DEPARTMENT OF JUSTICE

Statement of

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Good morning Mr. Chairman and members of the Committee. I am pleased to present this statement addressing how the Justice Department analyzes mergers in the telecommunications industry, a vitally important part of our economy.

Mergers can allow businesses to grow in ways that help consumers. They can combine complementary assets and enable firms to get new and better products to consumers more quickly and more cheaply.

On the other hand, mergers can harm consumers by, for example, eliminating competition that would have resulted in lower prices or product innovation. Those potential consumer harms have been a central concern of the Justice Department since the Sherman Act's enactment.

Since its passage in 1976, the Justice Department has reviewed mergers within the framework of the Hart-Scott-Rodino Antitrust Improvements Act. Under that statute, parties to proposed transactions over a certain size must provide to us information regarding their businesses before consummating their transaction. If a transaction falls outside the statute's reporting thresholds, the Justice Department can still investigate under its Civil Investigative Demand authority, which allows us to review both pending and consummated transactions.

Although our review of the vast majority of transactions subject to the Hart-Scott-Rodino Act's pre-merger filing requirement is accomplished within 30 days of the parties' initial filing, some transactions require a closer look for us to make an informed judgment about their likely competitive effects. In those instances, we issue what is called a second request, which is essentially a request for a more complete set of party documents and data. Until they comply with the second request and provide us time to review their materials, parties are not allowed to consummate their proposed deal.

During the period of time when the parties are complying with a second request, we typically conduct interviews with customers and competitors, and often request documents and data from industry participants. Working together, the Antitrust Division's economists and lawyers examine the transaction's likely competitive effects based on the facts as they present themselves.

An important point worth emphasizing is that the Justice Department's review during this second request phase is confidential. Under the law, even the fact that a company has filed a notification cannot be disclosed. Customers and industry participants with views about a transaction should know that the law places significant, meaningful restrictions on our ability to disseminate information provided to us during our merger investigations. I noted at the outset of this testimony that we cannot discuss the details of an active investigation. Indeed, absent an explicit waiver, we are even restricted in our ability to share confidential information with the Federal Communications Commission, which, as I will describe below, also reviews transactions in the telecommunications field.

Turning back to the second request, we try to minimize costs and delay, recognizing that second requests can not only impose significant burdens on merging parties but also harm consumers by delaying a transaction, thus denying them the benefits of procompetitive mergers. At the same time, however, we often need to conduct a thorough inquiry to assess adequately how a proposed transaction will affect the consumers we are charged with protecting. That may necessitate a particularly detailed review in instances involving significant transactions that have the potential to transform markets because there is typically no going back once that transformation occurs.

For those transactions requiring a second request, it often takes the parties several months to comply with our requests. At the end of our review, if we believe that the transaction is likely to violate the antitrust laws, the Department must file a lawsuit asking a court to enjoin the parties from completing their transaction. Courts adjudicate our merger challenges under the well-established standards of the Clayton Act, which is not specific to the telecommunications industry and prohibits transactions that result in a substantial lessening of competition.

After learning that the Department intends to file suit to block a deal, parties frequently will seek to negotiate a settlement that will remedy the competitive harms of the transaction while simultaneously allowing the procompetitive aspects of the merger to go forward. Indeed, it has been the case for many years that the majority of the transactions challenged by the Justice Department have resulted in negotiated settlements. Accordingly, our investigations are conducted not only with an eye toward litigating, but also in light of the reality that we often obtain a solution that protects competition without resort to a contested litigation. Thus, the contours of any potential

consent decree can be the subjects of our confidential discussions with industry participants during our investigation.

In the telecommunications field, we conduct our merger reviews alongside the Federal Communications Commission. The FCC has jurisdiction to review transactions involving the transfer of FCC licenses, and it has the power to impose conditions on those transfers. Unlike the Justice Department's inquiry, which is conducted under the antitrust laws and thus focuses on competition, the FCC's review is typically conducted under the Communications Act of 1934 and that statute's mandate to protect the public interest. Unlike the Antitrust Division, which must persuade a court to enjoin a transaction, the FCC may condition license transfers under its own authority.

Under the public-interest standard, the FCC focuses not only on competition concerns but also other considerations, including universal service, spectrum allocation, diversity of news and content, technological standards, and national security. Even though the standards are different, the Justice Department and the FCC often focus on similar issues and review similar facts, and both agencies seek to cooperate during their investigations. That cooperation allows us to share expertise about market structure and industry trends, and also to make sure that any necessary remedies are consistent.

In terms of process, the Justice Department and FCC coordinate during investigations to minimize the parties' costs. For instance, merging parties typically grant waivers that permit the FCC and Antitrust Division to coordinate document productions, thereby minimizing party burdens. Another procedural point worth mentioning is that, unlike the typical merger reviewed by the Justice Department, where the parties are free to close their transaction 30 days after substantially complying with a

second request, merging parties in the telecommunications field may be required to wait for the FCC to affirmatively approve the transfer of a license before closing, thus displacing, at least as a practical matter, the time constraints normally imposed by the Hart-Scott-Rodino Act. In all cases, however, we do our best to review transactions closely and, at the same time, not delay the closing of procompetitive transactions unnecessarily.

A review of the Antitrust Division's general work over the past year will, I hope, provide useful insight into our priorities and approach to antitrust enforcement.

In short, antitrust enforcement helps keep markets competitive, protecting consumers and spurring innovation. In the merger context, this approach means ensuring that we either go to court to block those mergers that will substantially reduce competition or negotiate a settlement agreement that simultaneously enables the procompetitive aspects of a deal to go forward yet also prevents mergers from having anticompetitive effects on consumers. Our review of likely competitive effects considers both vertical and horizontal issues, and we publicly set forth our enforcement standards in a number of ways, including competitive impact statements, litigation pleadings, closing statements, and other policy documents. When we investigate the unilateral conduct of a firm with market power or the coordinated conduct of firms, this approach means ensuring that firms do not engage in behavior that harms consumers and competition. In the criminal context, this approach means working to detect cartels and prosecuting the firms and individuals who fix prices.

As Assistant Attorney General for Antitrust, I have sought to take a measured approach to enforcement using sound antitrust principles, evaluating each matter

carefully, thoroughly, and in light of its particular facts. Some matters involving large, significant companies have proceeded unchallenged because they were unlikely to result in anticompetitive harm. For instance, the Justice Department did not challenge either the combination of Oracle and Sun or the collaboration between Microsoft and Yahoo!.

Some proposed mergers have been altered through settlement agreements designed to ensure that competition would be preserved. For instance, the combination of Ticketmaster and Live Nation, as well as that of Bemis and Rio Tinto, proceeded only after we obtained decrees resolving our competitive concerns. Some aspects of our Ticketmaster decree are worth pointing out. The proposed settlement requires Ticketmaster to license its ticketing software and divest ticketing assets to two different companies, allowing both to compete head-to-head with Ticketmaster in the provision of primary ticketing services. In addition, the proposed consent decree also subjects Ticketmaster to court-ordered behavioral restrictions including, among other things, provisions that preclude Ticketmaster from retaliating against any venue that chooses to use another company's ticketing services or another company's promotional services. As we explained in our competitive impact statement accompanying the proposed settlement, our conclusion that Live Nation was a "disruptive entrant" that was positioned potentially to challenge Ticketmaster's dominance in ticketing constituted the core of our competitive concerns regarding the merger and triggered our judgment that a strong remedy was necessary. By enabling the entry and repositioning of other competitors, the Division concluded that the agreed-upon remedies preserved the competition that would have existed but for the merger.

We are ready to litigate when we need to. We are currently challenging a transaction involving Dean Foods, the nation's largest dairy processor, in the United States District Court for the Eastern District of Wisconsin. We are seeking a court order requiring Dean to divest the milk processing plants it acquired from a close competitor in Wisconsin on the ground that the merger will increase the price of both the fluid milk bought in the grocery stores and other similar retail outlets and the school milk drunk by students in Wisconsin and the Upper Peninsula of Michigan.

In addition to our work involving mergers, the other aspects of our civil-enforcement program are active. For instance, in a series of court filings and court appearances, the Justice Department articulated a number of concerns about the business arrangements negotiated, through the construct of a proposed class-action settlement, between Google and the nation's largest book publishers. In the same vein, we have articulated to the United States Court of Appeals for the Second Circuit our competitive concerns about so-called reverse payments in the pharmaceutical arena, whereby firms agree to delay the entry of generic-drug competition through settlement of a patent dispute. Finally, we recently announced a proposed settlement resolving our concerns about anticompetitive conduct that thwarted regulatory incentives to lower electricity prices in New York City.

On the criminal side, our cartel enforcement is very active. Our ongoing investigation of price fixing in the liquid-crystal-display and cathode-ray-tube industries continues to result in plea agreements and significant criminal fines and jail time. In October, a jury also returned the first indictment in our ongoing investigation of anticompetitive conduct in the municipal bond industry.

The Justice Department has also taken an active role advocating on behalf of competition and consumers. For instance, in coordination with the National Telecommunications and Information Administration, we recently provided to the Federal Communications Commission a submission addressing broadband competition as part of the FCC's ongoing preparation of a national broadband plan as requested by the Congress. That submission was part of a broader effort to share our industry expertise and understanding of how competitive behavior affects consumers.

Finally, I would like to conclude by mentioning a policy that has been of particular importance to me. Within the confines of our confidentiality obligations, the Antitrust Division seeks to be as transparent as possible regarding our enforcement intentions. I have made this point a policy priority, particularly in the international arena, because the burgeoning of antitrust enforcement around the world has the potential to harm U.S. business interests in those places where enforcement intentions are unclear. Transparency is good for business, and it is also good for consumers. Among other virtues, transparency enables businesses to better predict enforcement actions. From my prior work in private practice and service on corporate boards of directors, I know first-hand that predictability is of crucial importance to the business community.

To sum up, with the Division's excellent career staff and my very experienced Front Office team, the Antitrust Division is proceeding in the direction that I outlined in my first public remarks as Assistant Attorney General: "vigorous antitrust enforcement in this challenging era." In reviewing proposed transactions, we use our analytical skills and tools to determine the appropriate competitive analysis. In reviewing proposed mergers in the telecommunications industry, we work closely with the Federal

Communications Commission to ensure that any antitrust remedy is synchronized with their public-interest analysis to yield the appropriate marketplace result that best promotes consumer welfare and a vibrant telecommunications market.

Mr. Chairman, this concludes my prepared statement. I am happy to address any questions that you or the other members of the Committee may have.