



DEPARTMENT OF JUSTICE

RECENT DEVELOPMENTS AND FUTURE CHALLENGES AT THE ANTITRUST DIVISION

Remarks by

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Good afternoon. It is a pleasure to be with you here in Dallas. Many thanks to the Dallas Bar Association and Alan Pason, our recently retired Dallas Field Office chief, for their gracious hospitality in arranging this event. Alan has done a wonderful job with our Dallas office, and the Antitrust Division will sorely miss him.

The fall season is upon us; Labor Day has come and gone, traffic levels have resumed their normal level of congestion as people have returned from their summer solstice, the National Football League is in full swing, and, of course, students are back in school. Thinking back to my school days, I always look forward to September as the beginning of a new year. And so, last week, I gathered my senior staff, welcomed them to the start of a new year, and outlined for them what I perceive to be the Division's primary goals and objectives over the coming months. This afternoon, I would like to reflect upon what we have accomplished over the 15 months since I assumed office last June, and to discuss the challenges we face over the coming year.

Merger Enforcement

I assumed the post of Assistant Attorney General last June, ready to reacquaint myself with an agency that I worked for in the early 1990's during what many call "Bush '41." I arrived with an open mind, ready to listen and learn. I also arrived with several expectations in mind. Having devoted the majority of my professional career both in and out of government to merger enforcement, I expected that most of my time at the Division would be devoted to merger matters. This did not appear at the time to be an unrealistic assumption. We were, after all, in the midst of an unprecedented wave of corporate mergers fueled by burgeoning technology and telecommunications sectors and a galloping stock market. Just two weeks into my tenure, however, the Court of Appeals for the D.C. Circuit issued its decision in the *United States v.*

Microsoft. Since that time, *Microsoft* and a number of other non-merger matters, including our efforts on the international front, have occupied a great deal of my time during my first year in office. The downturn in the stock market, the tragic events of September 11, and the spate of corporate fraud scandals, in turn, each has contributed to reduced levels of merger activity over the past year. So much for expectations.

Merger activity is significantly down compared to prior years. We have received notification of just 1,122 Hart-Scott-Rodino transactions for Fiscal Year 2002 to date, down from 2,245 for the same period of Fiscal Year 2001. My immediate predecessors had the benefit of 4,537 HSR transactions for the same portion of Fiscal Year 2000. Even taking into account last year's increase in the HSR filing threshold, 2002 merger figures are still below previous levels of activity, reflecting the well-known slowdown in corporate transactions. This slowdown has been particularly acute in telecommunications, media and information technology — areas that have contributed a significant portion of the Division's workload.

Notwithstanding the general slowdown, the Division has investigated and taken action in a number of significant transactions over the past year. These matters include:

- **General Dynamics/Newport News.** General Dynamics and Newport News were the only two nuclear-capable shipyards and the only designers and producers of nuclear submarines for the U.S. Navy. The two shipbuilders also lead opposing teams to develop the next generation propulsion system for use in submarines and surface combatants, so-called electric drive. The Department of Defense ("DoD"), the only customer, opposed the transaction on competitive grounds. The complaint alleged that the

combination would create a monopoly in nuclear submarines design and construction, and would substantially lessen competition for electric drive and surface combatants.

After the parties terminated their merger agreement, Newport News received a second bid from Northrop Grumman, which did not raise significant competitive issues.

- **Suiza/Dean.** Suiza and Dean were dominant firms in several geographic markets for fluid milk processing and school milk markets. The parties agreed to divest 11 dairies to National Dairy Holdings, L.P. (NDH), a newly formed partnership that is 50 percent owned by Dairy Farmers of America Inc. (DFA), a dairy farmer cooperative. The parties also agreed to modify Suiza's supply contract with DFA to ensure that dairies owned by the merged firm in the areas affected by the divestitures would be free to buy their milk from sources other than DFA.
- **United/USAirways.** At the time of the transaction, United and US Airways were the second and sixth largest U.S. airlines. The Division concluded that US Airways is United's most significant competitor on densely-traveled, high revenue routes between their hubs, such as Philadelphia and Denver, as well as for nonstop travel to and from Washington, D.C. and Baltimore, and on many routes up and down the East Coast. The acquisition would have given United a monopoly or duopoly on nonstop service on more than 30 routes, where consumers spend more than \$1.6 billion annually, and substantially limited the competition it faces on numerous other routes representing more than \$4 billion in revenues. The parties abandoned the transaction after the Division indicated its intention to challenge it.

- **3D Systems/DTM.** The Division concluded that the acquisition as initially proposed would have substantially lessened competition in the U.S. industrial rapid prototyping systems market by reducing the number of competitors in the U.S. market from three to two and limiting the dynamic competition that has resulted in lower prices to customers and technological improvements to rapid prototyping systems. Rapid prototyping is a process by which a machine transforms a computer design into three-dimensional objects, speeding the design process for everything from cellular phones to medical equipment. The Division filed suit to block the transaction, and subsequently reached a settlement with 3D Systems Corporation that allowed the company to go forward with its purchase of DTM Corporation, provided that the merged 3D/DTM agreed to license their rapid prototyping patents to a company that currently manufactures rapid prototyping equipment and that will compete in the U.S. market, thus adding a new entrant.

The Division also has challenged mergers in a number of other markets, including airline reservations systems, banking, boom trucks, fresh bread, molded doors and doorskins, electric power, ready-mix concrete, corn wet milling, college textbooks, and computer-based testing. In fact, since June 2001, the Division has successfully challenged 20 of the 21 transactions it had deemed anticompetitive. (The Division was unsuccessful in seeking to block the Sungard/Comdisco merger, a transaction the Division asserted was likely substantially to lessen competition in the market for shared hot-site disaster recovery services.) Six of these matters were resolved by consent decree, nine were resolved through a “fix-it-first” restructuring, four were abandoned after the Division indicated that it would file suit to challenge the transactions,

and one — General Dynamics/Newport News — was abandoned after the Division filed suit.

In addition, this past April, we announced a proposed settlement of a gun-jumping complaint against Computer Associates and Platinum Technology, which alleged violations of both Section 7A of the Clayton Act and Section 1 of the Sherman Act. 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 premerger 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 premerger requirements.

Most recently, we filed a proposed settlement agreement with Earthgrains Baking Companies, Inc. to resolve our concerns about violations of a consent decree governing Earthgrains’ 2000 acquisition of Metz Baking Company. In a petition filed along with the settlement agreement, the Division alleged that Earthgrains violated the 2000 consent decree by failing to maintain the required level of promotion support for brands that were to be divested under the decree, by transferring employees who worked at a bakery that was to be divested under the decree, and by closing the bakery prior to its divestiture. Earthgrains agreed to pay a \$100,000 civil penalty. More importantly, the case underscores the need for companies to abide by the terms of consent decrees, and demonstrates that we will aggressively enforce decrees to ensure that they serve their purpose of maintaining competition.

Several dozen merger investigations are in the queue, including DirecTV/Echostar, AT&T/Comcast, Univision/Hispanic Broadcasting, and TRW/Northrop Grumman.

Civil Non-Merger Enforcement

Our plate also has been full with civil non-merger matters, some of them involving the resolution of cases brought by the prior Administration. Of course, the big news this past year in the non-merger area has been our settlement of the *Microsoft* case. In June 2001, the Court of Appeals for the D.C. Circuit sustained only the Section 2 monopoly maintenance claim against Microsoft and only a portion of the acts underlying that claim. The court also vacated Judge Jackson's remedy ordering a break-up of the company and remanded the case for further proceedings before a different district court judge. In November 2001, the Division and nine states reached a proposed settlement with Microsoft that effectively stops the conduct found unlawful by the court of appeals, prevents similar conduct from recurring in the future, and restores the competitive conditions to the market. Nine states and the District of Columbia declined to join in the settlement and decided to pursue much broader remedies from Microsoft in the district court. On March 6, 2002, the district court held a one-day Tunney Act hearing to assist it in determining whether entry of the proposed consent decree between the Division and Microsoft is in the "public interest." The court still has the matter under advisement.

Additionally, appeals are underway in the *United States v. American Airlines* predatory conduct case and the *United States v. VISA U.S.A., VISA International, and MasterCard* case. In May 1999, the Division brought a civil injunctive action against American Airlines charging that the company had violated Section 2 of the Sherman Act by adding money-losing capacity without a legitimate business justification in order to maintain its monopoly power on routes at Dallas-Fort Worth Airport against the challenge of low cost airlines. The district court entered

summary judgment for the defendants in April 2001, on several grounds. The Division has appealed, and the Tenth Circuit is expected to hear oral arguments during the week of September 23, 2002.

In October 1998, the Division filed a civil suit against Visa and MasterCard alleging that the credit card companies violated Section 1 of the Sherman Act with their governance duality and exclusivity rules that forbid members of their associations from issuing credit cards on competing networks. The district court found the companies' exclusivity rules unlawful in October 2001, and issued a final judgment enjoining the offending conduct. The companies' practice of governance duality was upheld by the court. The defendants obtained a stay of the court's final judgment and appealed the liability finding. Oral argument before the Second Circuit is scheduled for this fall.

We also are continuing litigation against Dentsply International, in which we have alleged that the company has unlawfully maintained its monopoly in the market for artificial teeth by entering into restrictive dealing arrangements with more than 80 percent of the nation's tooth distributors that prevent them from selling competitors' products. We completed the evidentiary phase of trial in late May. We have filed post-trial briefs and proposed findings of fact and conclusions of law, and closing argument is scheduled for the end of this week.

One of our most recent civil non-merger cases is a suit against The MathWorks Inc. and Wind River Systems Inc. to stop them from illegally allocating the markets for software used to design dynamic control systems. Dynamic control system design software enables engineers to develop the computerized control systems of sophisticated devices, such as anti-lock brake

systems for automobiles, guidance and navigation control systems for unmanned spacecraft, and flight control systems for aircraft. High-technology products like these work behind the scenes to help build some of the most sophisticated products in our economy. The crux of our complaint was that the “licensing” arrangement between the parties operated primarily to force the exit of the Wind River product from the market and to prevent it from reemerging in the hands of some other party. We filed a proposed consent decree with the court as to Wind River at the time we filed our original complaint in June. In August, the Division and The MathWorks reached a settlement agreement that requires The MathWorks to offer for sale Wind River’s design control software assets.

Since my arrival at the Division, we also have launched a number of important joint venture investigations involving, among other products, on-line media, financial services and electronic air passenger ticketing. Joint ventures are a high priority for the Division, in part because we believe that many firms are turning to joint ventures as an alternative to mergers, and in part because joint ventures are an important way in which competitors interact with each other in emerging markets.

Criminal Enforcement

In the area of criminal enforcement, we move forcefully against hard-core antitrust violations such as price fixing and bid-rigging. During the last 15 months, the Antitrust Division has secured almost \$125 million in criminal fines, convicted 24 corporations and 25 individuals, and sentenced 25 individuals to prison terms averaging 17½ months, continuing a trend toward more certain and longer prison terms for antitrust offenders. In the last year, record-breaking jail

sentences have been imposed on defendants convicted of antitrust and related offenses. These include:

- On January 22, 2002, Austin “Sonny” Shelton, a former government official in Guam, was sentenced to 10 years in jail – the longest antitrust-related jail sentence ever imposed – for orchestrating a bid-rigging, bribery, and money laundering scheme involving FEMA-funded contracts. This case was prosecuted jointly by the Antitrust Division and the U.S. Attorney’s Office in Guam, and was a model for inter-agency cooperation.
- On November 9, 2001, Melvin Merberg, a former New York City food company executive, was sentenced to serve more than five years in prison for his role in multi-million dollar bid rigging, fraud, and tax conspiracies that defrauded many New York-area public and nonprofit entities, including: New York City public schools; the Newark, New Jersey public schools; a Manhattan drug rehabilitation center; and Nassau County, New York jails. The fraudulent schemes affected contracts valued at more than \$210 million.

The Division is not deterred in pursuing high-ranking corporate defendants engaged in illegal activity. For example, A. Alfred Taubman, former chairman of the board of Sotheby’s Holdings Inc., is now serving a year and a day in prison, as well as paying a \$7.5 million fine, for his role in a scheme between the Sotheby’s and Christie’s auction houses to fix the price of sellers’ commissions at fine art auctions.

Restitution — money retrieved by the Division that will go to compensate those affected by the conspiracies involved — reached an all-time high of over \$30 million in FY 2001, as a result of convictions in the Division’s New York food distribution bid-rigging cases and in a bid-rigging case involving U.S.-funded construction projects in Egypt. In the New York-area food distribution case, we secured a record criminal antitrust restitution order of \$22.5 million.

We are particularly pleased with our continuing success in rooting out international cartel activity, affirming our government’s resolve to protect American consumers from unlawful

cartels wherever they base their operations or conduct. During the past 15 months, 54 percent of corporations prosecuted have been foreign-based, and 37 percent of individuals prosecuted have been foreign nationals. The Division now has 99 grand jury investigations open, 39 of which have international implications. In this effort, we work in close cooperation with our counterpart enforcement agencies in Europe, Canada, and elsewhere. We expect to see even more progress through these collaborations now that the European Union has brought its corporate leniency program in closer alignment with ours.

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

Markets in which the Antitrust Division has brought recent criminal prosecutions include:

- industrial chemical markets for monochloroacetic acid (MCAA), used in the production of numerous commercial and consumer products, such as pharmaceuticals, herbicides, and plastic additives;
- industrial chemical markets for organic peroxides, used in the manufacture of polyvinyl chloride, low-density polyethylene, and most polystyrene products such as containers and packaging;
- carbon cathode block, used in aluminum smelters or pots in the production of primary aluminum;
- US AID-funded construction projects for wastewater treatment in Egypt;
- nucleotides, used to enhance food flavor;
- magnetic iron oxide (MIO) particles used in the manufacture of video and audio tapes;

isostatic graphite;

- tactile tile;
- scrap metal;
- printing and graphics;
- automotive tooling;
- collectible stamp auctions; and
- automotive replacement glass.

International Initiatives

Increased globalization is one of the dramatic changes occurring in our economy that is creating new challenges for antitrust enforcement. With corporations and corporate alliances stretching across the globe, we must work with antitrust enforcers abroad to forge an effective cooperative relationship based on our core beliefs in competition. We must seek convergence in procedure and substance wherever possible, to minimize the cost, complexity, and sheer uncertainty of enforcement and compliance that could otherwise become a major hindrance to procompetitive business activity and economic growth.

For a number of years, people have talked about the need for cooperation and collaboration. Now the Antitrust Division is taking aggressive steps to turn this talk into action. We have already made substantial progress and hope and expect to continue and expand that success in the future. In particular, we have strengthened our cooperative relationships with foreign antitrust authorities and worked hard promoting convergence in enforcement policies. For the first time, we have dedicated one Deputy Assistant Attorney General, Bill Kolasky,

exclusively to international issues.

European Union

The EU currently stands as the most important antitrust enforcer outside our borders. There have been limited occasions when we haven't seen eye-to-eye with the EU. Ironically, our experience with the GE/Honeywell merger has served as a catalyst for making our relationship with the EU more substantive and more action-oriented than ever before. As a result, both sides agree that the relationship has been strengthened and improved. Despite our different legal traditions and cultures, and despite substantial differences in the language of our governing laws, we have been able to develop largely consistent competition policies, built on sound economic foundations directed at the goal of promoting consumer welfare through competition.

It is important that other jurisdictions do not base antitrust enforcement policy on the fear that one firm's enhanced efficiency could disadvantage its competitors. Such a policy is incompatible with the fundamental precept that antitrust should protect competition, not competitors. We have both publicly and privately presented this view at every opportunity, thereby putting the issue forward to debate and consideration in Europe and elsewhere. We are pleased that the EU has reaffirmed its commitment to consumer welfare, in the form of lower prices, higher output, and enhanced innovation, as the ultimate goal of sound competition policy, and has made clear that, like us, it views economic efficiency positively and will not punish firms for taking steps to become more efficient.

The EU also currently is reviewing its merger policies. It recently asked for comments in

a so-called “Green Paper” on a broad range of issues, including on the substantive standards it should apply to mergers. Moreover, the EU is undertaking to adopt comprehensive merger guidelines, as we did decades ago.

One vehicle we are using to pursue our shared goals is our U.S.-EU Merger Working Group, which we reinvigorated last September following our divergence on the GE/Honeywell transaction. The working group is examining several issues, including merger process and timing, conglomerate mergers, and the role of efficiencies in merger analysis. Through this Working Group, we have been developing “best practices” for coordinating merger investigations subject to both U.S. and EU review, and expect to announce agreement on such practices in the near future. These best practices are designed to minimize the risk of divergent outcomes, facilitate coherence and compatibility in remedies, enhance investigative efficiency, and reduce burdens on those subject to multiple antitrust reviews.

An additional area in which we have made great progress toward convergence with the EU is corporate leniency. The Division's Corporate Leniency Program — which provides for freedom from prosecution for companies and their executives who are the first to come forward, cooperate, and meet the program's other requirements — has played a major role in cracking the majority of the international cartels that the Division has prosecuted. The extraordinary success of this program to date has generated widespread interest around the world. As a result, we have advised a number of foreign governments in drafting and implementing effective leniency programs in their jurisdictions. We were particularly pleased when the EC revised its leniency

program in February to establish a more transparent and predictable policy along the lines of our own policy. The adoption of effective leniency programs by foreign antitrust enforcers can be tremendously beneficial to our own enforcement efforts, by making it more likely for a firm to come forward to report antitrust violations, since the firm can also receive leniency in other jurisdictions in which it might be prosecuted.

Emerging Antitrust Regimes

There are now nearly 100 national and regional antitrust regimes in the international arena, with roughly 65 of those requiring some form of premerger notification. While in one sense this is the result of our sustained efforts to encourage other countries to adopt and enforce antitrust laws, the assertion of overlapping antitrust jurisdiction by multiple sovereigns has the potential to harm some of the very competitive values that antitrust is meant to protect. As the nations of the world adopt and implement their own antitrust laws, we need to continue exercising leadership to prevent antitrust enforcement from being misused as a tool of industrial policy or protectionism and thereby jeopardizing the strong public and political support for sound and vigorous antitrust enforcement.

Last October we, along with the FTC, were among the lead jurisdictions to launch the International Competition Network (“ICN”), to develop guiding principles and “best practices” to be endorsed, and then implemented voluntarily. The ICN now includes 65 jurisdictions on six continents, representing over 70 percent of the world's GDP.

The ICN exists as a “virtual” network through which agency heads commission and guide the efforts of working groups focused on specific competition law issues. The working

groups themselves are directed by government personnel, but receive input from a broad range of sources, including international organizations, academics, industry groups and leaders, and private practitioners. Recommendations by the working groups will be considered by the ICN members, but implemented, if at all, through separate governmental initiatives. The ICN itself will not be a forum for reaching binding international agreements.

Our convergence efforts with other competition authorities around the world are based on six principles:

- Protect competition, not competitors.
- Recognize the central role of efficiencies in antitrust analysis.
- Base decisions on sound economics and hard evidence.
- Acknowledge the limits to our predictive capabilities.
- Be flexible and forward-looking.
- Impose no unnecessary bureaucratic costs.

The ICN has initiated two major projects in the first year of its existence. First, under the leadership of the Antitrust Division's Deputy Assistant Attorney General for International Enforcement, a Merger Working Group is dealing with several aspects of the difficult issues raised by multi-jurisdictional merger review, including merger notification and review procedures, the various analytical frameworks pursuant to which mergers are reviewed around the world, and investigative techniques.

A subgroup of 13 agencies has recommended that the entire ICN adopt broad guiding principles involving such things as transparency of merger processes, non-discrimination on the

basis of nationality, and efficient, timely, and effective merger review. This subgroup has also recommended that the ICN adopt more technical “recommended practices,” such as having a sufficient nexus between the transaction and the reviewing jurisdiction, and having clear and objective notification thresholds. If adopted and implemented by ICN members, we will have made an important beginning in rationalizing the current thicket of multi-jurisdictional merger enforcement, in a way that well-serves the competitive process worldwide. With respect to improving merger investigative processes, later this fall, we will host a conference here in Washington for merger officials from dozens of countries, with the goal of increasing understanding and pursuing healthy convergence in the practical aspects of our various merger regimes.

With respect to the second ICN initiative, the head of the Mexican antitrust agency heads a working group on the very important subject of competition advocacy, a subject that is of particular importance to developing countries and countries in transition. This working group will produce a comprehensive report on the practice of competition advocacy in 50 ICN jurisdictions, an unprecedented effort that should form the basis, among other things, for deriving recommended practices in the practice of competition advocacy.

And that’s just the beginning. We will move on to new projects in the coming year, with the goal of further rationalizing multi-jurisdictional review and other aspects of international antitrust enforcement.

Process Initiatives

In addition to our enforcement efforts, the Division has undertaken several efforts

designed to improve our ability to investigate mergers and potentially anticompetitive conduct effectively and efficiently. These efforts include our modernization effort, the Merger Review Process Initiative, and the development of a “best practices” manual on merger investigations.

Modernization

The modernization effort implemented earlier this year is the first congressionally approved reorganization and modernization of the Division in more than two decades. It is designed to improve our effectiveness as enforcers by concentrating industry expertise within particular sections of the Division and giving those sections broad enforcement responsibility for both civil merger and non-merger matters. Under the previous, more function-based structure, multiple sections shared enforcement responsibilities for certain industries and commodities, with some sections focusing mostly on merger enforcement, and other sections concentrating on civil non-merger investigations. In recent years, this function-based structure became cumbersome, and in recent years the Division had begun to move away from it in practice.

The new structure concentrates investigatory and enforcement expertise and resources for particular industries and commodities within a particular section. The modernization effort also recognizes the emerging importance of certain areas of the economy — including information technology, media, telecommunications, and industries characterized by network competition — and the need for concentrated, focused expertise in these industries. The new structure is strengthening areas of responsibility, sharpening lines of reporting, increasing accountability, and ultimately improving efficiency and productivity in carrying out the Division's mission, positioning us to better address the challenges of the New Economy in the 21st Century while

strengthening enforcement capability in traditional industries.

Merger Review Process Initiative

Similarly, we implemented the Merger Review Process Initiative in order to more quickly identify the critical legal and economic issues raised by transactions, facilitate more focused investigative discovery, and provide for an orderly process for the evaluation of evidence. The success of the Initiative depends in large part on the willingness of our lawyers and the parties to work together in identifying at the earliest possible point the issues that require ongoing investigation and in developing a sensible plan for investigating these issues. We have received some very positive feedback thus far regarding the Initiative, but the true test will come when we have a broader array of mergers under review.

Following on the broad framework for investigations set forth in the Merger Review Process Initiative, we are in the process of developing, evaluating, and institutionalizing a more specific set of internal “best practices” for conducting merger investigations. This project, undertaken under the direction of our Director of Operations, Connie Robinson, with active consultation with the FTC, will result in the creation of a “best practices” manual that will be a valuable tool for our staffs. The type of “self-benchmarking” reflected in the best practices initiative will allow us to embrace merger techniques that have proven successful in real investigations, while eliminating techniques that have proven unproductive. We look forward to working with the private bar, as we constantly work to improve our performance.

Antitrust Policy

We also have a number of ongoing policy initiatives that are designed to strengthen our enforcement capabilities in the areas of intellectual property issues; remedies; coordinated effects analysis; and gun-jumping.

Intellectual Property Hearings

In recent years, intellectual property issues have arisen with increased frequency in our merger and civil conduct investigations and enforcement actions. While intellectual property and antitrust law share the common purpose of promoting dynamic competition and thereby enhancing consumer welfare, issues at the intersection of intellectual property and antitrust can be murky. More than ever before, the creation and dissemination of intellectual property is the engine driving economic growth. Consequently, as antitrust law addresses the competitive implications of conduct involving intellectual property, and as intellectual property law addresses the nature and scope of intellectual property rights, care must be taken to maintain proper incentives for the innovation and creativity on which our national economy depends.

Both we and the FTC believed that a thorough review of the issues in this important area should be undertaken. We decided to hold joint hearings, with the involvement of the U.S. Patent and Trademark Office, on enforcement policy issues at the intersection of antitrust and intellectual property law. The hearings, which began in February and will be completed in the fall, have drawn from a broad cross-section of business leaders, legal practitioners, economists, and academic experts with extensive experience in these areas. We expect to publish a report in 2003, which we hope will provide new insights into the effects of competition and patent law

and policy on innovation and other aspects of consumer welfare.

Remedies

With respect to remedies, we are undertaking a thorough review of the entire remedy process, examining our guiding principles and the legal and economic basis for imposition of particular remedies, as well as administrative issues. This is an important component of antitrust enforcement that I believe has not been focused on sufficiently. After all, it does little good to challenge a practice or a merger as anticompetitive if the remedy you end up with at the end of the day does not protect and preserve competition — or worse yet, if the cure is worse than the disease.

Coordinated Effects Analysis

Another more substantive ongoing policy initiative is our review — or attempted rediscovery — of coordinated effects analysis. In recent years we have seen the emergence of unilateral effects as the predominant theory of economic harm pursued in government merger investigations and challenges. Unilateral effects, while a viable theory of harm, should not be the theory of choice simply by default. 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.

As a result, as I discussed at the American Bar Association's annual convention this past August, for the last several months, I have had a team of lawyers and economists led by the Division's Deputy Assistant Attorney General for Economics, Michael Katz, and Acting Chief of

our Competition Policy section, Andrew Dick, looking closely at coordinated effects analysis. Throughout this process of rediscovering coordinated effects, we will continue to draw upon the prevailing economic literature, case precedent, and case experience, as well as share our perspectives with our colleagues at the FTC, who are undertaking a similar endeavor. We hope that as a result of our efforts we will be better analysts and advocates, and that we will renew the focus on coordinated effects analysis.

Gun-Jumping

An additional area that we are reviewing and in which we hope to provide additional guidance to the public is gun-jumping. The pendency of a proposed merger does not excuse merging parties of their obligations to compete independently. We know that additional clarity concerning the Division's views on this issue would be helpful to the public, and as such, we have undertaken a review of this issue. In the coming months we hope to provide additional guidance on the types of pre-consummation activities that may or may not be advisable under controlling legal precedent.

The Coming Months

When I first came into office, I said that my principal goal was to ensure that the Antitrust Division remains a vigorous, formidable and effective enforcer of our nation's antitrust laws. Over the past 15 months, we have made considerable progress in restructuring our operations to meet the challenges of the modern economy, improving our investigative methods and processes, and giving critical thought to substantive policy issues important to our mission. The hallmark of any truly successful organization is that it constantly strives to improve itself,

and our staff has worked hard in that very spirit.

Within the very near future, you will see many of our important first-year initiatives coming to fruition in various forms:

- ▶ a clearer articulation of the Division’s policies on civil remedies;
- ▶ a report summarizing the learning derived from our joint hearings on intellectual property;
- ▶ guidance to the business community on “gun-jumping” under the HSR Act;
- ▶ the product of our comprehensive review of the law and economics of coordinated effects in merger enforcement;
- ▶ a manual on best practices for conducting merger investigations;
- ▶ a statement of best practices for cooperation between the U.S. and the EU in conducting simultaneous merger investigations; and
- ▶ the work product from our ICN consultations with regard to merger standards, premerger notification and competition advocacy.

Our goals on all of these matters are to ensure that our policies reflect the best possible thinking, to institutionalize best practices across the entire Division, and to make our policies as transparent as possible.

With regard to enforcement, our docket will be dictated by what goes on in the economy over the coming months. I will, however, offer the following general observations.

Corporate misconduct now has emerged “front and center” in the national consciousness, and we certainly can see its effect upon confidence in our business institutions and financial markets. While there is no necessary connection between the types of conduct we read about in

the newspapers and the types of issues actionable under the antitrust laws, it would be a mistake to assume that the events of recent months have not raised the antennae of our criminal enforcers in the Antitrust Division. We remain fully committed to an aggressive, no-excuses approach to criminal antitrust enforcement, and we have redoubled our efforts to root out criminal conduct through outreach activities in a number of important sectors, our relationships with antitrust enforcers abroad, and use of our corporate leniency program.

No one, of course, can predict when merger activity will accelerate or whether it will at any time in the near future resume the frenetic pace of the late 1990's. Given the state of affairs in some economic sectors, we often hear the prediction that economic circumstances will force significant consolidation in certain markets and that the financial condition of one or more of the merging parties will be a key factor in our analysis. As experienced antitrust practitioners know, financial circumstances can be a factor in merger review where, for example, one of the firms meets the technical requirements of the failing company defense or where its financial condition limits in some substantial way its ability to compete. For firms considering such mergers, practitioners should be aware that the ordinary standards for merger guidelines review will continue to apply. In other words, such arguments will be scrutinized closely, with the recognition that careful and balanced merger enforcement can be as important in downward trending markets as it can be in industries experiencing growth.

Merger practitioners also should note carefully our renewed focus on coordinated effects. Our internal working group is making considerable strides in sharpening our ability to identify the ways in which mergers may facilitate tacit coordination. We are also working hard to

improve our techniques for collecting evidence in this area and for presenting convincing coordinated effects stories in litigation. In some instances, coordinated effects theories may suggest broader harm and the need for broader relief than theories premised solely upon the elimination of the competition that existed between just the merging parties.

Finally, in the non-merger civil arena, I cannot emphasize enough our intention to look closely at joint ventures — both horizontal and vertical — to ensure that these collaborative efforts do not harm competition and consumers. Our focus in this area is broad, ranging from licensing critical technologies to broad efforts among competitors to commercialize new technologies.

Conclusion

I am blessed to head the Antitrust Division in interesting times. As an agency, we confront some of the most interesting and, often, confounding economic issues of our times. The Division is comprised of some of the most dedicated men and women in government, who demonstrate every day their unswerving commitment to preserving competition as a foundation for our market economy. I cannot tell you how much I look forward to the coming year and the challenges it will bring.