Department of Justice

STATEMENT

OF

CHRISTINE A. VARNEY
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

BEFORE THE

SUBCOMMITTEE ON THE COURTS AND COMPETITION POLICY
COMMITTEE ON THE JUDICIARY
U. S. HOUSE OF REPRESENTATIVES

OVERSIGHT HEARING ON

THE FEDERAL TRADE COMMISSION'S BUREAU OF COMPETITION AND THE U. S. DEPARTMENT OF JUSTICE'S ANTITRUST DIVISION

PRESENTED ON

JULY 27, 2010

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Good morning Chairman Johnson and members of the Subcommittee. It is a pleasure for me to appear before you today on behalf of the Department of Justice to discuss with you the work of the Division over the last year.

Competition is a cornerstone of our nation's economic foundation. The Department of Justice's Antitrust Division takes a measured approach to enforcement using sound competition principles, evaluating each matter carefully, thoroughly, and in light of its particular facts. Our enforcement helps keep markets competitive, thereby protecting consumers and spurring innovation. We appreciate this Committee's active interest in—and strong support of—our law enforcement mission. We are particularly thankful that this Committee, with the support of the Obama Administration, is leading the effort to eliminate antitrust immunity for the health-insurance industry.

The Antitrust Division is galvanizing the tremendous skills of our lawyers and economists to coordinate strong enforcement with thorough market and policy analysis, as part of a broad effort to encourage competition. In addition to our enforcement efforts, the Division

plays a vital role within the government promoting competition. We are mindful that initiatives in other parts of the government can often have significant competition implications, and we share our expertise throughout the government. We also listen to other parts of the government, academics, and marketplace leaders to learn from them and anticipate potential antitrust problems to better serve American consumers.

Merger enforcement continues to be a core priority for the Antitrust Division. We are committed to going to court to block those mergers that will substantially reduce competition. The commitment to litigate enhances our ability to negotiate settlements that simultaneously enable any procompetitive aspects of a deal to go forward yet also prevent harm to consumers. At the same time, we are also committed to quickly closing our investigations of mergers that do not threaten consumer harm so as not to unnecessarily impede business operations. Just as consumers rely on us to protect them against harmful business combinations, businesses should also be able to rely on us to quickly and efficiently clear their lawful transactions.

One enforcement action that remains in active litigation involves the nation's largest dairy processor. In January, the Division filed suit to undo the merger of Dean Foods and Foremost Dairy, alleging that the merger reduced competition for milk sold to schools, grocers, and retailers in Illinois, Michigan, and Wisconsin. The Department's suit seeks not only to undo the 2009 deal but also an order requiring Dean to notify the Department before any future acquisition involving a milk processing operation. More generally, this enforcement action is indicative of this Department of Justice's commitment to our nation's farming industries.

Investigation dynamics can be difficult in transactions, like the one between Dean and Foremost, where the pre-merger notification process under the HSR Act does not apply and the parties are free to close their transaction before review of the transaction is complete.

Nevertheless, the Division continues to investigate and, where appropriate, take action against transactions that do not require pre-merger notification. Another example of our law enforcement was the abandonment by Blue Cross-Blue Shield of Michigan of its proposed purchase of Physicians Health Plan of Mid-Michigan. Had that acquisition gone forward, it would have given Blue Cross control of nearly 90 percent of the commercial health insurance market in the Lansing, Michigan, area, resulting in higher prices, fewer choices, and a reduction in the quality of commercial health insurance plans purchased by Lansing area residents and their employers. The acquisition also would have given Blue Cross the ability to control physician reimbursement rates in a manner that could harm the quality of health care delivered to consumers. We informed the parties that we would file an antitrust suit to block the transaction, and the parties then abandoned the deal.

It is in the shadow of our willingness to litigate that we have also been able to obtain several settlements that simultaneously resolve our competitive concerns while permitting the parties to proceed with those parts of their transaction that do not threaten consumer welfare. For instance, in January, the Antitrust Division announced that it would require Ticketmaster, the world's largest ticketing company, to license its ticketing software, divest ticketing assets, and subject itself to anti-retaliation provisions in order to proceed with its proposed merger with Live Nation Inc. The remedy, which remains under Tunney Act review, will give concert venues more choice for their ticketing needs and will promote incentives for competitors to innovate and discount.

The proposed relief in the Ticketmaster matter is both structural and behavioral. The settlement requires Ticketmaster to divest more ticketing than it will gain through its acquisition of Live Nation. Simultaneously, the licensing solves a second competitive issue by giving AEG,

an integrated competitor, the ability and incentive to compete with the combination of Ticketmaster and Live Nation for concert promotion, venue management, and ticketing. Under the settlement, Ticketmaster will be required to license its ticketing software to AEG, which had been Ticketmaster's single largest customer. AEG will now have the opportunity and incentive to compete in primary ticketing, both in its own venues and third-party venues, thereby opening the door for AEG to become a vertically integrated competitor with competitive incentives similar to those of the merged company. In addition, Ticketmaster was required to divest Paciolan, an established ticketing business that sells tens of millions of tickets annually. Finally, the settlement provides tough, ten-year, anti-retaliation provisions that prohibit anticompetitive bundling and should keep the merged company in check. Those anti-retaliation provisions illustrate a slight shift of Division policy in realm of merger remedies. Although we generally prefer structural solutions, we are also committed to thinking creatively about market conditions and employing behavioral solutions, particularly when they are needed, in tandem with structural solutions, to protect against consumer harm.

Another transaction where we were able to obtain a consent decree resolving our competitive concerns involved Bemis's $1.2 billion acquisition of the Alcan Packaging Food Americas business from Rio Tinto. As originally proposed, the transaction would have combined Bemis and Alcan, two of the leading U.S. manufacturers of (1) flexible-packaging rollstock for chunk, sliced, and shredded natural cheese and (2) flexible-packaging shrink bags for fresh meat. Without divestitures, the acquisition would have led to higher prices, lower quality, less favorable supply-chain options, reduced technical support, and less innovation. The settlement, which has been approved by the court, requires the companies to divest Alcan

contracts and intellectual property, plants located in Oklahoma and Wisconsin, and other assets necessary to the manufacture of flexible packaging for natural cheese and fresh meat.

Similarly, we moved quickly to remedy the combination of the nation's two largest providers of voting machines. Again, this transaction fell below the HSR-reporting thresholds, so our investigation began only after the parties had combined their assets and dismantled some of their pre-combination operating divisions. The settlement, which has been approved by the court, provides quick, effective relief resolving our competitive concerns and enabling local and state jurisdictions to obtain competitive bids for their immediate voting equipment needs.

Specifically, under the settlement, the acquirer, Election Systems & Software, was required to divest the means to produce Premier Voting Equipment Systems, including the necessary intellectual property, tooling, fixed assets, inventory of finished devices, and replacement parts. The settlement also prohibits ES&S from bidding on new voting equipment system contracts using the Premier equipment. Last month, Dominion Voting Systems purchased the Premier assets from ES&S. The divestiture allows Dominion to contract immediately with third party manufacturers, consistent with Premier's past practice, for the production of Premier devices and parts.

As mentioned earlier, the Antitrust Division is also committed to expeditiously closing those matters that do not threaten consumers. Unnecessary delay is simply unacceptable. For instance, the Justice Department did not challenge either the combination of Oracle and Sun or the collaboration between Microsoft and Yahoo!. In other words, we seek to ensure that our commitment to vigorous enforcement of the antitrust laws does not impede legitimate business transactions that do not run afoul of the antitrust laws.

On civil non-merger issues, we have two matters that remain under court review through the provisions of the Tunney Act. In the first, we allege that the then-largest seller of electricity capacity in the New York City market engaged in an anticompetitive swap transaction that likely resulted in a price increase for retail electricity suppliers and, in turn, an increase in electricity prices for consumers. In the second, we allege that a group of Idaho orthopedic surgeons organized a boycott of Idaho's workers' compensation system, essentially refusing to treat injured workers. Our proposed decree would enjoin the conduct.

In our criminal program, we continue to uncover and prosecute a number of cartels that inflicted significant competitive harm. These efforts were significantly enhanced by the provisions of the Antitrust Criminal Penalty Enhancement and Reform Act, which supplements our leniency program, and we thank you for leading the effort to extend that program through a ten-year reauthorization.

Recently, we have prosecuted criminal cases against firms and individuals in several industries, including air transportation services, liquid crystal display panels, financial services, Internet services for disadvantaged schools and libraries, packaged ice, environmental services, and post-Hurricane Katrina remedial work. Those prosecutions resulted in significant fines. In our most recent fiscal year 2009, the Division obtained more than $1 billion in fines, which is the second highest amount of total fines ever obtained by the Division in a fiscal year. The bulk of those fines were the result of the Division's investigations of the air transportation and LCD industries. Recent fines in the air transportation area includes (1) a $119 million fine against Luxembourg-based Cargolux Airlines International, (2) a $109 million fine against LAN Cargo, a Chilean company, and a Brazilian company that it substantially owns, (3) a $50 million fine against Korea-based Asiana Airlines, (4) a $45 million fine against Japan-based Nippon Cargo

Airlines, and (5) a $15.7 million fine against EL AL, an Israeli company. Recent fines in the LCD area include (1) a $400 million fine—the second largest fine in Antitrust Division history—against Korean LCD manufacturer LG Display and its California subsidiary, (2) a $220 million fine against Taiwan manufacturer Chi Mei Optoelectronics, (3) a $120 million fine against Japanese manufacturer Sharp, (4) a $65 million fine against Taiwan manufacturer Chunghwa Picture Tubes, (5) a $31 million fine against Japanese manufacturer Hitachi Displays, and (6) a $26 million fine against Japanese manufacturer Epson Imaging Devices.

In addition to corporate fines, holding culpable individuals accountable by seeking jail sentences also remains an effective way to deter and punish cartel activity. Individuals prosecuted by the Division are being sent to jail with increasing frequency and for longer periods of time. In our most recent fiscal year, courts imposed more than 25,000 jail days against defendants in Antitrust Division matters. Defendants prosecuted by the Division are, on average, serving increasingly longer sentences, and they are also going to jail with increasing frequency. For instance, in the 1990s, 37 percent of defendants prosecuted by the Division were sentenced to jail on average. Last year, 80 percent were.

In addition to the threat of fines and jail time, rigorous internal compliance programs, where employers rigorously instruct their employees about the requirements of the antitrust laws and set up internal controls to protect against cartel activity, are another important deterrence mechanism that can prevent harmful cartel activity from occurring in the first place. As we move forward, we look forward to encouraging firms to undertake effective compliance programs and thinking creatively about ways to stimulate them. Early detection of criminal antitrust activity allows companies, where necessitated, to take advantage of the Division's criminal leniency program.

On the competition-advocacy front, the Antitrust Division has stepped up its efforts with various programs and initiatives directed at strengthening markets and preserving economic freedom and fairness. Promoting competition principles through broad advocacy efforts and regulatory outreach is one of our highest priorities. As a result of our enforcement efforts, the Antitrust Division has gained enormous insight into the competitive dynamics of many industries. We are committed to sharing that expertise throughout the government to enhance pro-consumer outcomes. To that end, the Division works actively with a broad range of federal and state agencies to promote competition principles across a number of vitally important industries in our economy, including agriculture, telecommunications, energy, financial services, and healthcare.

Prominent among these efforts is our work in the agriculture industry. Earlier this year, the Department of Justice and the Department of Agriculture launched a series of workshops around the United States to discuss competition and regulatory issues in the agriculture industry. Both Attorney General Holder and Secretary of Agriculture Vilsack are personally participating in these unprecedented series of joint public workshops, which are the first-ever sponsored jointly by the Justice Department and the USDA to discuss competition and regulatory issues in the agriculture industry.

The first workshop was held in March of this year in Ankeny, Iowa, and featured panel discussions on a variety of topics important to America's farmers and ranchers, including competitive dynamics in the seed industry, trends in contracting, transparency, and buyer power, and concluded with public testimony. More than 700 citizens were in attendance. We had our second hearing in Normal, Alabama, where we addressed the concerns of poultry farmers, trends in poultry production, and related regulatory and enforcement issues. More than 500 farmers and

other participants attended. A third hearing was held last month in Madison, Wisconsin, where we discussed trends in the dairy industry, market consolidation, and market transparency. Additional two hearings will be held later this year in Colorado and Washington, D.C. Among other lessons, these hearings have impressed upon us the vital importance of effective co-operatives and family farms for well-functioning agriculture markets.

To maximize the effect of our learning from these hearings, the Justice Department has formed a joint task force with the USDA to help us determine how the government can best utilize what is learned from those hearings to help promote competition in our nation's agricultural markets. Even though antitrust is not the solution to all problems, we are committed to championing throughout the government pro-consumer principles that will promote competition in agriculture markets.

Another inter-agency task force that we are fully engaged on is the Financial Fraud Enforcement Task Force, which the President established to strengthen efforts to combat financial crime. Led by Attorney General Holder, the task force works with state and local partners to investigate and prosecute significant financial crimes, ensure just and effective punishment for those who perpetrate financial crimes, address discrimination in the lending and financial markets, and recover proceeds for victims. We are fully engaged in this effort.

In transportation, the Division has been working closely with the Department of Transportation, especially on issues related to antitrust immunity requests for airline alliances. We conducted thorough investigations and filed comments with the DOT addressing the competitive implications of immunity requests affecting the Star and oneworld alliance agreements. We also collaborated closely with our European counterparts in those matters. In addition, we provided to the DOT comments regarding the proposed transaction whereby Delta

and USAir would swap their slots at LaGuardia and National airports. The DOT cited our submission extensively in its order requiring slot divestitures before the transaction could proceed.

We have been active in telecommunications as well. Earlier this year, the Division submitted comments promoting competition principles with the Federal Communications Commission regarding its national broadband plan inquiry. We are also collaborating closely with the FCC on our concurrent review of the proposed transaction involving Comcast and NBC in order to harmonize to the maximum extent possible government review of that deal.

In the energy sector, the Division, along with the Federal Trade Commission, recently held an internal workshop on competition in the energy markets, which involved collaboration with representatives from the Federal Energy Regulatory Commission, the Department of Energy, and several state regulatory agencies. That workshop was part of a broader effort to coordinate with state enforcers on various matters, including both particular industries and antitrust doctrine more broadly. We are also working closely with the FERC on proposed transactions in the energy industry in an effort to more closely align our efforts.

In intellectual property, the Division is committing significant attention to the Intellectual Property Task Force established by Attorney General Holder. The Task Force focuses on strengthening efforts to combat intellectual property crimes through close coordination with state and local law enforcement partners, as well as international counterparts. It also serves as an engine of policy development to address the evolving technological and legal landscape of this area of law enforcement. Moreover, we have been working closely with the Patent and Trademark Office on issues relating to the intersection between patent law and competition principles. As part of that effort, the Department, the Federal Trade Commission, and the PTO

held a public workshop last month on the intersection of patent policy and competition policy and its implications for promoting innovation. The collaboration marked the first time that the three groups had sponsored a public workshop on this vitally important aspect of today's economy.

In addition to collaborating on the workshop, the Division has collaborated efficiently and effectively with the Federal Trade Commission on a number of other fronts. For example, our joint, ongoing review of the Horizontal Merger Guidelines and examination of whether they need to be updated in light of changes in agency practice in the eighteen years since the Guidelines were last significantly revised has been a constructive and positive collaboration. We are also beginning to coordinate efforts to support effective implementation of the new health-care-reform legislation. During my confirmation hearing, I stressed the need for harmonizing relations between the Division and the Federal Trade Commission, and we are working actively on that.

Healthcare is a particular priority for the Department. We have been actively working on the complicated competitive issues surrounding clinical integration among doctors, and the resulting competitive dynamic with health insurers, in conjunction with the Federal Trade Commission. We are also working collaboratively with the Department of Health and Human Services on the new Affordable Care Act, seeking to proactively identify competitive issues relating, for instance, to administrative services organizations and the new marketplace dynamics that will be shaped by the reform.

Another important piece of the Division's commitment to advocate on behalf of competition and consumers is our amicus program where, often in conjunction with other parts of the Department and other parts of the government, we participate in the filing of amicus briefs

in cases dealing important antitrust issues. For instance, the Division worked with the Department to articulate to the United States Court of Appeals for the Second Circuit our competitive concerns about so-called "pay-for-delay" settlements in the pharmaceutical arena, whereby firms agree to delay the entry of generic-drug competition through settlement of a patent dispute.

Amicus briefs provide a valuable opportunity for the Department to offer courts the benefits of the Division's specialized competition knowledge and expertise. These briefs also increase public transparency and inform the business community and antitrust counselors about the Division's approach to key antitrust and competition issues. Through our amicus program, we also are able to articulate our views about the proper scope and reach of new and important decisions. In this regard, it is worth noting that the Federal Trade Commission, in its recent testimony before this Committee, has identified a "worse case" reading of the recent *Trinko* and *Credit Suisse* decisions. While we appreciate the Commission's concern about how these cases could be inappropriately applied in other contexts, we understand the Court's reasoning to be limited to the facts and circumstances presented in those particular cases. We are working diligently to enforce the antitrust laws consistent with our understanding of the Court's precedents.

A very recent milestone for our amicus program occurred earlier this year when the Supreme Court issued its American Needle decision, which accorded with the recommendation of the Solicitor General. The Court's unanimous decision was an important win for consumers. It clearly stated that competitors, including joint ventures involving sports leagues and teams, are subject to the antitrust laws and rejected an effort to create a broad immunity under the antitrust

laws for agreements among competitors. The decision ensures that playing fields remain open and competitive, providing consumers with more choices.

Not only are we championing consumers and competition domestically, but we are also actively engaging with the global antitrust community, which has grown as the scope of international business operations have grown. The Division works with international competition groups, like the Organisation for Economic Co-operation and Development and the International Competition Network, as well as international competition agencies, to promote competition and consumer interests across the globe. Our efforts to spearhead this important priority have been particularly enhanced by the strong relationship we have with our counterparts in the European Union. By way of example, we recently had a particularly constructive working relationship with the European Commission analyzing the transaction between Cisco and Tandberg, and we aim to build upon that relationship going forward.

A particular priority has been promoting dialogue on the importance of transparency, due process, and fairness among international competition agencies. These efforts include participating in international workshops on a broad range of policy issues and contributing to guidance documents promulgated by organizations like the OECD and the ICN. The Division also consults bilaterally with a range of international jurisdictions on issues like adopting new antitrust laws, drafting guidelines, intellectual property licensing, and cooperation on international investigations and enforcement actions. Among many accomplishments, the Division and the FTC entered into a groundbreaking Memorandum of Understanding with the Russian Federal Anti-Monopoly Service in November 2009. We are also engaging actively with the relatively new Chinese and Indian competition authorities, and are establishing relationships there that will serve as springboards for future dialogue and discussion. For example, over the

past year, the Division has had exchanges with Chinese agencies on their proposed regulations and guidelines, arranged a training program for eighty Chinese judges, and participated as instructors in workshops on merger enforcement, cartels, and other topics. The Division also participates in the Administration's initiatives in China, including the U.S.-China Strategic and Economic Dialogue and the Investment Forum. These and related efforts seek to promote the adoption of sound competition principles and antitrust enforcement around the world.

My first year as AAG has been remarkable. Working within the Justice Department on Attorney General Holder's team and closely with the dedicated men and women of the Antitrust Division, we are doing all we can to ensure that the competitive playing field is open and fair, giving consumers more and better choices. I look forward to year two and am committed to further fulfillment of what we started.

Mr. Chairman, that concludes my remarks. I am grateful to have had the opportunity to speak with you, and am happy to answer any questions.