DEPARTMENT OF JUSTICE

“Getting Better”*: Progress and Remaining Challenges in Merger Review

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Good afternoon. Thank you, Richard Kaplar, for that kind introduction. Thank you also to Chairman Emeritus Dick Wiley for inviting me. He is a titan of the communications bar, with a distinguished career in both public service and private practice, and I'm honored that he thought to bring me here to the Media Institute today.

The topic of my speech is the merger review landscape. I come to celebrate a success, but also to identify a potential for alarm.

Bill Baxter, a distinguished predecessor of mine as the head of the Antitrust Division – and roughly a contemporary of Dick Wiley's when Dick was the head of the FCC – noted that mergers are "an extremely important and valuable capital market phenomenon, that they are to be in general facilitated, and that it is socially desirable that uncertainty and risk be removed whenever possible to do so, subject, of course, to the very important limitation that where a merger threatens significantly to lessen competition, it should be halted."[1] I agree with Professor Baxter.

My job as an antitrust enforcer is to create a merger review landscape that allows enforcers to stop harmful mergers while also allowing for the efficient resolution of investigations of competitively beneficial or neutral mergers.

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[*] THE BEATLES, *Getting Better* (Parlophone, 1967).
[1] William F. Baxter, A Justice Department Perspective, 51 Antitrust L.J. 287, 288 (1982).

This brings me to the successful effort that I would like to report. About a year and a half ago, I outlined a series of reforms the Antitrust Division would undertake to modernize the merger review process. As a benchmark to measure success, we committed that, we would aim to resolve most merger investigations within six months of filing. That is provided, of course, that merging parties cooperated expeditiously and complied throughout the entire process.

As part of those reforms, the Antitrust Division published a model timing agreement, which, in addition to providing much needed transparency, significantly changed how the Division approaches Second Request investigations. Among other things, the new timing agreement limits the number of custodians and depositions that the Division seeks in a Second Request and commits the Division to deciding significantly faster than the previous norm. In return, the timing agreement requires merging parties to produce documents and data earlier in the process.

We also published for the first time a model voluntary request letter to allow for merging parties to anticipate and collect the information and documents that the Division needs to make an informed decision. Getting that information to the Division during the initial waiting period often allows the merging parties to avoid a Second Request or to narrow the scope of a Second Request. By publishing these, we increased transparency and put all merging parties on an equal footing.

We now have data showing nearly a year and a half of results. I am happy to report that we consistently have been meeting or beating our pledge of completing the investigation phase of our merger reviews and informing the parties of the Division's position within six months.

In all merger investigations, the average time from the merging parties filing an HSR to the Division notifying the parties of the Division's position is 5.4 months. In merger investigations resulting ultimately in a challenge, whether a litigated court challenge or a remedy, the average time to notification is 5.7 months.

Once we notify the parties of the Division's position, one of three things can still happen. First, the Division can report that it has no concerns and the deal can close. Second, the Division can inform the parties that it believes the transaction is anticompetitive and the parties can offer a divestiture or other fix. Third, the Division can inform the parties that it believes the transaction is anticompetitive and the parties can seek a meeting with the Front Office. Of course, additional discussions regarding a proposed fix or a meeting with the Front Office adds time.

Not every merger can be resolved in six months. Parallel investigations, whether with a sister agency like the FCC or a foreign enforcer like the European Commission, typically take longer than six months, often because of factors outside the Division's control. Mergers that must be remedied with an upfront

buyer also take longer to resolve, as the Division performs due diligence on the divestiture buyer.

Additionally, the merging parties themselves exercise significant control over the timing of the merger review process. If the merging parties are slow to produce documents or provide data, then that necessarily slows our review. Likewise, if merging parties play games with the Division, that also can slow down the process.

In a recent significant merger, for example, the merging parties submitted woefully inadequate privilege logs. As a result, the Division rejected the parties' Second Request compliance certification and required the parties to re-review documents for privilege and produce remedial privilege logs. This had the effect of adding months to the merger review process. I don't want unnecessary delay, but I won't compromise the Division's ability to protect free markets and the American consumer.

Indeed, we won't hesitate to challenge anticompetitive mergers. In fact, the Division is currently in trial seeking to enjoin Sabre's acquisition of Farelogix. Next week, we will begin a first-of-its-kind arbitration in order to protect competition in Novelis's acquisition of Aleris.

For transactions that don't harm competition, we are moving quickly to complete our review and allow the market to function.

Delay is a form of risk and uncertainty, and we have taken concrete steps to reduce delay to the extent possible. That is the successful news to report.

As I mentioned at the outset, however, I also am concerned about another recent development. That is the possibility of third parties undercutting federal enforcement decisions, which is currently at risk in the proposed merger of T-Mobile and Sprint. As I'm sure many of you are aware, the Antitrust Division and a great group of ten state partners have a settlement pending before the district court here in DC. That settlement, if approved by the court, would permit T-Mobile and Sprint to merge, but would require substantial divestitures to DISH. We agreed to this settlement because it meets the twin goals of antitrust remedies: it allows consumers to benefit from the efficiencies associated with the merger, while protecting consumers from the harms that would otherwise come from a lessening of competition.

Of course, as many of you in this room also know, the Antitrust Division was not the only federal agency to evaluate this merger. As it does with all spectrum license transfers, the Federal Communications Commission reviewed T-Mobile's proposed acquisition of Sprint. After thorough consideration, the FCC determined that, in light of the parties' commitments to the FCC and the DOJ, the license transfers were in the public interest. In doing so, the FCC emphasized that the anticipated impact of the merger on high-speed connectivity was a matter of

health, safety, and equality for rural communities. It also found that the divestiture of Boost to DISH, in particular, will allow currently underutilized spectrum to be placed in the hands of consumers.

What I've described so far is nothing new. The Antitrust Division, state attorneys general, and the FCC all regularly review telecom mergers. We often work closely with our state attorneys general partners in enforcement actions. Here, however, a small group of state attorneys general did not reach consensus. Although a good group of states joined the Antitrust Division in settling, a minority of states sued to block the transaction. These states asked the Southern District of New York to issue a nationwide injunction preventing the merger. The trial in that action took place in December of 2019. The decision has not yet been issued, but is highly anticipated.

So, we have two specialized federal agencies reviewing the T-Mobile/Sprint transaction. Each of these specialized federal agencies has considered the procompetitive as well as the anticompetitive effects of the transaction. Each agency has negotiated nationwide relief to prevent harm from the merger. One of these federal agencies is also moving in federal court to approve its nationwide settlement. Yet, we have a minority of states and the District of Columbia trying to undo that relief across the entire country. If you find this situation odd, you're not alone.

Part of the challenge of addressing a nationwide mobile wireless market was balancing the interests of rural and urban populations. Historically, rural populations have been under-served by the Big Four mobile wireless network providers. With this merger and associated commitments, however, rural populations will see increased competition. That increased competition will occur because the FCC has required T-Mobile to cover 99% of the population with 5G connectivity. The Antitrust Division's remedy builds on T-Mobile's commitments to the FCC, and protects urban competition by requiring the divestiture of Boost Mobile, among other requirements. This is a win-win solution that permits rural residents to benefit from the merger's efficiencies, while simultaneously protecting competition for urban residents.

Unfortunately, the scenario that has unfolded here is incompatible with the orderly operation of our antitrust merger laws and telecommunications regulations. It creates the risk that a small subset of states, or even perhaps just one, could undermine beneficial transactions and settlements nationwide. That is why the Antitrust Division and the FCC filed a brief in the New York litigation opposing these states' requested relief of nationwide injunction in this particular merger.

I want to be clear about what our position is, but also equally clear about what our position is not. Our position is not that states lack standing to sue for antitrust violations. In fact, the brief that we filed in the Southern District of New

York explicitly recognized states' standing, their quasi-sovereign status, and their ability to represent their citizens in a parens patriae capacity.

Our position also is not that the states are barred from seeking different relief than the federal government in merger reviews. We welcome the states—or any private parties—requesting a remedy in a merger case, either where the Antitrust Division does not act, or where they seek relief that does not conflict with the Division's relief. In fact, when we were moving to extend the Live Nation consent decree just last month, the Division did not oppose a number of states' requested incremental relief. Additionally, I should note, in a 2018 brief, the Antitrust Division supported the right of a private party to seek a divestiture following a merger that the Division had not challenged.[2]

Instead, our position consists of three straightforward and related points that flow from Supreme Court precedent. First, Congress treated states as private parties for purposes of antitrust enforcement. This means that states are required to meet a higher standard than the United States when seeking equitable relief in a merger case. The Supreme Court has consistently reiterated that position, including in its *American Stores* opinion in 1990.[3] Second, where the United States has already secured relief in a merger case, a court must take that relief into

[2] Statement of Interest of the United States of America Regarding Equitable Relief (ECF No. 1640), *Steves & Sons, Inc. v. Jeld-Wen, Inc.*, No. 3:16-cv-00545 (E.D. Va.).
[3] *See Cal. v. Am. Stores*, 495 U.S. 271, 295-96 (1990).

account. This also follows directly from Supreme Court precedent, including the Court's 2010 opinion in *Monsanto* and its antitrust-specific holding in *BMI v. CBS*.[4] Third, courts should not award any private party, including the states, relief that is incompatible with relief secured by the federal government. This, too, has been well-settled Supreme Court precedent for seventy-five years.[5]

This is the only position that makes practical sense, given the statutory structure enacted by Congress for merger review. Because what is the alternative? That any state, or even any individual, can undo the nationwide relief secured by the federal government and approved by a federal court? That would wreak havoc on parties' ability to merge, on the government's ability to settle cases, and cause real uncertainty in the market for mergers and acquisitions.

Permitting states to undermine federal enforcement also would be contrary to congressional intent. When debating the Clayton Act over a century ago, the Senate considered allowing state attorneys general to "bring suit in the name of the United States to enforce any of the antitrust laws."[6] The Senate, however, decided not to grant this right to the states. This decision reflected concerns about the "great danger of having a diversity of conclusions"[7] and the possibility that it could

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[4] *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010); *Broadcast Music v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 13 (1979).
[5] *See Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945); *United States v. Borden Co.*, 347 U.S. 514 (1954).
[6] 51 Cong. Rec. S14,476 (daily ed. Aug. 31, 1914), *reprinted in* 3 Earl W. Kintner, *The Legislative History of the Federal Antitrust Law and Related Statutes* 2288 (1978) ("Kintner").
[7] 51 Cong. Rec. S14,477 (daily ed. Aug. 31, 1914), *reprinted in* Kinter at 2289.

"prevent the carrying out of any uniform policy in the enforcement of the antitrust law."[8] That concern resonates particularly strongly in the telecom industry, given that it is not just uniform antitrust enforcement at risk, but also national telecommunications policy set by a separate federal agency.

This is not a new argument. It is the same position that the Antitrust Division took 25 years ago in *Microsoft*, and has been the bipartisan position of every administration since that time. As my predecessor, former-Assistant Attorney General Bill Baer, explained, "[f]ederal and state competition law enforcers have similar missions: both protect the public from the harms flowing from anticompetitive conduct. But federal enforcement seeks to protect the interest of all consumers across the nation, while state enforcers understandably focus their efforts on the consumers in their respective states."[9] It is for this reason that "[t]he idea has always been that these . . . enforcers should play different, yet complementary roles."[10] I share former-AAG Baer's commitment to this complementary enforcement.

Part of that commitment is protecting the nationwide perspective that the Antitrust Division and other federal agencies bring to merger reviews involving national markets. In the T-Mobile/Sprint matter, in particular, we continue to

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[8] 51 Cong. Rec. S14,518 (daily ed. Sept. 1, 1914), *reprinted in* Kintner at 2303.
[9] William J. Baer, Assistant Att'y Gen. for Antitrust, U.S. Dep't of Justice, Public and Private Antitrust Enforcement in the United States, at 1 (Feb. 11, 2014).
[10] *Id.*

believe in the strong disruptive potential of a combined T-Mobile and Sprint, and of DISH. We look forward to securing those benefits for *all* American consumers.

I hope that my remarks today have shed some light on how the Antitrust Division views its role in merger enforcement, and given you some food for thought as we navigate a complex enforcement landscape.