DEPARTMENT OF JUSTICE

Reflections on Elements of Effective Antitrust Enforcement

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Thank you to Bill Kolasky for the kind introduction and to Margaret Sanderson, Jason Gudofsky, and the Global Competition Review for the opportunity to join you today.

I have been privileged to serve as Assistant Attorney General of the Antitrust Division for just over two years and to work with an outstanding law enforcement team. It has been a busy stretch and especially challenging given the resource constraints that confronted the Division when I first took the job. We had just closed four offices. Our hiring was frozen. And our spending was severely limited due to sequestration. We were headed to trial in a number of major criminal and civil matters and about to challenge other anticompetitive behavior. And then we had to weather that inexplicable government shutdown in late 2013. But our team stayed focused, worked hard, and continued to deliver meaningful results to the American consumer. The women and men of the Antitrust Division deserve our gratitude. They certainly have mine.

Those of you who follow us—and not just in the Twitter sense—know we remain busy. But today I want to take a step back and discuss some of the basic principles that in my experience underlie sound and effective enforcement. As Bill Kolasky reminded us, I have been privileged to work in the antitrust arena for quite awhile, including two earlier five-year stints at the Federal Trade Commission and some considerable time in the private sector. Obviously my experiences—and the last two years as AAG—influence how I think about antitrust enforcement and the role of the Antitrust Division. Without claiming any original insight, here are some thoughts I try to keep in mind in doing right by the laws we are asked to enforce.

We must remember our mission. It is about effective law enforcement. I recoil at the suggestion that antitrust equates to regulation. That is not what we do. And it is not how we ought to think about what we do. Our work is to use our statutory authority to remove restraints on competition and prevent behavior or consolidation that risks limiting competition. We do not aspire to be regulators or to pick winners and losers. Instead antitrust enforcement, done right, focuses on removing impediments to competitive markets and protecting market structures that facilitate competition.

Be trial-ready. We must be prepared to be put to our proof. Of course, most cases, criminal and civil, settle. But we need to embrace the role that judges play and the

discipline imposed by proving our cases to neutral arbiters. We need always to be prepared to vindicate at trial the great charters of economic freedom and protect the free markets the antitrust laws were meant to encourage.

At the same time, we must also remember that our mission reaches beyond the courthouse. Engagement and coordination with other enforcement agencies within the federal government is crucial. As a proud FTC alum, I appreciate the important role the Commission plays in both consumer protection and competition enforcement. The Division works closely with the FTC on a range of issues, including law enforcement, policy guidance, competition advocacy, and international engagement. We join forces on matters with competition significance pending before the Supreme Court and the courts of appeal. We share talent—most recently and most reluctantly, Terrell McSweeny. We also work to complement each other in many areas. For example, when the Commission uncovers hard-core Section One violations, FTC staff refers that behavior to us for investigation and possible criminal prosecution. Similarly, we refer to the FTC anticompetitive conduct that is best addressed under Section 5.

We foster similar productive relationships with our colleagues at the Federal Communication Commission, the Departments of Transportation, Commerce, and Agriculture, the Federal Reserve, and other federal agencies whose mandates intersect with our own. And our record of successful cooperation with state attorneys general demonstrates that shared jurisdiction can work and provide real opportunity to increase our combined effectiveness.

Engagement and coordination no longer end at our shores. That is quite the understatement. Each day the world economy becomes more tightly integrated. Meanwhile, more than 120 jurisdictions today have competition laws. Coordination is essential to avoiding the prospect of an antitrust Tower of Babel. Thus we engage multi-laterally–through our work with the Organization for Economic Cooperation and Development and the International Competition Network—and bilaterally on a regular basis.

This engagement with our counterparts overseas requires significant and continuing resource commitments. But it is worth it. Consumers and the competitive environment benefit when antitrust enforcers work effectively in parallel. We see it in

cartel matters. And we see it in merger investigations, like the Division's work last year with our colleagues from Canada, Brazil, and Mexico in Continental AG's purchase of Veyance Technologies. There the Division worked with our counterparts to coordinate our analyses and formulate appropriate remedies. Companies benefit too, when enforcers can coordinate their analysis to advance merger reviews more quickly, and when competitively benign mergers receive more prompt clearance.

Another important part of our mission is finding ways to do our jobs efficiently and to be mindful of burdens and costs we don't need to impose. Last March, the Division announced a new streamlined procedure for parties seeking to modify or terminate old antitrust settlements and litigated judgments entered before 1980. We are not going to object to eliminating a decree that has outlived its usefulness. So in the usual course you no longer have to offer an elaborate justification and the Division does not need to invest scarce resources in getting to the obvious answer.

We look for other opportunities to make our processes more efficient. We have embraced predictive coding, which, with appropriate safeguards, allows for quicker and more focused production of electronic records – saving us all time and money. We have also created standardized electronic production requirements, which give parties greater predictability and streamline productions. These initiatives help move the conversations beyond arguments about process and instead allow us to focus on the substance of the investigation. And we continue to look for additional ways to lessen the burden on producing parties while ensuring that we receive the information necessary to complete our mission.

We need to continue to seize the opportunity to provide meaningful front-end guidance to the people in this audience and to the businesses you represent. Most businesses want to play by the rules. Offering guidance about our enforcement priorities, whether through formal guidelines, business review letters, or speeches, helps them make plans and provides a good opportunity for the Division to educate businesses, the courts, and the public about our current approach to antitrust analysis.

The Horizontal Merger Guidelines best demonstrate the value of formal guidance. Over time, the Division and the FTC have worked closely to refine their approach to merger enforcement. These refinements are reflected in the most recent iteration of the

merger guidelines. The courts increasingly rely on them, and other jurisdictions use them as a sound and insightful analytical tool.

Sector-specific and conduct-specific guidance has value too. Last April, for example, the Division and the FTC issued a joint policy statement that makes clear that properly designed cyber threat information sharing can help secure the nation's networks of information and resources and is not likely to raise competitive concerns. Late last year, we applied this guidance in a business review letter stating that the Division would not challenge a proposal by CyberPoint International LLC to offer a cyber intelligence data-sharing platform that allows members to share threat and incident data about cyber attacks.

Another basic principle we need to remember is that competition is not neat, organized, or pretty. There will be big winners and big losers in many markets – and big temptation to stifle these new competitive dynamics. We see that most often when a new business model disrupts the old way of doing things and threatens profits incumbents may see as an entitlement. Generic competition certainly changed the pharmaceutical business—and created incentives for competitors to restrict competition at consumer expense. Ebooks have transformed the relationship among authors, publishers, retailers and consumers—and, as we now know, tempted some to conspire to preserve profits at the expense of consumers and competition.

We need to anticipate that market disruptors will generate complaints, most often from competitors, and tempt firms to respond in anticompetitive ways or by acquiring innovators that threaten the accepted ways of doing things. There is a rich history too of threatened incumbents responding to innovation by seeking local, state, or federal regulation that stifles competition. Antitrust enforcers need to be vigilant in working with public officials to sort out calls for regulation that mask this sort of anticompetitive motivation and risk stifling innovation that benefits consumers.

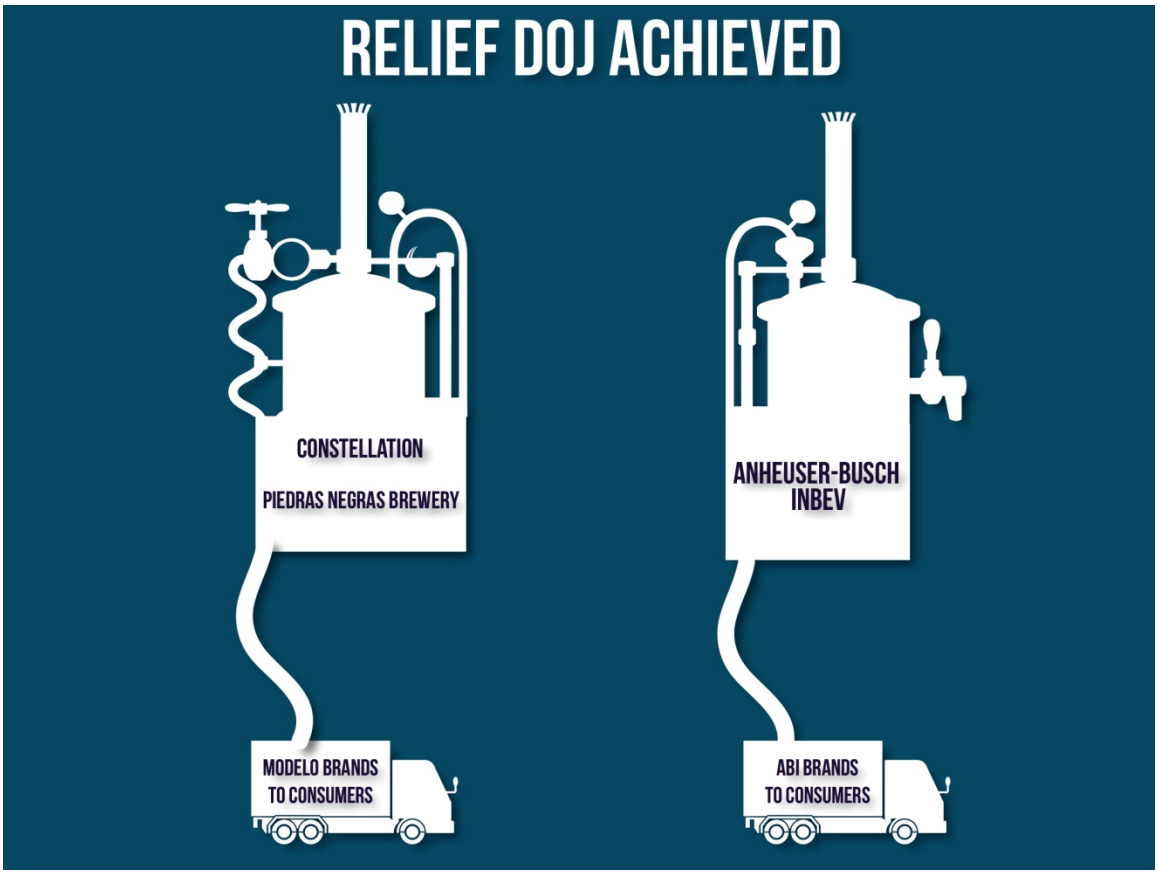
Sound antitrust enforcement requires careful attention to remedies. Some of you will recall that taking a harder look at remedies was a particular focus of mine in the 1990s as Director of the Bureau of Competition at the FTC. It remains so today. Remedies in our horizontal merger and Sherman Act cases should maximize competition

– existing or new – and minimize the need for ongoing regulatory involvement in decisions better left to the market.

My first week in this job required a deep dive into Anheuser-Busch InBev's effort to buy all of Grupo Modelo, the Mexican brewer best-known for Corona. The merger would have combined the largest and third-largest beer sellers in the United States and eliminated the pesky maverick behavior of the Modelo brands. The parties presumably knew this would trouble us and publicly offered a purported remedy – a complicated long-term supply agreement to a U.S. importer that would have left AB InBev with a chokehold over production of Corona and other brands for U.S. consumption. Here is how the AB InBev remedy looked to us:

This would have left the importer --Constellation -- totally dependent on AB InBev for beer supply, without any brewing or bottling facilities of its own, and subject to being pushed aside after only ten years. It is hard to see what incentive Constellation would have had to invest when it would not be in there for the long term.

We sued. And pretty soon AB InBev agreed to very different terms-- terms that divested Modelo's entire U.S. business to Constellation, including its newest and most technologically advanced brewery in Piedras Negras, Mexico. Here is the deal we did find acceptable:

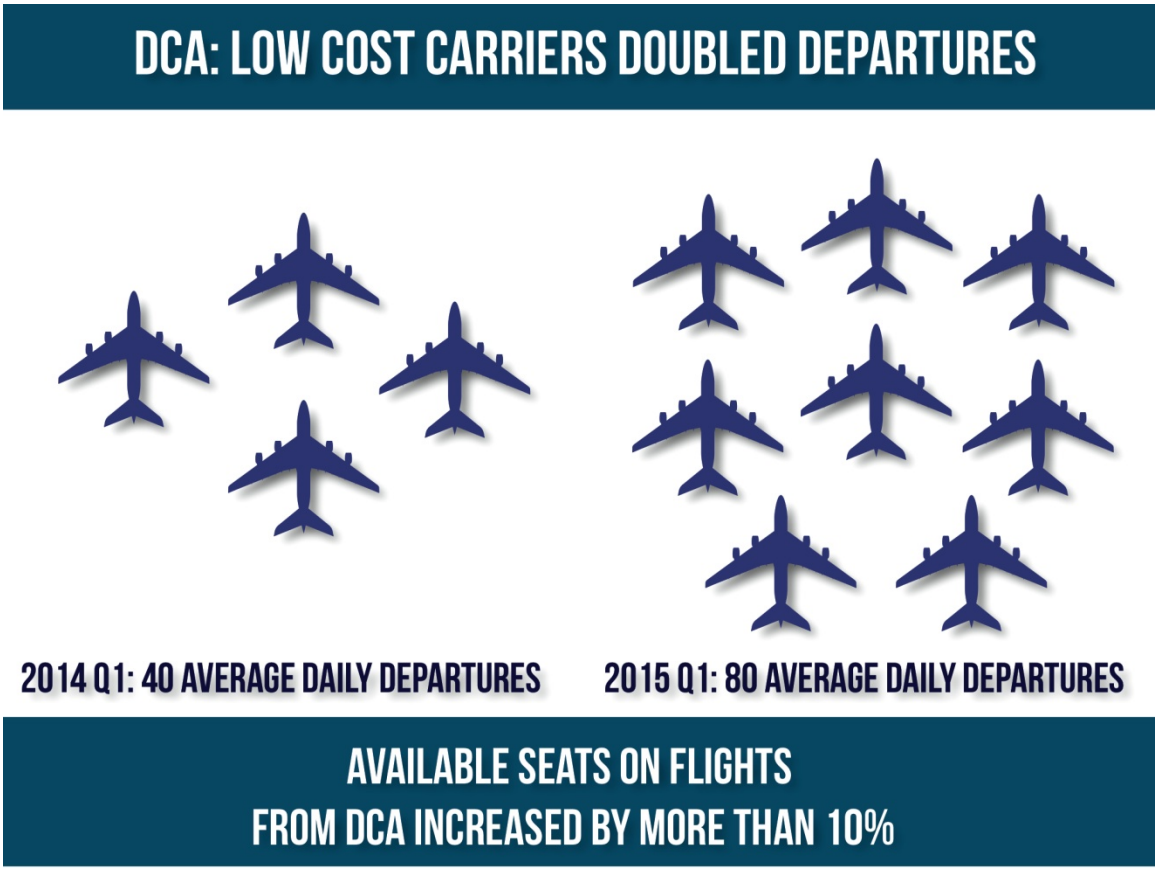


The settlement also provided for Constellation to double the size of that brewery to meet aggressive growth projections.

The structural remedy we litigated for is paying off for the American consumer. Constellation has begun offering new draft and canned beers, bringing competition to segments of the market that Grupo Modelo had previously ignored. Constellation is increasing capacity at Piedras Negras beyond its initial plans. And, according to its executives, Constellation continues to grow its U.S. sales faster than the market as a whole, and has shipped nearly 200 million cases of beer in the last 12 months, up significantly since the divestiture.

We had to wage a similar battle in connection with the merger of US Airways and American Airlines, two of the largest five airlines in the United States. Throughout our investigation the parties publicly maintained that no relief was necessary. We disagreed and filed suit. On the eve of trial the defendants agreed to significant divestitures to address our competitive concerns. Those divestitures included 104 take-off and landing slots at Reagan National Airport, 34 slots at LaGuardia Airport in New York, and gates and associated ground facilities at other key airports across the United States. The goal was to inject new competition into capacity constrained airports where the incumbents lacked incentive to compete aggressively.

It is still early, but the results of these divestitures are beginning to be felt. At DCA the low cost carriers that acquired the divested slots have introduced more than 40 additional departures each day out of DCA, including service to 14 new airports. The planes are bigger too. This spring we anticipate there will be more than 10% more seats available on flights from DCA than the average first quarters for the last ten years.



The early results are promising elsewhere too. New York's LaGuardia Airport has seen growth in traffic and new service from Southwest and Virgin America to Chicago, Nashville, and cities throughout Texas. In Dallas our relief -- transferring gates to Virgin America at Love Field -- was timed to coincide with the expiration of the Wright Amendment restrictions on flights out of that airport. The result: new service to major cities—Washington, Los Angeles, New York, and San Francisco—and a huge increase in passenger traffic as passengers take advantage of the expiration of the Wright Amendment and the introduction of new competition. And at Chicago O'Hare, low cost carriers Spirit and Frontier are now using the divested gates and bringing additional competition to 16 routes.

Pursuing meaningful structural relief in mergers is important – even when the eggs have been scrambled. Last year—after convincing a judge that Bazaarvoice's consummated acquisition of PowerReviews violated Section 7—we negotiated a remedy that required Bazaarvoice to restore the status quo ante, a challenging task two years after the leading firm had eliminated its only rival. Our relief required Bazaarvoice to sell all of the PowerReviews assets and – in order to recreate a viable competitor – to give up more than it had originally acquired, through other contractual provisions designed to compensate for the deterioration of PowerReviews' competitive position. The parties completed the divestiture in mid-2014 and customers are now benefiting from more choices among ratings and review software.

Remedies matter in conduct cases, too. Our ebooks investigation showed that book publishers and Apple had acted together to raise ebook prices and eliminate retail price competition. Our remedy went beyond telling the publishers to "go forth and sin no more." The judgments against the publishers included provisions designed to prevent them from hamstringing price competition by ebook retailers or sharing competitively sensitive information with each other—either directly or using an intermediary, like their co-conspirator Apple.

We will continue to demand civil penalties and disgorgement to ensure that companies that violate the civil antitrust laws do not profit from bad behavior. During an investigation into the Flakeboard—SierraPine merger late last year, we discovered that during the HSR Act's statutory waiting period the defendants agreed to close a SierraPine

particleboard mill, and conspired to transfer customers from that unlawfully closed mill to Flakeboard. This naked gun-jumping violated the HSR Act and constituted a clear violation of Section 1 of the Sherman Act. The parties ultimately abandoned the merger. They also paid a price for disregarding their HSR obligations: Flakeboard and SierraPine paid a combined civil penalty of $3.8 million for violating the HSR Act. And Flakeboard was required to disgorge over $1 million in profits—its ill-gotten gain from violating the Sherman Act.

We will continue to focus on obtaining effective relief where we find antitrust violations and to regularly review how well our decrees work. And I applaud the FTC's recently announced proposal to assess the effectiveness of the Commission's remedies in its more recent merger cases. Together, the agencies will continue to learn from our experiences and apply those lessons when crafting future remedies.

Thank you again for the opportunity to speak with you today. What I have discussed this morning – the benefits of engagement and guidance, the need to focus on market structures and maintaining competition, and the importance of holding out for meaningful remedies – are not that complicated, but together they are key parts of ensuring that the Antitrust Division's law enforcement efforts continue to serve the public interest.