enforcement within the next couple of months,[1] after which time we hope to fill the International Deputy slot. As we move forward, we are placing particular emphasis on continuity and excellence in all of our endeavors. With that, I would like to provide a brief overview of some our recent accomplishments and ongoing efforts at the Division.

Criminal Enforcement

Our criminal program continues to move along at a swift pace, and the Division will continue to emphasize uncovering and ferreting out bid-rigging and other cartel-like criminal behavior. Between June 2001 and September 2002, the Division secured almost $125 million in criminal fines, convicted 24 corporations and 25 individuals, and sentenced 25 individuals to prison terms averaging 17½ months. In Fiscal Year 2002 alone, the Division filed 33 cases and imposed $102,511,000 in fines. A few of the more notable jail sentences include:

- a 10 year prison sentence imposed on "Sonny" Shelton — the longest antitrust-related jail sentence ever imposed — for his role in a bid-rigging, bribery, and money laundering scheme involving FEMA-funded contracts in Guam; and

[1] On January 27, the Department of Justice announced the designation of David S. Sibley as the Deputy Assistant Attorney General for Economics Enforcement at the Antitrust Division.

- a 1 year and a day prison sentence imposed on Alfred Taubman, the former Chairman of Sotheby's for his role in a scheme to fix the commissions paid to auction houses. The court also imposed a $7.5 million fine on Mr. Taubman.

In total, for Fiscal Year 2002, the Division imposed a record amount of jail time — 10,501 days.

On the cartel front, between June 2001 and Sept. 2002, 54 percent of corporations the Division has prosecuted have been foreign-based, and 37 percent of individuals prosecuted have been foreign nationals. The Division now has approximately 95 grand jury investigations open, over 35 of which have international implications. Markets where the Antitrust Division has brought recent criminal prosecutions include: monochloroacetic acid (MCAA); organic peroxides; carbon cathode block; US AID-funded construction projects for wastewater treatment in Egypt; nucleotides; tactile tile; scrap metal; printing and graphics; automotive tooling; collectible stamp auctions; and automotive replacement glass.

Civil Enforcement

On the civil side, the Division has continued to prosecute vigorously the cases that we inherited from the prior administration. Many of you already are familiar with our efforts in the *Microsoft* case. We are pursuing an appeal in the *American Airlines* predation case. We are defending against an appeal challenging the district court's finding of partial liability in *Visa/MasterCard*. And we recently tried the *Dentsply* case, in which we have challenged as unlawful maintenance of monopoly the distribution practices of a leading false tooth manufacturer.

One area in which the Division has been particularly active in recent months is in taking enforcement action against firms that engage in illegal premerger coordination, known as gun-jumping. In 2002, the Division brought two cases against firms that we concluded had engaged in such illegal premerger coordination. In April 2002, the Division announced a proposed settlement of a "gun-jumping" complaint it had filed against Computer Associates International, Inc. and Platinum Technology International, Inc., alleging violations of Section 7A of the Clayton Act and Section 1 of the Sherman Act.[2] The charges stemmed from the parties' alleged conduct during the period between the execution of their merger agreement and the termination of the waiting period under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended.

In bringing a Section 1 claim, the Division alleged that an agreement between the parties to limit discounts that could be offered to customers during the pendency of the merger and the defendants' actions to effectuate that agreement chilled Platinum's ability to compete against Computer Associates, and had the effect of denying Platinum's and Computer Associates' customers the benefits of free and open competition. In asserting a violation of the HSR Act, the Division charged that the defendants' merger agreement and pre-consummation conduct altered their status as separate and independent economic actors by transferring to Computer Associates control of substantial aspects of Platinum's business.

After filing the complaint, the Division reached a proposed settlement with Computer Associates. The settlement contains injunctive provisions intended to prevent recurrence of the

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[2] *United States v. Computer Assocs. Int'l, Inc.*, Complaint, Civ. No. 01-02064 (D.D.C. filed Sept. 28, 2001), available at <http://www.usdoj.gov/atr/cases/f9200/9246.htm>.

violation of Section 1 of the Sherman Act and a $638,000 monetary civil penalty for violating the HSR Act.[3]

In another Section 7A case, the Hearst Corporation and its parent, The Hearst Trust, agreed to pay a civil penalty of $4 million to resolve charges that the company failed to produce key documents required to have been supplied along with its pre-merger notification of the acquisition of Medi-Span. The Division filed the lawsuit at the request of the Federal Trade Commission (FTC), and the civil penalty is the largest a company has ever paid for violating antitrust pre-merger requirements.

The Division will continue to be vigilant in the area of gun-jumping, and you can expect to see more activity on this front. It remains a priority for the Antitrust Division. In conjunction with these enforcement actions, we are reviewing, along with the FTC, our approach to evaluating gun-jumping issues, and hope to provide further guidance in the coming months.

Joint ventures also are a high priority for the Division. Joint ventures may be a preferred form of business coordination due to stock market or other considerations that may dictate against a complete merger. They increasingly are being utilized by incumbents seeking to commercialize new technologies in adjacent markets. The Division has launched a number of important joint venture investigations involving on-line media, financial services, and electronic air passenger ticketing. At the same time, the Division has taken steps to improve its investigative and enforcement capabilities with respect to joint venture enforcement. This includes the implementation of a structural reorganization and modernization initiative in the fall

[3] *United States v. Computer Assocs. Int'l, Inc.*, Proposed Final Judgment, Civ. No. 01-02064 (D.D.C. filed Apr. 23, 2002), available at <http://www.usdoj.gov/atr/cases/f11000/11083.htm>.

of 2001 that resulted in a clearer assignment of specific industry responsibilities to specific sections and attorneys within the Division.

Policy Initiatives

In addition to the modernization initiative, the Division has underway a number of policy initiatives that are designed to improve its enforcement capabilities. The Merger Review Process Initiative,[4] launched in 2001, is designed to promote quicker identification of the critical legal, factual, and economic issues in a merger investigation; more efficient and focused discovery; and more effective evaluation of evidence. In appropriate circumstances that could mean agreeing to special procedures that meet convenience and needs of the parties in exchange for cooperation. Even though overall merger activity levels have not been very high over the course of the past year, the Division continues to initiate investigations at a roughly comparable, if not greater, rate, and has received some very positive feedback from merging parties who have worked with Division staff to implement some of the practices set forth in the Merger Review Process Initiative.

The Division also has ongoing remedies and coordinated effects projects that were launched during former AAG James' tenure. The Division is undertaking a thorough review of the guiding principles and legal and economic basis for imposing particular merger remedies. It does little good to challenge a merger as anticompetitive if the remedy does not protect and preserve competition. We also are engaging in what my predecessor has referred to as a "rediscovery" of coordinated effects analysis in which the Division hopes to sharpen its analytical abilities and enhance our effectiveness in presenting coordinated effects cases in court.

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[4]Available at <http://www.usdoj.gov/atr/public/9300.htm>.

Unilateral effects has emerged as a predominant theory of economic harm pursued in government merger investigations and challenges. As former AAG James noted in testimony before Congress last fall, "If we reach too quickly for unilateral effects theories to the exclusion of meaningful coordinated effects analysis, we might miss important cases that should be brought or craft our relief too narrowly in cases that we actually pursue."[5] As a result, for the past several months, a team of lawyers and economists have been looking closely at coordinated effects analysis.

Along with these policy initiatives, the Division continues to emphasize training opportunities for its lawyers and economists. This winter the Division will conduct the second Annual Antitrust Institute, an intensive three-day course for junior attorneys and economists who are new to the Division. This event kicks off a comprehensive three year development plan that is designed to educate and train the Division's legal and economic staff.

International Efforts

Turning to the international arena for a moment, our bilateral and multilateral efforts to promote convergence with foreign antitrust counterparts have been quite fruitful over the course of the past year. Our relations with the European Union continue to grow closer. Ironically, the divergence that we experienced with the EU in the GE-Honeywell transaction in 2001 has served as a catalyst for making our relationship more substantive and more action-oriented than ever before. This past fall the US/EU Merger Working Group announced a set of Best Practices for

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[5]Statement of Charles A. James, Assistant Attorney General, Antitrust Division, Before the Subcommittee on Antitrust, Competition, and Business and Consumer Rights, Committee on the Judiciary, United States Senate (Sept. 19, 2002), available at <http://www.usdoj.gov/atr/public/testimony/200233.htm>.

coordinating merger investigations.[6] The best practices are a concrete demonstration of the U.S. and EU antitrust agencies' commitment to cooperate closely and keep each other fully informed of developments throughout their respective merger investigations. Many of the best practices memorialize and make more transparent practices that have been in place informally for quite some time.

Following on the success of the Merger Working Group, we decided to create an Intellectual Property Working Group with the EU. Through this group, U.S. and EU government antitrust experts can engage one another on a regular basis on issues involving both antitrust and intellectual property issues. The first meeting of the IP Working group will take place this winter, and the first topic for discussion will be patent pooling.

The EU also has taken significant concrete steps towards aligning its corporate leniency policy with that of the U.S. A properly conceived leniency policy ─ which encourages disclosure of secret cartel activity — is a necessary law-enforcement tool for combating cartels. The increased transparency and predictability of the EU's new policy greatly increase the incentives for seeking leniency in the European Union. Now that the EU's and U.S.'s programs are more or less in line with one another, it is much more attractive for companies to seek and obtain leniency simultaneously in the two jurisdictions.

On the multilateral front, the International Competition Network ("ICN") has served as an effective platform for promoting convergence and cooperation among antitrust authorities worldwide. Since its inception just over one year ago, the ICN has emerged as a global network

[6] US-EU Merger Working Group, Best Practices on Cooperation in Merger Investigations (Oct. 30, 2002), available at <http://www.usdoj.gov/atr/public/international/docs/200405.htm>.

of antitrust authorities from nearly 70 developed and developing countries — representing nearly 90 percent of the world's Gross Domestic Product. The virtual network structure of ICN, and its organization around diverse working groups that consult frequently and informally throughout the year, have enabled ICN to produce meaningful results very quickly. Ensuring ICN's continued success will remain a critical priority for the Division in 2003.

Deputy Assistant Attorney General Deborah Majoras has taken over for Deputy Assistant Attorney General for International Enforcement William Kolasky as Chair of ICN's Merger Working Group, and a wide range of Division staff is continuing to devote many hours to supporting all of the ICN's many working groups. The Merger Working Group currently is looking at multi-jurisdictional merger review and best practices for merger process. In addition, Connie Robinson, the Division's Director of Civil Enforcement, Division staff, and staff from the Israel Antitrust Authority organized an excellent merger workshop in November in Washington for officials from 40 ICN member agencies. We hope to repeat these staff-level workshops in the future.

II. Merger Investigation and Litigation Issues

I would like to spend the remainder of my time this morning discussing some of the procedural issues that tend to arise in the course of merger investigations and litigation. These issues will include: (1) improving the investigative process; (2) working with parties on fashioning appropriate remedies; (3) using fix-it-first remedies versus consent decrees; (4) requiring (or not requiring) upfront buyers; (5) responding to parties' concerns about the pace of investigations and litigation; (6) ensuring adequate opportunities for discovery; and (7) balancing judicial efficiency goals with the government's need to have adequate opportunity to present an effective case.

Improving the Investigative Process

The Division constantly is exploring ways of improving the efficacy of the investigative process. The first step in any effective merger review is to develop an appropriate investigative plan. In recent years the Division has made a concerted effort to improve the investigative process, most recently through the implementation of the Merger Review Process Initiative and the ongoing development of internal best practices. In our merger investigations, we have found that the element of surprise is vastly overrated, and that a more transparent process can lead to a quicker and more effective resolution of merger investigations. The Merger Review Process Initiative was implemented in the Fall of 2001 with this notion in mind. The Initiative has two components: aggressive use of the initial Hart-Scott-Rodino Act 30-day waiting period to identify possible competitive issues; and early and frequent consultations with parties to negotiate, where possible, a specific framework for conducting an investigation. The success of this Initiative depends vitally on the willingness of the parties to cooperate. In the year since the Initiative was implemented, we have seen that its success in individual cases rises and falls on the commitment of staff and parties to work together.

Following on the Merger Review Process Initiative, we are in the process developing a specific set of internal best practices for conducting merger investigations and creating a best practices manual. The purpose of this project is to identify and embrace merger techniques that have proven successful in real investigations, and eliminate techniques that have proven unproductive. We hope to bring this project to a conclusion within the next few months.

Fashioning Appropriate Remedies — The Process

A second issue that arises regularly in merger investigations is dealing with parties' requests that the Division — as opposed to the parties — propose a remedy to an anticompetitive transaction. Parties seeking to resolve an investigation and close their deal sometimes prevail upon the Division to develop an appropriate fix. "Just tell us what you want us to do to resolve your concerns," is a sometimes-heard refrain. It is not our job to design the parties' deal.

On the other hand, the process we engage in with parties is necessarily an iterative one, and there is a risk that the negotiation process will devolve into a *de facto* agency structuring of the deal. We could enforce a "one bite at the apple" approach and provide the parties' with a single opportunity to propose a remedy, but we have not done so and do not intend to do so in the future. We do, however, request that parties enter into a timing agreement that provides greater certainty as to the duration of the negotiation process.

Ultimately, in looking at the adequacy of any proposed fix, we consider whether it will restore the competition otherwise lost by the transaction. In some cases, "fix-it-firsts" will resolve our concerns; in others, we conclude that a consent decree is a necessary.

Resolving Competitive Concerns Through Fix-it-Firsts

A fix-it-first is a remedy in which the parties to a transaction restructure an otherwise problematic transaction, and the Division's competitive concerns are resolved without filing a judicial complaint and consent decree. There are several circumstances under which a fix-it-first remedy may be appropriate. A fix-it-first remedy may be preferable to a consent decree when the appropriate remedy is a clean, structural change — the "cleaner the better" — such as the sale of a business.

There are, of course, circumstances in which it might not be advisable to implement a fix-it-first remedy. Consent decrees may be preferable when non-structural relief is required, or when there are timing concerns and the parties are unable to identify a purchaser or the assets to be sold in a timely manner. Consent decrees also may be more appropriate if it is not possible to make a "clean cut" of the assets to be divested, such as remedies that require the licensing of technologies or implicate other intellectual property issues. In such situations, the Division needs the power to enforce the agreement that only comes with a consent decree.

The Tunney Act does not apply in fix-it-first situations.[7] The Tunney Act requires a sixty-day period for the submission of public comments on any proposed final judgment (i.e., consent decrees).[8] The Tunney Act thus provides transparency and an opportunity for public commentary on any proposed merger remedies that are filed with a court. Fix-it-firsts, argue some, do not provide for either.

While the Division recognizes the value and importance of transparency, as a threshold matter, we cannot seek a consent decree unless we conclude that a transaction would result in a violation of the law. A court is the ultimate arbiter of our decisions, and we cannot present to a court a case that lacks a violation. If parties alter their deal in a way that resolves our competitive concerns, we cannot then file a complaint challenging a transaction that no longer violates the antitrust laws. And, if one of the goals of the antitrust laws is to protect consumer

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[7] *See, e.g.*, Statement of Albert A. Foer, President, The American Antitrust Institute, to the Subcommittee on Antitrust, Business Rights, and Competition, Senate Judiciary Committee, Regarding Oversight of the Federal Antitrust Enforcement Agencies (Sep. 19, 2002).

[8] 15 U.S.C. § 16(b).

welfare, it also bears mentioning that fix-it-first remedies often resolve competitive concerns on a faster basis than consent decrees, and thus allow consumers to enjoy the procompetitive efficiencies of transactions more quickly.

Requiring Upfront Buyers

An additional issue that the Division often confronts in its merger investigations is the question of upfront buyers. Antitrust enforcers sometimes refuse to permit a deal to go forward until the parties find a purchaser, known as an upfront buyer, of the assets that are to be divested under a consent decree. An upfront buyer requirement may be preferable if there is a serious risk that assets will deteriorate in value if they are not sold before the underlying deal closes. The benefits of requiring an upfront buyer include having greater certainty that the buyer is capable of succeeding and that the assets to be divested have been identified accurately.

Unlike the FTC, the Division has not required the identification of upfront buyers. Some antitrust observers suggest this reflects a conscious difference in approach between the FTC and DOJ. I would suggest, however, that the difference is due in part to the fact that the risk of wasting assets tends to be more prevalent in retail and other mergers that are within the purview of the FTC, not the Division. Retail mergers, for example, often implicate brand names that could quickly lose their value during the pendency of a sale if not adequately maintained. Observers also should not lose sight of the fact that the Division has the power in every consent decree to refuse to approve the purchaser of any assets to be divested. And in many cases, the Division has eliminated or substantially narrowed the field of acceptable purchasers by exercising this “veto” power.

Perhaps, then the difference between the DOJ and the FTC in this regard is more a timing issue than anything else. It is worth remembering that permitting the parties to close prior to the identification of a buyer means that any procompetitive efficiencies of a deal are realized on a relatively *faster* basis than might otherwise occur if the parties could not close until a buyer had been approved. In those situations where there is a significant risk that assets will waste pending the identification of a buyer, the Division has imposed more stringent timing requirements on the parties in their identification of a purchaser (*e.g.*, 30 days in some cases). The Division's goal in approving any such buyer, however, is not to pick "the best" one — that is, the buyer who would most likely maximize the value of the assets to be divested. Rather, the Division's job is to approve a buyer who is likely to restore the competitive conditions otherwise lost through the merger.

Setting the Pace of Merger Investigations and Litigation

Turning to the pace of investigations and litigation, an issue that frequently arises is dealing with parties' requests that the Division conduct an investigation or litigation within certain time frames. This issue arose most recently and visibly in the *Sungard/Comdisco* and *DirecTV/Echostar* cases. *DirecTV* is still pending, so my comments will be limited to what the Division has stated in public court filings.[9] In general, timing concerns can be motivated by external or internal factors. In *Sungard*, for example, the parties' desire for a quick and prompt resolution of the merger review was driven by the "external factor" of a bankruptcy court that was overseeing the sale of the to-be-acquired assets on a very short time frame. Recognizing

[9]On December, 10, 2002, the DirecTV and Echostar announced they were abandoning the transaction.

these timing constraints, the Division, having concluded the transaction would be anticompetitive, litigated a two-day trial just ten weeks after the parties' filed their Hart-Scott-Rodino premerger notifications forms and seventeen days after filing the complaint. The Division's general position has been that we will never abdicate challenging a transaction due to timing concerns. However, as we sought to do in *Sungard*, we will try to challenge a transaction and make it possible for a court to decide upon our challenge within a sufficient period of time so that we do not "smother" the transaction by virtue of our power to hold it up.

Like *Sungard*, the parties in the *DirecTV/Echostar* case sought a trial date that would follow closely on the heels of the filing of the complaint. The Division filed its complaint challenging the *DirecTV/Echostar* merger on October 31, 2002, and at a pre-trial conference held less than a week later, the parties requested a trial date of November 18, 2002. Unlike *Sungard*, however, the motivation for such an expedited schedule appeared to be "internal" rather than external: the merger agreement provides for a drop-dead date of January 21, 2003 that permits either party to walk away from the deal by January 21, 2003, if the merger has not been completed.

While we will be respectful of firms' business exigencies and will try to move quickly when there are legitimate drivers affecting timing, we must balance these exigencies against the Division's own need to have sufficient time to prepare the case for trial, which includes conducting pretrial and expert discovery. In this case, as the Division's memorandum in support of its proposed scheduling order indicated, the parties' self-created deadline, which creates incentives for but does not require termination of the deal, "can be changed with the stroke of a pen."[10] Moreover, the parties' "claimed sense of urgency"[11] is without merit — the transaction cannot be completed by January 21, 2003, because the parties need Federal Communications Commission (FCC) approval to complete their transaction and that approval will not be forthcoming any time soon. The FCC has set the case for administrative hearing, having concluded that the transaction will reduce competition and harm consumers. An administrative law judge has yet to be appointed for the hearing, and no schedule has been set.

As we argued before the Court in the *DirecTV* matter, comparisons to *Sungard* are inapposite, as there are crucial differences between the two cases. Unlike *Sungard*, *DirecTV* does not involve a business failure. There is no externally-imposed deadline from the bankruptcy process, no inability to provide service, no imminent loss of substantial value to the DirecTV business, and no critical infrastructure ramifications in the short term. After some consideration of the Division's and parties' arguments, the Court did not agree to adopt the extremely abbreviated schedule proposed by the parties. The Court instead has proposed a trial date of March 2003.

In general, the Division will attempt to accommodate timing concerns to the extent reasonable and practicable, but we will not be sympathetic to parties who want us to conduct an investigation or litigate on a truncated schedule when they are not themselves willing to participate in the investigative process. Most of the time, the pace of an investigation is driven

[10] *United States of America, et. al v. Echostar Communications Corp., Hughes Electronics Corp., General Motors Corp., and DirecTV Enterprises Inc.,* Memorandum in Support of Plaintiffs' Motion For Scheduling Order, Civil No. 1:02CV02138 (D.D.C. filed Nov. 4, 2002), available at <http://www.usdoj.gov/atr/cases/f200400/200438.htm>.

[11] *Id.*

by the parties. The merger statutes also provide the parties with certain rights regarding the timing of investigations — as long as the parties comply with their statutory obligations.

The Division is not sympathetic, then, when parties argue that an investigation has consumed an excessive amount of time and it is the *parties* who have delayed responding to an information request or who have asked for additional time to respond throughout the investigatory process. The Division encourages parties to work with us in identifying as quickly and as efficiently as possible the issues that are relevant to an investigation. We take seriously our effort to be transparent during the investigatory process. In some cases, parties have chosen not to proceed upon such a course, and it is in many of those instances that we hear the loudest complaints about the pace of an investigation.

Ensuring Adequate Opportunities for Trial Discovery

In the litigation context, parties' timing constraints sometimes conflict with the Division's need to conduct adequate discovery. Merging parties have raised the argument that the government does not need a great deal of time to conduct discovery because it already has obtained discovery through the investigative process. However, investigative discovery is different from trial discovery. In the investigative stage, the Division is trying to determine whether the transaction will result in a violation of the law that is subject to legal challenge. Some of this investigative discovery is relevant to the litigation that might ensue, but there are many items of information that the Division must obtain through litigation discovery that are not part of the investigative process.

In certain instances, parties sometimes posit that a particular issue, such as entry or market definition, is dispositive as to the determination of whether a transaction is likely to violate the antitrust laws. As a result, they might request that the Division defer discovery on certain matters pending the resolution of the potentially dispositive issue. If the case proceeds to litigation, it then may become necessary to conduct discovery on the deferred matters, and that certainly will consume additional time.

In addition, parties sometimes load the Division up at the end of the process with new studies and new information. If the Division proceeds to trial shortly thereafter, it must have sufficient time to digest this material and seek discovery on any materials that might be relevant to the late-presented information. For example, as we have indicated in court filings for the *DirecTV/Echostar* matter, the merging parties in that case have suggested they intend to defend their case substantially on the grounds of a partial divestiture remedy. This remedy however, was very late arising, has not even been finalized yet, and creates new anticompetitive problems itself that must be considered.

Balancing Judicial Efficiency Goals With the Government's Need to Have Adequate Opportunity to Present an Effective Case

Weighing the parties' timing constraints against the Division's need to conduct adequate discovery is just one form of balancing that takes place in the litigation context. I would like to conclude my remarks today by offering a few thoughts on whether the steps being taken by courts to achieve "judicial efficiencies" in trying cases help or hurt the Division's ability to win merger cases, and whether the Division needs to change how it presents its cases.

A number of courts, for example, limit the amount of court time for each party. This is understandable given the burgeoning docket of many district court judges. But the complexity of antitrust cases — in particular cases in high tech industries — raises the question of whether the Division has an adequate amount of time to present its case. Setting a very short time for trial increases the risk that courtroom antitrust litigation will devolve into a battle of the economic experts. While it is essential that enforcement decisions and cases be grounded upon sound economic analysis, setting short time frames and limiting live testimony to experts or to cross-examinations could lead to the exclusion of important fact witnesses.

These are just of a few of the issues with which the Division grapples in its merger cases. We are engaged in a constant learning process about how we can present the most effective case possible while still furthering the important goal of judicial efficiency. On this topic I ultimately have more questions than answers, but we will continue to work through these issues.

Conclusion

Let me thank you again for the opportunity to discuss recent developments at the Division, and to share with you some thoughts on merger investigations and litigation. While my comments this morning may not be of a truly "jurisprudential" nature, I do hope that I have planted some seeds for lively debate and discussion. Thank you.