DEPARTMENT OF JUSTICE

At the Intersection of Antitrust & High-Tech: Opportunities for Constructive Engagement

RENATA B. HESSE
Deputy Assistant Attorney General for Criminal and Civil Operations
Antitrust Division
U.S. Department of Justice

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1. INTRODUCTION

It has been a great pleasure to be here today, in the heart of Silicon Valley, to explore with you many of the important competition and intellectual property issues related to high-technology industries.

As we bring today's event to a close, I want to discuss the multi-faceted relationship between the Antitrust Division and the nation's high-technology companies. From our offices in San Francisco, Chicago, and New York, as well as Washington DC, Antitrust Division attorneys and economists interact with technology companies on a daily basis. It is perhaps unavoidable that some of these interactions are perceived as adversarial -- such as when your company or client is the focus of a merger or conduct investigation. In other contexts, however, there are significant opportunities for cooperation. You may also encounter us as we work to promote pro-competitive outcomes at other government agencies and engage in outreach to private organizations, such as standard setting organizations.

Antitrust analysis in high-technology markets implicates a host of complex legal, economic, and technical issues. While the rapid pace of change in technology markets can sometimes minimize the potential for the accumulation or misuse of market power, other common attributes of high-tech markets counsel careful scrutiny. In navigating these thorny issues, the Antitrust Division depends on active engagement from technology companies. We look to customers and other market participants to help us identify, understand, and challenge anticompetitive conduct and transactions. At the same time, we rely on companies whose conduct or transaction is under investigation to help us avoid over-enforcement -- by ensuring that we fully understand market dynamics

and pro-competitive justifications, as well as the intricacies of the underlying products and services.

2. ANTITRUST ENFORCEMENT ACTIVITIES IN HIGH-TECH MARKETS

If you work at or on behalf of a major U.S. technology company, there is a good chance that you've come in contact with an Antitrust Division investigation. In addition to our office in San Francisco, which interacts regularly with technology companies in this region, we have attorneys and economists who specialize in enforcing the antitrust laws in tech industries -- including our Networks & Technology Enforcement Section, Telecommunications & Media Enforcement Section, and Litigation III Section.

a. Merger Enforcement

i. In High-Tech Markets, Preventing Harm to Innovation is Often an Important Consideration

Let me begin by talking about the division's approach to merger investigations in high-tech markets. Today, the goal of protecting innovation is often a decisive factor in our enforcement decisions involving technology companies, as well as in ensuing litigation. While competitive prices are -- and will remain -- a key objective, the division fully appreciates the importance of innovation. Innovation can dramatically improve consumer welfare by motivating the introduction of extraordinary new products, including some that meet demands that consumers didn't even anticipate. In fact, research shows that innovation has historically driven a significant share of economic growth and improvements in consumer welfare in the United States.[1]

[1] *See e.g.*, Robert M. Solow, *A Contribution to the Theory of Economic Growth*, 70 Q.J. Econ. 65 (1956). *See also*, Fiona Scott-Morton, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *Antitrust Enforcement in High-Technology Industries: Protecting Innovation and Competition*, Remarks as Prepared for the 2012 NYSBA Annual Antitrust Forum (Dec. 7, 2012), at 4 ("It is now well understood that dynamic efficiencies, and, in particular the leap-frog type, account for the lion share of economic growth."), *available at* http://www.justice.gov/atr/public/speeches/290876.pdf.

Fortunately, we are rarely forced to choose between preventing higher prices and protecting innovation.[2] Competition drives firms to compete on price and become more efficient, but it also can motivate them to invest more and work harder to improve their product design, function, and production processes.[3] In high-tech markets, a transaction that threatens to lead to higher prices or reduced output, therefore, will often have a corresponding negative effect on a firm's incentives to innovate.[4] Recognizing this, the 2010 Horizontal Merger Guidelines place a new emphasis on the potential for mergers to reduce innovation.[5]

In recent years, the Antitrust Division has repeatedly alleged that mergers involving high-technology companies likely would harm competition by reducing innovation.[6] These allegations are not mere surplusage. The United States often finds

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[2] The two do not always go hand in hand. *See* Horizontal Merger Guidelines, §6.0 Unilateral Effects, U.S. Dep't of Justice and Fed. Trade Comm'n (Aug. 2010), (hereinafter "2010 HMGs") ("A merger may result in different unilateral effects along different dimensions of competition. For example, a merger may increase prices in the short term but not raise longer-term concerns about innovation…"), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html.

[3] Some opponents of antitrust enforcement in high-tech industries have theorized that antitrust enforcement can stifle innovation because monopolies have greater incentive and ability to engage in the R&D that often delivers groundbreaking new products. Others have countered that dominant firms have little incentive to cannibalize their existing market position. *See* Jonathan M. Jacobson, *Do We Need a 'New Economy' Exception for Antitrust?*, American Bar Association Antitrust Bulletin, 89, 90 (Fall 2001), *citing* Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Innovation*, in THE RATE AND DIRECTION OF INVENTIVE ACTIVITY (National Bureau of Economic Research 1962).

[4] *See generally*, William W. Lewis, THE POWER OF PRODUCTIVITY: WEALTH, POVERTY, AND THE THREAT TO GLOBAL STABILITY (Univ. of Chicago Press 2004) (exploring correlation between competition and dynamic efficiency gains); *see also* Jacobson, *supra* note 3, at 90 (noting that "a substantial body of data suggests that unchecked market power impairs rather than enhances long-run innovation.")

[5] *See* 2010 HMG, *supra* note 2, §6.4 Innovation and Product Variety (2010).

[6] *See e.g.* Complaint ¶ 50, *United States v. Bazaarvoice*, No. 3:13-cv-00133 (N.D. Cal. Jan. 8, 2014) (filed Jan. 10, 2013) ("Quality and innovation for PRR platforms will likely be less than the levels that would have prevailed absent the transaction."), *available at* http://www.justice.gov/atr/cases/f291100/291187.pdf; Complaint ¶54, *United States v. H&R Block, Inc. et al.*, 833 F.Supp.2d 36 (D.D.C. 2011) (1:11-cv-00948) (filed May 23, 2011) ("quality and innovation of and in Digital DIY Tax Preparation Products would likely be less than levels that would prevail absent the transaction…"), *available at* http://www.justice.gov/atr/cases/f271500/271579.htm; Second Amended Complaint, ¶ 48, *United States v. AT&T et al.*, No. 11-01560 (D.D.C.)(filed Sept. 30, 2011) ("innovation and product variety likely will be

compelling evidence -- including internal company documents -- establishing that pre-merger competition between the merging firms was an important driver of innovation. During the United States' recent challenge to the consummated merger of Bazaarvoice and PowerReviews, for example, the division offered significant evidence on this point at trial.[7] One exhibit was an internal document in which company executives wrote about how Bazaarvoice and PowerReviews had "pushed each other to innovate in ways that help[ed] consumers and retailers."[8]

While I have not had any involvement in the *Bazaarvoice* matter, I can tell you that evidence of this sort of pre-merger "one-upmanship" is a significant red-flag for antitrust enforcers in other matters. Similarly, we are concerned by evidence that shows that a firm being acquired has been a particularly innovative or disruptive competitor.[9] Such concerns have contributed to the division's decisions to challenge mergers involving technology companies, such as H&R Block's proposed acquisition of TaxAct,[10] and AT&T's proposed acquisition of T-Mobile.[11]

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reduced"), *available at* http://www.justice.gov/atr/cases/f275700/275756.pdf. *See also*, Press Release, "Justice Department Requires Google Inc. to Develop and License Travel Software to Proceed with its Acquisition of ITA Software Inc." (April 8, 2011) ("The department said that the acquisition, as originally proposed, would have substantially lessened competition among providers of comparative flight search websites in the United States, resulting in reduced choice and less innovation for consumers."), *available at* http://www.justice.gov/atr/public/press_releases/2011/269589.htm.

[7] *See e.g.* Plaintiff United States of America's Post-Trial Proposed Findings of Fact, ¶ 198-216, *United States v. Bazaarvoice*, No.13-cv-00133 (N.D. Cal. Jan. 8, 2014) (filed Oct. 31, 2013), *available at* http://www.justice.gov/atr/cases/f301400/301437.pdf.

[8] *Id.* ¶198.

[9] *See* 2010 HMG, *supra* note 2, §6.4; *see also id.* §7 (noting that the potential for coordination is reduced where a market is marked by leapfrogging technological innovation).

[10] *See* Press Release, "Justice Department Files Antitrust Lawsuit to Stop H&R Block Inc from Buying TaxAct" (May 23, 2011) ("H&R Block's acquisition … would eliminate a company that has … disrupted the U.S. digital do-it-yourself tax preparation market through low pricing and product innovation."), *available at* http://www.justice.gov/atr/public/press_releases/2011/271570.htm.

ii. High-Tech Mergers, Like Other Mergers, Require a Fact-Intensive Analysis

For years, observers have pointed out that certain features common in high-technology markets can diminish the potential for the accumulation or exercise of market power.[12] We often agree. For example, rapidly evolving technology can sometimes render market power transient in high-tech markets. To ensure that our enforcement decisions are well-founded, our attorneys and economists work diligently to identify any evidence that rapid technological change, entry, efficiencies, or other pro-competitive benefits would make it unlikely that a transaction will significantly harm competition.[13]

Even where market shares are high, one or more of these factors can lead the division to close an investigation without taking enforcement action. For example, evidence regarding the rapid evolution of technology played an important role in the division's analysis of the likely competitive effects of the 2008 merger of XM and Sirius, the only two satellite radio providers in the United States.[14] In particular, the division was persuaded that consumers would soon have access to new technologies, including

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[11] *See* Press Release, "Justice Department Files Antitrust Lawsuit to Block AT&T's Acquisition of T-Mobile" (Aug. 31, 2011) ("AT&T's acquisition of T-Mobile would eliminate a company that has been a disruptive force through low pricing and innovation …. T-Mobile has been an important source of competition among the national carriers, including through innovation and quality enhancements…."), *available at* http://www.justice.gov/atr/public/press_releases/2011/274615.htm.

[12] As the Court of Appeals described in *Microsoft*, "[r]apid technological change leads to markets in which firms compete through innovation for temporary market dominance, from which they may be displaced by the next wave of product enhancements." *U.S. v. Microsoft*, 253 F.3d 35, 49 (D.C Cir. 2001).

[13] Many of these concepts are recognized in the 2010 Horizontal Merger Guidelines. *See, e.g*, 2010 HMG, *supra* note 2, § 10 ("[A] primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete…. When evaluating the effects of a merger on innovation, the Agencies consider the ability of the merged firm to conduct research or development more effectively….").

[14] Press Release, "Statement of the Department of Justice's Antitrust Division on its Decision to Close its Investigation of XM Satellite Radio Holdings Inc's Merger with Sirius Satellite Radio Inc." (March 14, 2008), *available at* http://www.justice.gov/atr/public/press_releases/2008/231467.htm.

mobile broadband internet devices.[15] Similarly, the division cited evidence of a dynamic industry, including low-switching costs and multiple examples of entry, in explaining its decision not to challenge Google's 2011 acquisition of Admeld.[16]

In some cases, the division may even find that a proposed combination has the potential to *increase* competition.[17] In 2010, the Antitrust Division concluded that the combination of the back-end search advertising businesses of Microsoft and Yahoo! would create significant scale economies. The joint venture, the Division said, would enable Microsoft and Yahoo! to compete more aggressively with Google, and thereby enable "more rapid innovation of potential new search-related products."[18] The division announced that it was taking no action, even though the transaction further concentrated an already concentrated market.

But, these factors won't always carry the day. They must be considered in light of many other characteristics of high-tech markets that can exacerbate the potential for competitive harm. Most prominently, many high-tech markets are characterized by

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[15] In fact, today millions of consumers do use smart phones and other mobile broadband devices to listen to internet radio through their car stereo systems. And recently, Google and others have contracted with car manufacturers to integrate 4G wireless access directly into vehicles. *See, e.g.*, Judy Woodruff, "At Consumer Electronics Show, 'smartphone revolution' spreads from car to closet", January 6, 2013, PBS.org, *available at* http://www.pbs.org/newshour/bb/science/jan-june14/ces_01-06.html.

[16] *See* Press Release, "Statement of the Department of Justice's Antitrust Division on its Decision to Close its Investigation of Google Inc.'s Acquisition of Admeld Inc." (Dec. 2, 2011) ("The investigation determined that web publishers often rely on multiple display advertising platforms and can move business among them in response to changes in price or the quality of ad placements. This … lessens the risk that the market will tip to a single dominant platform. In addition, there have been recent … entrants in the display advertising industry. These were significant considerations in the division's decision to close the investigation."), *available at* http://www.justice.gov/atr/public/press_releases/2011/277935.htm.

[17] 2010 HMG, *supra* note 2, § 10 ("[A] primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products.") .

[18] *See* Press Release, "Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of the Internet Search and Paid Search Advertising Agreement Between Microsoft Corporation and Yahoo! Inc." (Feb. 18, 2010), *available at* http://www.justice.gov/atr/public/press_releases/2010/255377.htm.

network effects, where the value of a product to consumers increases with the total number of users of the product. For example, a social networking site -- such as LinkedIn or Facebook -- becomes more valuable to consumers as the size of the network grows. This type of positive feedback benefits consumers and can operate as a powerful barrier to the success of new entrants and existing fringe competitors. In some markets, particularly platform markets, *tipping* can occur, resulting in a "winner take all", or "winner take most" outcome.

Judge Orrick's recent 141-page opinion in *Bazaarvoice* is important reading for technology companies and their counsel, as well as those who question the applicability of the antitrust laws in the high-tech space. The court found that the United States had demonstrated that network effects and high switching costs are significant barriers to entry in the ratings and reviews platforms market.[19] In light of this evidence, Judge Orrick rejected the idea that tech companies can defend an anticompetitive merger simply by pointing to the existence of well-funded technology companies in adjacent markets:

> The marketplace may be filled with many strong and able companies in adjacent spaces. But that does not mean that entry barriers become irrelevant or are somehow more easily overcome. To conclude otherwise would give eCommerce companies carte blanche to violate the antitrust laws with impunity with the excuse that Google, Amazon, Facebook, or any other successful technology company stands ready to restore competition to any highly concentrated market.[20]

The decision confirms that merger analysis in high-tech markets, as in other markets, is highly fact-specific. High-tech mergers do not get a free pass, and their impact on competition must be evaluated on a case-by-case basis.

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[19] Memorandum Opinion at 132-33, *United States v. Bazaarvoice*, No. 13-cv-00133 (N.D. Cal Jan. 8, 2014) ("[T]he Court finds that syndication, switching costs, intellectual property/know how, and reputation are formidable barriers to new firms entering the market for R&R platforms and to existing R&R providers expanding their operations to replace the competition previously provided by PowerReviews."), *available at* http://www.justice.gov/atr/cases/f302900/302948.pdf.

[20] *Id.* at 133.

iii. Even Relatively Small Mergers Can Violate the Antitrust Laws

Although many successful start-ups are taken public, many more are acquired by other well-capitalized technology companies. In most cases, these transactions don't raise competition concerns -- such as where the transaction leads to a combination of complementary products or technologies.

The *Bazaarvoice* decision, however, is a reminder that even transactions that are not reportable under the Hart-Scott-Rodino regulations may violate the antitrust laws.[21] When parties close a non-reportable transaction without consulting with the United States, the Division will not hesitate to challenge the transaction if the evidence indicates that it is likely to harm competition. And, Judge Orrick recognized that there is no special legal standard or alternative methodology for analyzing consummated mergers.[22] Post-acquisition evidence that arguably could be subject to manipulation by the merging parties has limited probative value.[23]

Small technology companies that are contemplating a non-reportable transaction that raises potential antitrust concerns should seek antitrust counsel and consider contacting the Antitrust Division before, rather than after, closing.

b. Non-Merger Enforcement

Few popular culture images are as durable, as justified, or as admirable as the story of the nimble technology company started out of an entrepreneur's garage. Bill Hewlett and Dave Packard famously founded HP in Packard's garage, located a few miles from here, on Addison Ave. in Palo Alto.

[21] *See id.* at 140 n.22 (noting that the merger was not reportable under the HSR thresholds).

[22] *Id.* at 138-40.

[23] *Id.* at 108.

While such stories undoubtedly continue today, high-tech is also big business. Many of the largest and most profitable companies in America are technology firms. Though the antitrust laws don't object to large market caps obtained through aggressive competition, we remain vigilant against the abuse of market power, either by dominant firms, or through anticompetitive agreements. In high-tech markets, we are particularly sensitive that firms with market power must not be allowed to stifle innovation and technological progress.

i. The Importance of Effective Antitrust Compliance

For this reason, tech firms, like other companies, should review the effectiveness of their antitrust compliance programs. Let me reference the Antitrust Division's recent *ebooks* case, another case in which I did not participate, to illustrate this point. There, Judge Cote held that Apple had participated in and facilitated a horizontal price-fixing conspiracy.[24] In considering the Antitrust Division's request to appoint an independent monitor, Judge Cote described a "blatant and aggressive disregard at Apple for the requirements of the law" and noted that the anticompetitive conduct involved "Apple lawyers and its highest level executives."[25]

The division has explained that effective antitrust compliance requires corporate executives who know legal boundaries; it needs to empower lawyers with the ability to

[24] *See* Opinion and Order at 120, *United States v. Apple, Inc. et al*., No. 12-cv-2826 (S.D.N.Y July 10, 2013), *available at* http://www.justice.gov/atr/cases/f299200/299275.pdf.

[25] *See* August 27, 2013 Hr'g Tr. at 17:1-6, *United States v. Apple, Inc. et al*., No. 12-cv-2826 (S.D.N.Y July 10, 2013) ("The record at trial demonstrated a blatant and aggressive disregard at Apple for the requirements of the law. Apple executives used their considerable skills to orchestrate a price-fixing scheme that significantly raised the prices of E-books. This conduct included Apple lawyers and its highest level executives."). A more detailed discussion of these issues is set forth in Judge Cote's latest opinion, denying Apple's request to stay the external monitor provisions of the Final Judgment in that case. *See* Opinion & Order, *United States v. Apple, Inc. et al*., No. 12-cv-2826 (S.D.N.Y July 10, 2013) (filed Jan. 16, 2014).

say "no" to anticompetitive behavior, even if proposed by senior executives; and it obligates employees to take responsibility when such behavior occurs.[26] With these principles in mind, even firms with well-established legal departments may benefit from taking a hard look at their compliance programs.

ii. Information Sharing Relating to Cyber-Security

Let me use this opportunity to address any uncertainty regarding antitrust enforcement with respect to legitimate information sharing aimed at preventing cyber attacks on our nation's telecommunication networks, power grids, banking systems, and military networks. I firmly believe that these collaborations can be accomplished in a manner consistent with the antitrust laws rather than in conflict with them. Specific guidance is provided by the Antitrust Division's October, 2000 business review letter to the Electric Power Research Institute, Inc. (EPRI). The division confirmed that it had no intention to initiate an enforcement action against the EPRI's proposal to exchange information related to industry specific "best practices" for cyber-security programs and identified cyber-security vulnerabilities, including discussions of actual real-time cyber threat and attack information.[27] Importantly, the division recognized that EPRI did not propose to exchange any company-specific competitively sensitive information, such as pricing, capacity, or future plans.

While this guidance is now over a decade old, it remains the Antitrust Division's current analysis that properly designed sharing of cyber-security threat information is not

[26] *See* Memorandum in Support of Plaintiffs' Revised Proposed Injunction at 8, *United States v. Apple, Inc. et al*., No. 12-cv-2826 (S.D.N.Y July 10, 2013) (filed Aug. 23, 2013), *available at* http://www.justice.gov/atr/cases/f300200/300263.pdf.

[27] *See* Letter from Joel I. Klein, Assistant Att'y Gen., Antitrust Division, U.S. Dep't of Justice, to Barbara Greenspan, Assoc. Gen. Counsel, Electric Power Research Inst. (Oct. 2, 2000), *available at* http://www.justice.gov/atr/public/busreview/6614.htm.

likely to raise antitrust concerns. I encourage any who desire more specific guidance to consider taking advantage of the business review process, which I will describe shortly.

c. Criminal Enforcement

Criminal antitrust enforcement remains among the division's highest priorities. And there is certainly no indication that high-tech markets are immune to cartel behavior.[28] The Antitrust Division has a vibrant corporate leniency program that provides incentives for companies to investigate and self-report to the Antitrust Division their involvement in antitrust crimes. If you or your client uncovers evidence that suggests criminal antitrust behavior, we encourage you to contact one of our offices, either here in San Francisco, or in Chicago, New York, or Washington DC.

d. Effective Engagement with the Antitrust Division

It's a big economy out there. We depend on customers and competitors to bring their competition concerns to our attention. This is particularly true in high-tech markets, where complicated issues abound. Often the anticompetitive impact of a transaction or conduct will not be readily apparent. Even the products themselves can be a challenge to understand. In bringing your concerns to us, focus on harms to the competitive process and come armed with facts. If you are a customer concerned about a transaction, be prepared to explain, for example, why the merging firms are particularly close competitors.

And, if you or your client is the focus of an enforcement investigation, engagement can be even more critical. It is exceedingly rare that parties to a merger do not assert -- typically with great conviction -- that they face vigorous competition, that

[28] *See e.g.*, Press Release, "Korean Company--Hynix--Agrees to Plead Guilty to Price Fixing and Agrees to Pay $185 Million Fine for Role in DRAM Conspiracy" (April 21, 2005) (manufacturer of dynamic random access memory agreed to plead guilty and to pay $185 million fine for role in conspiracy to fix prices in the DRAM market), *available at* http://www.justice.gov/atr/public/press_releases/2005/208655.htm.

there are no barriers to entry in their industry, or that their technology is likely to be outdated within months. But, we wouldn't be meeting our obligations if we didn't verify such claims. Parties can help their cause immensely by identifying evidence, particularly *contemporaneous, ordinary course of business documents* to substantiate their assertions:

- Show us the win/loss reports identifying a wide range of competitors.
- Bring in the business plan from before the merger was under consideration that discusses the threat posed by an emerging technology.
- Dig up the engineering documents that show you've previously struggled to achieve an efficiency that can be obtained from a merger.
- Find the email that documents the pro-competitive justification for an agreement or practice that tends to exclude your competitors.

You can be sure that we are looking for these exculpatory documents ourselves. It may surprise some to learn that division investigators often do a better job than parties and their counsel at identifying and substantiating the reasons why a transaction or conduct is not likely to harm competition. However, parties can often locate their own relevant data and documents more quickly and thereby increase the efficiency of our investigations.

3. COMPETITION ADVOCACY IMPACTING HIGH-TECH INDUSTRIES

Although the Antitrust Division is fundamentally a law enforcement agency, our mission also extends to providing guidance to the business community and serving as an advocate for competition.[29] These activities offer opportunities for high-tech companies to engage with the Antitrust Division, to share their perspectives, and to ensure that our guidance and advocacy efforts are fully informed by market realities.

[29] *See* U.S. Dep't of Justice, Antitrust Division Website (describing Division's mission as enforcing the antitrust laws, providing guidance on antitrust law and serving as an advocate for competition), *available at* http://www.justice.gov/atr/about/mission.html.

a. Competition Advocacy Related to Intellectual Property Issues

Many of the division's competition advocacy efforts have focused on the complex interface between antitrust law and intellectual property rights. It is now widely recognized that intellectual property rights and antitrust enforcement are not antithetical--rather they work together to encourage innovation, competition, and economic growth. However, as many of today's panels have demonstrated, this relationship is complicated, and generates some of the most challenging questions facing antitrust enforcers and business leaders alike.

i. Standard Setting Organizations and Standards-Essential Patents

This morning's panel on "Competition and Standard-Essential Patents", so-called SEPs, explored many of the thorny competition issues that can arise when collaborative standards incorporate patented technologies. Disputes over the enforceability and interpretation of F/RAND commitments often lead to litigation that is expensive, creates uncertainty, and diminishes the efficiency-enhancing benefits of standards.

Fortunately, the federal courts have begun to clarify the applicable patent and contract principles in helpful ways.[30] And last August, the U.S. Trade Representative (USTR) disapproved an International Trade Commission (ITC) order that would have enjoined the importation of certain Apple products on the grounds that they infringe a F/RAND-encumbered SEP.[31] Ambassador Froman's decision relied heavily on the *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary*

[30] *See* Renata Hesse, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *The Art of Persuasion: Competition Advocacy at the Intersection of Antitrust and Intellectual Property*, Remarks as Prepared for Address to the Washington State Bar Association, at 9-13 (Nov. 8, 2013), *available at* http://www.justice.gov/atr/public/speeches/301596.pdf.

[31] *See* Letter from Ambassador Michael B.G. Froman to Hon. Irving A. Williamson, Chairman, United States International Trade Commission (August 3, 2013), *available at* http://www.ustr.gov/sites/default/files/08032013%20Letter_1.PDF

F/RAND Commitments, which we issued jointly with the U.S. Patent & Trade Office (PTO) in early 2013.[32] Though the impact of the USTR's action remains to be seen, it may lead to better harmonization between the ITC's treatment of F/RAND-encumbered SEPs and recent court decisions limiting the availability of injunctive relief.

While we welcome these developments, the division is working directly with SSOs and their members to encourage the adoption of clear, pro-competitive policies that can help avoid expensive litigation altogether.[33] We are pleased with the progress that has been made thus far on these issues at ETSI, ITU and other SSOs, and look forward to continuing to work with them to promote competitive standard-setting activities. As we engage, we have and will continue to coordinate our analysis and competition advocacy in the standard-setting area with our competition colleagues at the Federal Trade Commission (FTC) and the European Commission, as well as our interagency colleagues at the National Institute of Standards and Technology (NIST), USTR, and the PTO.

ii. Patent Assertion Entities

Along with many others in Congress, the White House, and our sister agencies, the Antitrust Division is also working to better understand the impacts of patent assertion entities (or PAEs), and to figure out where to draw the line between effective monetization of patent rights and activities that are harmful.

Last year, the division joined other experts from across the federal government on the White House Task Force on High-Tech Patent Issues. In June, the Task Force

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[32] *See* United States Department of Justice and United States Patent and Trademark Office, *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitment* (January 8, 2013), *available at* http://www.justice.gov/atr/public/guidelines/290994.pdf.

[33] *See, e.g.*, Renata Hesse, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *Six "Small" Proposals for SSOs Before Lunch*, Remarks as Prepared for the ITU-T Patent Roundtable, Geneva Switzerland (October 10, 2012), *available at* http://www.justice.gov/atr/public/speeches/287855.pdf.

announced a number of important executive actions and legislative policy recommendations to improve incentives for future innovation in high-tech patents by addressing challenges posed by PAEs.[34] At the same time, the President's Council of Economic Advisors issued a report on PAEs that is definitely worth a read if you are interested in this subject.[35] In this area, we also continue to work closely with the FTC, and to build on what we learned about potential harm to competition during our widely-attended December 2012 joint Workshop on Patent Assertion Entity Activities. The division has met with a number of technology companies and trade associations concerned about PAE patent assertions, often jointly with FTC staff. We also have met with PAEs to improve our understanding of these activities.

iii. Improving Transparency

We continue to coordinate with the FTC and the PTO to advance other intellectual property policies that will benefit competition. Last February, for example, we worked with the FTC to submit joint comments to the PTO, which encouraged the adoption of rules that would increase the transparency of patent ownership by requiring identification of the ultimate parent entity for both published patent applications and issued patents.[36] These sorts of changes have the potential to enhance competition by improving the efficiency of patent notice and discouraging abuses of the process, by PAEs or otherwise.

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[34] *See Fact Sheet: White House Task Force on High-Tech Patent Issues*, The White House (June 4, 2013) (announcing steps to improve incentives for future innovation in high-tech patents), *available at* http://www.whitehouse.gov/the-press-office/2013/06/04/fact-sheet-white-house-task-force-high-tech-patent-issues.

[35] *See Patent Assertion and U.S. Innovation*, Executive Office of the President, at 2 (June 4, 2013) (concluding that "[a] review of the evidence suggests that on balance, such patent assertion entities (PAEs) (also known as "patent trolls") have had a negative impact on innovation and economic growth"), *available at* http://www.whitehouse.gov/sites/default/files/docs/patent_report.pdf.

[36] *See Comments of the Antitrust Division of the United States Department of Justice And the United States Federal Trade Commission, In the Matter of Notice of Roundtable on Proposed Requirements for Recordation of Real-Party-in-Interest Information Throughout Application Pendency and Patent Term,*

b. Competition Advocacy in other Areas

In addition to our work in the intellectual property arena, we also work closely with many national and international agencies and organizations with regulatory responsibilities that impact the operations of high-tech companies.

For example, we work to encourage pro-competitive policies related to the administration of the internet. We coordinate our policy efforts in this and other areas with the National Telecommunications and Information Administration (NTIA), which is the Executive Branch agency principally responsible for advising the President on Internet Policy and the Domain Name System, as well as wireless and broadband issues. We work with NTIA in connection with its oversight of the Domain Name System, specifically regarding competition questions that can arise in allocating internet domain names.

Telecommunications, broadcasting, and cable companies are familiar with our close collaboration with the Federal Communications Commission (FCC). We work informally with the FCC to coordinate the agencies' approaches to competition-related issues in wireless, broadband, and other telecommunications industries. When the FCC engages in a formal rule-making, we often submit formal comments, such as the division's April 2013 comments relating to mobile spectrum auctions. In that instance, we noted that rules that ensure that smaller nationwide networks have the opportunity to acquire low-frequency spectrum could lead to increased competition and benefit consumers. And, when mergers or acquisitions involve telecommunications companies, we work closely with the FCC to coordinate our investigations. Most prominently, in

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Docket No. PTO-P-2012-0047 (Feb. 1, 2013), *available at* http://www.justice.gov/atr/public/comments/292147.pdf.

2011, the division and the FCC collaborated seamlessly in investigating the proposed merger of AT&T and T-Mobile.

c. Business Review Letters

Even the most well-counseled, best-intentioned corporate citizens can sometimes be left unsure about how antitrust enforcers will view their conduct. The division's business review procedure permits industry participants to submit a written request to the division asking for a letter explaining the division's enforcement intentions regarding a proposed activity.[37]

High-tech markets can raise complex issues that are particularly appropriate for business review letters. For example, in 2006 and 2007, two SSOs sought the division's enforcement views regarding certain proposed changes to their intellectual property policies relating to the standard setting process. After reviewing the potential benefits of the proposed policies, as well as the proposed safeguards to competition, the division confirmed that it would not likely challenge actions under either policy.[38] Similarly, we issued a positive business review of the RFID Consortium's proposal to license a pool of patents that are incorporated in a standard on RAND terms to all interested parties for use in manufacturing products compliant with the standard. We noted that the proposal contained safeguards tailored to minimize the risk of harm to competition and that the

[37] *See generally*, U.S. Dept. of Justice, Antitrust Division, *Introduction to Antitrust Division Business Reviews*, *available at* http://www.justice.gov/atr/public/busreview/276833.pdf.

[38] Letter from Thomas O. Barnett, Assistant Att'y Gen., U.S. Dep't of Justice, to Robert A. Skitol, Esq., Drinker, Biddle & Reath, LLP (Oct. 30, 2006), *available at* http://www.usdoj.gov/atr/public/busreview/219380.pdf; Letter from Thomas O. Barnett, Assistant Att'y Gen., U.S. Dep't of Justice, to Michael A. Lindsay (Apr. 30, 2007), *available at* http://www.usdoj.gov/atr/public/busreview/222978.pdf.

proposed patent pool could yield efficiencies by limiting the threat of patent hold up, reducing royalty stacking, and lowering the licensing transaction costs.[39]

We carefully analyze all business review requests, but the burdens on applicants are typically far lower than those faced by a company that becomes the subject of a civil or criminal antitrust investigation. We work to respond to requests for business reviews without unnecessary delay, often within 90 days. Recently, the division analyzed a new patent licensing model developed by Intellectual Property Exchange International, Inc. (IPXI), which creates a proprietary market for licensing patents on a per use basis. IPXI formally requested a business review in late November 2012, and we issued our letter in March of 2013.[40] We encourage you to consider using the business review process to seek *ex ante* review if you are or your counsel is unsure how the division would view a contemplated activity.

d. Appellate Advocacy

Finally, if you are involved in appellate antitrust litigation, you may encounter the Antitrust Division as *amicus curiae*. The United States may participate in that capacity where the Supreme Court or another appellate court calls for the views of the Solicitor General on competition related issues. We also actively monitor ongoing antitrust litigation across the country to identify cases that implicate important substantive or procedural issues of antitrust law. If you are a litigant or interested party and would like the Antitrust Division to participate as *amicus curiae*, we encourage you to contact our Appellate Section. Engage with us at the earliest possible time -- preferably well before

[39] Letter from Thomas O. Barnett, Assistant Att'y Gen., U.S. Dep't of Justice, to William F. Dolan, Partner, Jones Day (Oct. 21, 2008), *available at* http://www.justice.gov/atr/public/busreview/238429.htm.

[40] Letter from William J. Baer, Assistant Att'y Gen., U.S. Dep't of Justice, to Garrad R. Beeney, Sullivan & Cromwell LLP (March 26, 2013), *available at*, http://www.justice.gov/atr/public/busreview/295151.htm.

any briefs are filed in the appellate court -- and come prepared to explain why the case is likely to set a precedent that is important to competition and consumers.

5. CONCLUSION

Antitrust law has an important role to play in high-tech markets. Ultimately, the interests of truly innovative technology companies are closely aligned with the Antitrust Division, which seeks to ensure that commercial outcomes are decided in free and open markets, on the basis of superior innovation, quality, and price.

If you are a customer concerned about a merger of your suppliers, I encourage you to reach out to our staff. If you are an executive contemplating an activity that raises potential antitrust issues, talk it through with your antitrust lawyer -- the practice may be a candidate for a business review. If you are antitrust counsel to a technology firm, contribute your views at our next workshop that touches on issues of importance to your company. If you have strong views about the impact that a regulatory activity may have on competition, give us a call. And, if you are the subject of an Antitrust Division investigation, engage with us proactively and constructively.

Regardless of the context, we encourage you to work with us to ensure that our enforcement decisions and advocacy efforts accurately reflect marketplace realities.

Thank you.