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ANTITRUST LAW ENFORCEMENT DURING THE OBAMA ADMINISTRATION

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P R O C E E D I N G S

MR. FRIEDMAN: And take your seats.

So, the Obama administration has been involved in a renewed push to place antitrust as an important part of American industrial policy. I just learned this morning that in fact while he was a professor, Obama was in fact a professor of antitrust at Chicago and while he was a candidate in 2008 was asked, you know, what he thought of antitrust and easily defined his philosophy, which was that antitrust is the American way of making capitalism work for consumers. And he pledged, as a candidate, to reinvigorate antitrust enforcement and has certainly done so over the last three years with challenges to mergers and acquisitions, civil enforcement, and criminal prosecution.

Department of Justice has had to do this at a time of sharp criticism of any federal intervention of the marketplace, as well as shifting dynamics of competition and a new world of technology that has enabled both organizations to grow to unprecedented size and efficiency while tailoring to a very long tale of personalized demand. So, we have shifting complexities and competition as well.

To discuss this, and in particular her own role in it, we're pleased to welcome Sharis Pozen this morning, the acting assistant attorney general for antitrust.

Sharis has a long career in exploring and understanding competition in America. She began her career at the FTC in the Merger Litigation Group and stayed in the Bureau of Competition as the assistant to the director of that bureau; and then she was the attorney advisor to Dennis Yao, commissioner, and then to FTC Commissioner Christine Varney.

She joined the private sector in 1995 at Hogan & Hartson, where she was a partner, and focused on competition and industry trade. She rejoined public service in 2009 as chief of staff and counsel to Assistant Attorney General Christine

Varney and then in the summer of 2011 was named acting assistant attorney general for antitrust.

In that short time, it's been quite exciting. I'm sure she's going to tell us some very interesting stories and reflections on just what it means to make capitalism work for Americans.

So, Sharis?

MS. POZEN: Thank you. Good morning and thank you so much for inviting me here today.

My time at the division, as you mentioned, began February 2009, when I started as chief of staff and counsel in the Antitrust Division, and from there on it's been a truly remarkable experience for me personally, and, hopefully, as you said, we've contributed to antitrust in significant ways as well.

And so I welcome this opportunity during what is my last week as acting assistant attorney general to highlight the Division's great work and achievements on behalf of American consumers. I hope that in doing so I can offer you an insider's view of the last three and a half years at the Division.

Just over four years ago, as you mentioned, then candidate Barack Obama pledged if he was elected President that he would direct his administration to, and I quote, "reinvigorate antitrust enforcement." Within days of his inauguration, he nominated Christine Varney to be the assistant attorney general for antitrust, and at her confirmation hearing Christine Varney stated her commitment to strong antitrust enforcement. And, indeed, after she arrived at the Division, Attorney General Holder remarked that the Antitrust Division was open for business again.

Those were the promises, and since they were made I believe we've delivered.

Since January 20 of 2009, the Division has challenged a total of 57 mergers. We challenged proposed transactions between Comcast and NBC, Ticketmaster and Live Nation, Blue Cross/Blue Shield of Michigan and PHP, Dean Food and Foremost Farms, United and Continental Airlines, Google and ITA, the New York Stock Exchange and NASDAQ, the New York Stock Exchange and Deutsche Boerse, H&R Block and TaxAct, AT&T/T-Mobile, Blue Cross/Blue Shield of Montana, and New West, just to name a few.

Some of these challenges led parties to abandon the transaction. In others, parties were structured to fully address our competitive concerns, and sometimes we had to sue to block the transaction. There were also times when we concluded that the proposed transaction didn't raise competitive concerns, and in those instances we closed the investigation and informed the parties that they could proceed to their merger. And sometimes we issued closing statements to provide transparency into our decision-making.

And since 2009, we also challenged anticompetitive conduct in 18 civil nonmerger cases, again primarily focusing on contracting practices that reduced competition. Most recently, we challenged conduct by Apple and five of the major publishers: Hachette, HarperCollins, Simon & Schuster, MacMillan, and Penguin. We also challenged anticompetitive contracting practices by United Regional Hospital, Blue Cross/Blue Shield of Michigan, and Visa, MasterCard, and American Express, as well as conduct by Adobe, Google, Intel, Intuit, and Pixar.

And since 2009, we've criminally prosecuted unlawful conduct in 240 criminal cases. We obtained more than $2 billion in criminal fines and more than 80,000 days of jail time for criminal defendants. These prosecutions involved unlawful activity in a variety of industries, including municipal bonds, air cargo, real estate, and the auto

parts sectors, again just to name a few.

In all of these enforcement actions, we focused on preserving competition for consumers and businesses so they could benefit from the resulting innovation that is spurred by an open and competitive marketplace.

From this catalogue of achievements, I think there are three themes that emerge, which I'd like to discuss with you today. First, the Division is prepared to litigate, and it wins. Second, we're focused on and have prioritized enforcement and advocacy work in areas that have the greatest impact on American consumers. And third, we recognize that our actions are watched both domestically and internationally, and we have acted to ensure our message is effective and that our efforts are collaborative.

Starting with our litigation efforts, for anyone who ever questioned whether the Division could litigate and could be successful in court, that question can now be answered strongly in the affirmative. In October 2011, the Division won its first contested merger victory in nine years when it successfully stopped the proposed acquisition of TaxAct by H&R Block, a merger that would have left 40 million Americans who use digital do-it-yourself tax preparation software with only two major competitors. We alleged that the transaction would have led to higher prices, lower-quality products, and less innovation. And after hearing the evidence, the district court agreed, finding the proposed transaction violated Section 7 of the Clayton Act.

Soon after that victory, we were successful in our litigation to stop the proposed acquisition by AT&T of T-Mobile; again, a transaction that would have profoundly harmed consumers. We filed our lawsuit in August 2011, and through the hard work of our litigation team, the parties abandoned the transaction in December of that same year.

As I mentioned, we filed suit against Apple and the five publishers for

alleged conspiracy that led to higher prices for eBooks. Three publishers have settled. But stay tuned to this important litigation.

Our criminal program also has great litigation successes. For example, last month after an eight-week trial, a federal jury in San Francisco convicted AUO, its American subsidiary, and two former top executives for participation in a five-year conspiracy to fix prices of LCD panels sold worldwide. Those are the screens that we rely on for our computers, television, and tablets. The AUO case was an historic first because the jury determined, beyond a reasonable doubt, that the conspirators gained from their illegal conduct at least $500 million, taking the potential fine for each company from a statutory level of $100 million to 1 billion. The jury's decision on this illegal gain and to hold the companies and their executives accountable should send a strong deterrent message to boardrooms around the world.

These are just a few examples of the Division's recent litigation successes, and they're reflective of an overall effort to ensure that our litigation program has the necessary resources to win in court. The Division has always attracted the best lawyers in the country, and we continue to do so today.

We have a career staff with many skilled trial lawyers who have a deep understanding of antitrust and jurisprudence. To lead their efforts, we early on hired a trial lawyer, who is a member of the American College of Trial Lawyers, to serve as a deputy assistant attorney general, and we have maintained that practice.

Most recently we institutionalized that level of leadership by establishing the career position, director of litigation, filled by a senior trial attorney, who can continue to build on the Division's litigation expertise. And also on occasion, like with AT&T, we've brought in seasoned outside litigators who work side-by-side with the career staff to achieve a winning result.

So, the bottom line? The Antitrust Division isn't afraid to litigate, and when it does it wins.

These litigation efforts, and indeed all of our work, have been in keeping with our key priorities, which involve preserving competition and industries that provide consumers with products and services essential to their daily lives.

Identifying priorities was particularly important, given this administration began at one of the most difficult points in American history. With this as backdrop, from the beginning we made known that ensuring competitive markets was vital to our country's economic recovery. And that meant vigorous antitrust enforcement.

We learned from the post-Depression era when efforts were made to lessen competition, enforcement backfired and hurt recovery. For the Antitrust Division, the financial crisis and the resulting recession created significant challenges while limiting the resources we had at our disposal. In that environment, we knew that we could have the greatest impact and do the most good by focusing our resources on what I call pocketbook industries: those sectors where threats to competition can have a great impact on family budgets of most Americans. These include telecommunications and technology, financial services, health care, and agriculture.

Once these sectors were identified, we did our homework. We met with industry experts to help us identify potential competition issues in these industries. We looked at each industry as a whole, analyzing the challenges it presented and where our involvement could do the most good. And this has proven a successful strategy.

For example, in telecommunications and high technology we recognize the central role that innovation plays and have worked to ensure an open and fair playing field that allows innovation to occur. This is illustrated by our challenge to the proposed Comcast-NBCU joint venture involving the market for video programming. There we

recognize that Comcast Cable's traditional and evolving online rivals need continued access to NBCU's content and programming to compete effectively. Thus, our settlement, among other things, requires Comcast/NBCU to make such content available to online video distributors -- OVDs -- at a fair price.

We've all witnessed the ever-changing marketplace in this industry where people watch TV on laptops, tablets, and handsets. Today our settlement is helping to maintain an open and fair content distribution marketplace and ensure new content for those evolving distribution models. Since our settlement was filed, OVDs continue to sign significant deals for NBCU content. For example, in July 2011, Netflix secured a multiyear renewal of its contract with NBCU, and Amazon announced a deal with NBCU expanding Amazon Prime's access to Universal Pictures' film library.

We also recognize undue concentration was a looming threat to competition in the telecommunication markets. This concern was front and center when we moved to block the proposed acquisition of T-Mobile by AT&T. This transaction would have combined two of only four wireless carriers with nationwide networks. And by eliminating T-Mobile as an important source of competition and innovation, many consumers would have seen higher prices, lower-quality services, fewer choices, and less innovative products. The abandonment of this transaction was a victory for millions of American consumers.

Here again we have seen the early success of our efforts already. T-Mobile has recommitted itself to its "challenger strategy." In late February 2012, just 2 months after AT&T abandoned its acquisition T-Mobile announced a $4 billion investment in modernizing its network and to deploying 4G LT service. T-Mobile also has plans to aggressively pursue business customers, expand its sales force, ramp up advertising spending, and even remodel its retail stores.

Most recently we announced our challenge of the illegal agreement between Apple and the five book publishers in the United States. I mentioned that earlier. As outlined in our complaint filed in federal court, these companies conspired to end eBook retailers' freedom to compete on price. Because of this agreement, consumers paid millions of dollars more for their eBooks. At its heart, this case is about protecting competition, not consumers. No, it's protecting competition, not competitors, and protecting consumers -- sorry about that -- I get very passionate when I talk about eBooks, you can tell -- and about lowering even prices paid for consumers. Indeed, soon after we announced our lawsuit and settlement, Amazon announced plans to push down the prices on eBooks.

At the same time we filed our complaint, we reached a settlement that if approved by the court would resolve our concerns with Hachette, HarperCollins, and Simon & Schuster and will require those companies to grant retailers, such as Amazon and Barnes & Noble, the freedom to reduce prices on their eBooks' titles.

As I stated when we announced this action, our proposed remedy demonstrates that the antitrust laws are flexible and can keep pace with technology and rapid-changing industries.

Under this settlement, if approved, the settling parties will be prohibited for two years from placing constraints on retailers' ability to offer discounts to consumers and will be prohibited from conspiring or sharing competitively sensitive information with their competitors for five years. And if you know, our normal decrees last for 10 years, so we're very mindful of this evolving marketplace.

We continue to litigate this case against Apple, MacMillan, and Penguin to obtain the benefits of competition in the marketplace in the early stages of this emerging electronic books technology. As I said earlier, stay tuned on this litigation.

Another important issue we see in the technology sector is the sometimes challenging interaction between competition law and intellectual property law. This intersection is important, because so many of our most innovative industries rely heavily on patents or other forms of intellectual property. IP rights grant control over important inventions technology and create innovation incentives. But antitrust enforcement remains critical to ensuring that IP rights are not abused or asserted in a competitive way.

These issues are evidence in our investigation of Google's acquisition of Motorola Mobility; Apple's, Microsoft's and RIM's acquisition of Nortel patents; and Apple's acquisition of Novell's patents. Each of these investigations, which happen to come before the Division at the same time, involves the transfer of significant patent portfolios to large and powerful technology companies. We took a hard look at the ability and incentives of the acquiring companies to use the patents at issue to foreclose competition.

We were especially concerned about certain standard essential patents, or SEPs, that Motorola and Nortel had pledged to license to industry participants. We analyzed whether the acquiring companies could use SEPs to raise their rivals' costs. During our investigation, a number of the companies involved made commitments regarding their proposed SEP licensing practices. Apple and Microsoft in particular made clear commitments to license SEPs on fair, reasonable, and nondiscriminatory terms and to forego seeking injunctions in SEP disputes.

We ultimately concluded that none of these transactions would likely substantially lessen competition, and we closed them, explaining our rationale for doing so in a long public closing statement noting that we will continue to monitor this industry.

Now, turning to the financial sector. We also saw a range of

anticompetitive behavior that was hurting consumers. Examples are the credit card merchant restrictions that we challenged in our lawsuit against Visa, MasterCard, and American Express. These rules restrict merchants that accept the credit card companies' cards from offering discounts or otherwise encouraging consumers to use lower-fee cards. Visa and MasterCard agreed to rescind the anticompetitive rules and we settled with them. Our case against American Express is ongoing.

Financial services markets also are threatened by excessive concentration due to illegal mergers, such as the New York Stock Exchange-proposed acquisition of NASDAQ. There, the Division informed the companies it would file a lawsuit to block, and the parties abandoned the transaction. The proposed acquisition would have substantially eliminated competition for corporate stock listing services, opening and closing stock auction services, off-exchange stock trade reporting services, and real time proprietary equity data products.

Next, in the health care sector. We recognize that many health insurance markets were highly concentrated, which could lead American consumers to pay more for insurance and hospital services. We know that a potential solution to this problem is entry, and to make sure that entry is possible we knew that we had to stop incumbent insurers from erecting illegal barriers to entry. To this end, we concentrated on challenging contracting practices that favored incumbents and limited entry. That's why we're challenging Blue Cross/Blue Shield of Michigan's MFNs, and that's why challenge Blue Cross/Blue Shield of Montana's exclusive agreement with New West Health Services. There, we required New West to divest the majority of its commercial health insurance business to a new entrant, Pacific Source, as a precondition of New West owner hospitals from entering into an exclusive agreement to purchase health insurance from Blue Cross/Blue Shield of Montana.

Also in the health care sector, we brought our first traditional monopolization case since 1999. There, we entered into a settlement with United Regional, a Texas hospital, from entering into contracts with commercial insurers that inhibited insurers from doing business with United Regional's competitors. United Regional had negotiated a series of anticompetitive contracts with insurance companies. The hospital dominated the market for hospital services in Wichita Falls and was the region's only provider for certain essential services, making it a must-have hospital for the health plans.

When faced with a competitive threat by other facilities, like Cal West, United Regional responded by entering into a series of exclusionary contracts with commercial insurers serving the area. These contracts imposed a significant pricing penalty if an insurer contracted with any facility that competed with United Regional. Because of these contracts, United Regional's rivals could not obtain their own contracts with major insurers and were not included in the insurer's network, substantially hindering its ability to compete. Faced with the Division's challenge to these practices, United Regional agreed to a settlement that, among other provisions, prohibits it from entering into or enforcing exclusionary contracts. The court gave final approval to this settlement last fall, and since then Cal West has successfully negotiated contracts with several major insurers that formally had contracted only with United Regional for hospital services, giving patients in that area greater choice for hospital services.

And finally, in agriculture. Agriculture is another industry that the front office focused on starting in 2009. To gain a thorough understanding of agriculture in marketplaces, we and the Department of Agriculture jointly hosted five workshops around the country to explore the intersection of competition and agricultural policy. The workshops were attended and supported by Attorney General Holder and U.S.

Department of Agriculture Secretary Vilsack. We focused on row crops; hog, poultry, dairy, and livestock industries. We learned from the experience of the farmers, cooperative members, processors, and academic specialists about how these industries function on the ground.

Many of the issues focused at the workshop fell outside of the purview of the antitrust laws, but other issues highlighted the continued importance of vigorous antitrust enforcement in the agricultural sector. We recognized this importance in our court challenge and settlement of Dean Foods' acquisition of Foremost Farms' Consumer Product Division and dairy processing plants, and in our challenge to George's Foods acquisition of Tyson Foods' Virginia chicken processing plant.

In sum, it's no coincidence that we took actions in industries important to consumers' pocketbooks, and the results of those actions are already evidenced: competition and innovation were allowed to flourish.

Finally, in setting our priorities and undertaking enforcement actions, we've understood that our efforts were watched closely, as I said, both domestically and internationally. Domestically, we understand that businesses want certainty, and we seek to provide that transparency in our analysis. We've done this in many ways: through our policy statements and guidelines; filed cases and competitive impact statements; and our speeches, just to name a few ways we've tried to communicate with business.

We've also focused on competition advocacy in the courts, offering our views and analysis by filing amicus briefs in important management cases. American Needle offered the first opportunity for this administration to participate in an antitrust case before the Supreme Court and also resulted in the first Supreme Court decision since 1992 in favor of an antitrust plaintiff. The Court's decision was in keeping with our

views reflected in the solicitor general's brief, which advocated for a functional and pragmatic analysis based on the specific facts of each situation.

We also filed amicus briefs in two reverse payment cases -- Cipro and K-Dur -- setting forth our approach to cases where pharmaceutical companies producing brand name drugs pay firms for making generics not to exercise their entry rights provided under the Hatch-Waxman Act. The Division has called for a presumptively illegal standard, recognizing that some settlements may be pro-competitive by avoiding unnecessary litigation, that this issue, which is still under consideration and pending in the K-Dur case before the Third Circuit.

Internationally, we appreciate that our actions are watched around the world. In our global economy where many of our important transactions have cross-border implications, our relationship with international jurisdictions is more important than ever. We have nourished these relationships, strengthening ties to establish jurisdiction and emerging antitrust authorities such as the BRICS -- Brazil, Russia, India, China, and South Africa -- with which we have ongoing cooperative efforts. All of these efforts are valuable. They result in more effective and efficient cooperation, with international jurisdictions, upon transnational cases and lead to more effective and consistent enforcement.

The proof is found in many of our recent cases in which we were able to work collaboratively with our colleagues across the globe and with our United States attorneys general. And as a recent example is the eBooks investigation, where we cooperated closely with the European Commission throughout the course of our respective investigations.

This also is another example of our close collaboration with the states, given we worked closely with Connecticut and Texas. The state attorneys general have

been and will continue to be a very important partner in our law enforcement efforts. And, as I said, when the eBooks enforcement action was announcement, never before have we seen this kind of global cooperation on a civil enforcement matter.

So, as I prepare to leave the division, I take great pride in looking back and confirming, since our front office arrived in 2009, that we have worked very hard alongside our dedicated career staff, who have also worked very hard to make good on the President's pledge to reinvigorate antitrust enforcement.

I have to make a special note of two people who have been alongside me all along the way. First is Gene Kimmelman. As many of you know, Gene came with a consumer background, and there were lots of questions asked as to why Gene Kimmelman would join the front office of the Antitrust Division at the Department of Justice, and I'm here to tell you why. Gene brought the voice of consumers and consumerism to every decision that we made, and he was invaluable.

Also I would note Rachel Brandenberger, who joined us from overseas who became our special advisor for international. These international accomplishments would not have been possible without her.

Upon my departure, Joe Wayland will take over as the acting assistant attorney general. He knows well from his tenure as deputy assistant attorney general at the Division that he is well supported by the front office and our expert staff as he continues to effectuate this pledge. As the attorney general reiterated last month, the Antitrust Division remains open for business.

As I look toward the horizon I can clearly see the continued importance of our work to economic growth and consumers' pocketbooks and know that the commitments of its leadership and career staff of the Division will continue the tradition of success. As I've said many times, our compass is set. We know exactly where we're

headed.

Thank you.

MR. FRIEDMAN: Thank you, Ms. Pozen, for your remarks, and we'll get to some questions from the audience in just a moment.

I wanted to start off with my technology bias at the Center for Technology Innovation here at Brookings. It's very interesting to look at how industrial organization has been radically transformed in the past 20 years. We now have the ability to efficiently scale globally where we never had before. At the same time, new network technologies bring with them economics of network effects that mean that the value of something is a function of the fact that there is no competition or, you know, that the value's a function of science. And we also have, you know, challenges, you know, renewed evidence of Schumpeterian competition, creative destruction where something that looked very stable today is just blown out of the way by the next widget that comes along down the pipe.

In the face of sort of this new information economy, how do you think antitrust and competitiveness governance has shifted? Do you think there have been substantial ways in terms of how enforcement happens? Maybe it's easier for you to get data on price fixing, but at the same time judgments are harder. Give us some insight if you think things have changed demonstrably or if it's just applying old models to a new world.

MS. POZEN: That's a good question. I mean, I said when we brought the eBooks case -- and I wanted to make clear -- I think that case is a great example that the antitrust laws are flexible and we are able to apply them to nascent, evolving industries. At the same time, on the other side of the equation, what you see in these evolving industries are changes in business models that some in the industry find

threatening and react in different ways. And Microsoft, to the original case brought, Microsoft reacted to the browser and Java coming on board and took predatory action. In eBooks, what we've alleged in our complaint is that Apple with the five publishers got together and conspired to set the retail prices. So, you see those kinds of reactions, and that's why I think antitrust law has a role to play. It steps in and looks at those actions that, as I've said many times, cross the line.

Now, how does it do that I think is really important to think about. I think it has to do so in a very balanced way. I think we have to recognize that our economy is built on innovation and we have to ensure that innovation can thrive. The other side of the equation -- you have to make sure that the playing field's open and fair so that innovation can go forth, that there aren't bottlenecks that are stopping competition from going forward. I think -- and our remedies in the way we approach these kinds of industries -- we need to take a scalpel and not the blunt force that we can take or have the ability to take. And, again, I think in the settlement in the eBooks case is you see that. You know, we settled with three of the publishers in a decree that lasts five years, which is on the shorter end of our normal time range, and the cooling off period only lasts for two years, again recognizing that we wanted to reset the market, make sure that the playing field was open and fair, but we are not dictating a business model. The agency model can go forward, but at the same time, the retailers have the ability to price effectively and lower prices for consumers.

MR. FRIEDMAN: So, in your roles at both the FTC and the Department of Justice, you've had the ability to sort of witness, you know, antitrust and pro-competitive behaviors from both of these agencies. Can you talk a little bit about how that relationship has evolved and perhaps what this administration is doing to promote cooperation between those two bodies?

MS. POZEN: Sure. You know, as many folks know, we have a shared civil jurisdiction with the Federal Trade Commission, and we make decisions on who's going to investigate what, whether it's a merger or non-merger, based on expertise. That's the model that was established, and that's the model that we follow. And in certain industries where you see them evolve and, you know, change, sometimes the expertise can become blurred. And so then we have to just make decisions. We don't fight; we make decisions. And we work with our colleagues to ensure that, you know, the taxpayers are well served and that we can investigate and go forward and make those decisions.

There are lots of ways. I mean, when you look back when we walked in the door in 2009, you know, there were significant, substantive areas of disagreement between the FTC and DOJ. The Section 2 report had been issued by the DOJ. The FTC had refuted that. In reverse payments, there had been disagreement on how those should be handled. There are several others.

But right away, AG Varney withdrew the Section 2 report, and also we worked on a standard that brought us closer to the FTC's unreverse payment. So, you saw the substantive alignment between the two.

And also most recently something Chairman Leibowitz and I just inaugurated are working sessions between the two organizations. As we looked across our portfolios, we saw that there were certain areas where we could hone our skills, learn from each other. So, we had our first session on February 28th and John and I kicked it off -- John Leibowitz and I kicked it off -- and I think, to our astonishment, the room was packed with DOJ and FTC staff of all levels -- economists and lawyers -- and we worked together. I had several people afterward stop me in the hall. One of our managers of one of our economics groups stopped me and said wow, they had the problems that we

do with experts and we're going to work with them. So, I think that having those working sessions will continue to foster the relationship as well.

MR. FRIEDMAN: Good, that's great.

So, speaking of packed rooms, I'm pleased to see a crowded room here. We have a few seats in the front for those of you trying to squeeze in.

Just a few notes on questions. It is the custom at The Brookings Institution as people come around with microphones to rise and identify yourself before posing your question. It is the custom in English-speaking cultures that questions are relatively short and end in some sort of interrogative punctuation marks. (Laughter) And finally, given our speaker today, it's helpful to keep in mind when framing your question what Ms. Pozen may or may not be allowed to legally answer. (Laughter)

So, with that we have a question here in the front.

MS. WORTHEIM: I'm Mitzi Wortheim. Is this on?

MS. POZEN: Yeah.

MR. FRIEDMAN: Yes.

MS. WORTHEIM: With the Naval Postgraduate School. I have two quick questions.

First of all, if a company is being bought from an overseas firm and it starts to take it out of our market but then you're an overseas firm that -- I just -- I don't quite understand that, so let me --

But my second question is since we really care about competition and innovation, is it in your purview to look at shadow banking?

MS. POZEN: Well, so going to your first question, you know, if a foreign company buys a U.S. company does -- you know, there's a Hart-Scott-Rodino Act that sets out a criteria for whether or not they have to report that transaction to both the FTC

and DOJ and for it to be investigated. So, that's a process that we undergo regularly. And if it's reported, then we would review the transaction. So, even if it is a foreign company buying a U.S. asset and it's reportable, we review it. And even if it's non-reportable and we think it has competitive significance, we would review it. Our mission is competition. Purely competition.

In terms of shadow banking, we have a lot of expertise in the financial services industries. I mentioned our criminal act --

MR. FRIEDMAN: Would you like to define that for those in the audience -- present company included -- who are not very familiar with shadow banking.

MS. POZEN: Sure, sure. Well, again, the shadow banking side of it I don't want to go into too deeply, but my point is in the financial services area we have a lot of expertise in a variety of areas, like in the muni bonds cases that we're prosecuting in our New York offices.

We're very aware of financial services of potential harm to competition that financial services, whether it's shadow banking or other means are used, and are pursuing that vigorously. I think the muni bonds cases are an excellent example where we saw kind of an interesting industry that was kind of unknown to the American consumer necessarily. You know, when you issue municipal bonds, what do you do with the money? Where do you park it essentially? And there's a lot of negotiation that's supposed to go on, subject to Treasury Department rules, where you park that money and what the interest will be on that money.

This is money used for our schools, our bridges, our stadiums, you know, all the things our city -- and what we found, the evidence led us and we have plea agreements from corporations and global agreements from several banking institutions with us and other government entities, because we found that they were bid rigging

essentially on those rights. And so we put a stop to it. And I think we said loud and clear to the five financial institutions that enter into settlements with us and several other governmental agencies that we're a cop on the beat and if we see issues again, violations of our statutes that we enforce, we'll take action, and we did there.

MR. FRIEDMAN: Is there a question here in the fourth row?

MR. BERRY: I'm Brian Berry, Washington correspondent for *Euro Politics*. Question on merger policy.

You briefly mentioned the Deutsche Boerse/NYSE case, and there you have within the last couple of months the European Commission blocking the merger and yourselves giving it the okay. Just wondering why you think that happened that they came to two different conclusions.

And just more broadly from that, do you think it's fair to say that companies would have a harder time getting approval for a merger from the EU antitrust agencies than they would from the U.S. antitrust agencies?

MS. POZEN: Well, to the last question, I'm not going to touch that. (Laughter) I think we both -- on mergers there's been, you know, mostly convergence on our analysis and mergers, and so we're looking at the same effects. We're doing the same kind of analysis. We have very different systems, though, in which we operate.

Getting to the first question, though, on the NYSE/Deutsche Boerse matter, that was a matter that was before both of our agencies -- the EC and the DOJ -- at the same time, and we cooperated and coordinated quite effectively I think.

What we found at the end of the day was the effects of that merger were different in the U.S. than they were in Europe. They were just different. And so we took action based on our concerns and ended up entering into a consent agreement, which is now -- essentially we withdrew it from the Tunney Act proceeding, because the deal

didn't go forward.

The European Commission looked at a different set of facts on how the combination affected European markets and came to a conclusion that it did harm European markets. So, we worked in parallel. We worked cooperatively. But at the same time, the merger's going to have different impacts in different jurisdictions, and that's what that case stands for.

MR. FRIEDMAN: Is there a question in the back there? Second --

MR. O'CONNOR: Thank you. My name is Dan O'Connor. I'm with the Computer and Communications Industry Association.

I'm sorry, I wrote some notes here.

Recently -- well, traditionally, antitrust law and intellectual -- it considers intellectual property in its market definitions, particularly in innovation markets. But traditionally that analysis is tied --

MR. FRIEDMAN: A little closer to your mouth.

MR. O'CONNOR: Oh, sorry. Traditionally, intellectual property is examined in direct relation to the products it's associated with. More and more we see the evolution of non-producing entities, which function more upstream in these innovation markets. And there hasn't been much guidance on how to address upstream markets where they don't produce products. So, I was wondering if you can kind of comment on that phenomenon in antitrust rule and examining the use of intellectual property when it's not necessarily directly tied to a property.

MR. FRIEDMAN: The official DOJ position on the patent rules.

MS. POZEN: (Laughter) That's what -- I was thinking that was patent rules that you were talking about.

So, as I mentioned in my talk, this intersection of antitrust and intellectual

property has been actually a personal fascination of mine for years, because here, on the one hand, you have these property rights that we hold sacred. They lead to innovation. And on the other hand, you can have abuses, or you can have and use in an anticompetitive way. And again, I think it's an area you have to go carefully in a balanced approach.

In terms of, you know, there's a more polite name than "trolls" that's escaped me, but in terms of those entities that hold patent rights and assert them, on the one hand, they have every right to assert the patents that they hold and seek, you know, monetary value for those. On the other hand, if they do it in a way that harms competition, that's where we get involved.

Shifting from that a little bit is when you look at the SEPs -- the standard essential patents -- and the ability of them being held by, you know, a technology company or other company and asserting them in way of an injunction or exclusionary action of the ITC, that could harm their competitor. On the one hand, they have absolutely a right to assert within the full -- you know, their full rights, you know, the infringement or, you know, to receive the monetary value that's assigned to their patent. On the other hand, if it goes too far and we see that, you know, we're looking at that very closely.

So, I'm not directly answering your question on trolls. That's something that has been of great interest, but I'm not going to comment further on that. It's something we're certainly aware of.

MR. FRIEDMAN: Let's go in the corner there.

MS. FREEMAN: My name is Jo Freeman, and I write books, so I would like you to elaborate more on the eBook settlement, because it struck me that you completely left out the other side, which I am quite well aware of and I'm sure you are,

too.

MS. POZEN: Yes.

MS. FREEMAN: Which is that essentially Amazon has tried to undermine the traditional publisher's right to control the price of their own book by refusing to allow them to set the prices of their books for the eBooks. And the conspiracy that you made them give up was basically one to stand up to Amazon and retain their right -- a publisher's right to set the price of his own book. Collectively, they might be able to stand up to Amazon; individually, they couldn't. Now, as an author, I'm very concerned that publishers continue to survive, which means they have to make money. And I would like to know how your decision on this enhances competition if it undermines the ability of book publishers to survive.

MS. POZEN: Sure, I'd be happy to answer that question.

When this initiation of the eBooks conspiracy was underway for almost two years at the Antitrust Division, we talked to many market participants. We heard from many market participants and heard allegations about a variety of things in this industry. What struck us and what we thought crossed the line was when you had the CEOs from the major publishing companies on a quarterly basis dining in some of the fanciest restaurants in New York behind closed doors. From the evidence that we put in the complaint, we knew what they were talking about. It's exactly what you raised. They were concerned about Amazon's low pricing. We also saw Apple come along -- and again, we laid all this out in our complaint -- and facilitate that arrangement and that conspiracy. And what it's resulted in is higher prices to consumers. The antitrust laws are about choices and lower prices to consumers. And in many industries you see when faced, you know, with this kind of evolution of distribution models, as I said before, people feel threatened, companies feel threatened. They can take lots of actions that are

absolutely legitimate and they can work in ways, even collaboratively, that don't violate the law. But when they sit in fancy restaurants and make decisions, along with their partner, Apple, that result in a conspiracy that sets prices higher for consumers, I would be remiss if I didn't act.

We are not dictating a business model. As I said, in the three settlements that we have reached, the agency model can continue and go forth. What we're trying to ensure is that consumers are not paying more than they should for eBooks and that competition at the retail level can evolve and flourish and provide consumers with more choices.

MR. FRIEDMAN: All right, questions further -- in the corner there.

MS. STANTON: Lynn Stanton. I'm a reporter at *Telecommunications Reports*.

How does DOJ approach arguments from network companies that say that, you know, there's only so many networks that can be supported by the demand that exists or, in the case of the wireless companies, that can only support so many networks with the spectrum that's available so that trying to have more competitors reaches a point that would actually harm consumers?

MS. POZEN: So, I think, you know, again, it's hard to give a general answer. You know, we really do look at the cases before us and the facts that are specific to those cases and make an evaluation in that way. That's the responsible way to enforce the antitrust laws. You know, if you're referencing AT&T/T-Mobile while on the one hand T-Mobile was going to give AT&T Spectrum that AT&T said that it needed, on the other hand, it was at a tremendous cost to competition. You know, they were going to take out one of the, you know, national network providers, T-Mobile, who -- again, we laid this all out in our complaint that we file in federal court -- had been a maverick. It had

been a disruptive force in the market. It had, you know, been a real competitor in that environment. So, it was too great of a cost, and that's why we challenged that particular merger.

Our concern was that competition choices for consumers, prices for consumers, and innovation would -- competition would be harmed by that merger, that particular merger. And there are other ways you can go about acquiring spectrum other than taking a leading competitor out of the national market.

MR. FRIEDMAN: In the back, standing.

MR. McCONNELL: I'm Bill McConnell with *The Deal Magazine*.

MS. POZEN: Hi, Bill.

MR. McCONNELL: On several occasions, you've mentioned your preference for merging parties to sign waivers so that regulators in different countries can share information that would otherwise be confidential. Have you felt like there's some reluctance on some parties to cooperate or to enter waiver agreements with you?

MS. POZEN: Well, the reason that I stress that, you know, and we've stressed it as a department particularly over the last three and a half years, is because as I mentioned in my talk, the level of cooperation around the world has absolutely flourished. And I don't know -- and I want to make sure that merging parties are, you know, in instances where we have dual investigations going on, are aware of that level of cooperation. That cooperation is facilitated by the signing of waivers. There's no doubt about it. And in my view, it certainly helps us cooperate more efficiently and effectively and I would think for parties having efficient and effective review of their transaction on a global basis would be in their interest as well.

We have seen instances where parties have tried to, just to use my Missouri twang, you know, whipsaw us a bit and, you know, providing some information

to one jurisdiction and not to us or vice versa. And, again, I'm a big believer in transparency. I want folks to know that we know about that, and we know when they're doing it. There may be legitimate instances where parties don't want to sign waivers. They don't think it's helpful to them. We can't force people to do that in any way, shape, or form. And we have different kinds of waivers, so there are different levels of cooperation that we can have, depending on the jurisdiction. But I do think it's important to know that there is a much more and daily cooperation going on with our counterparts around the world, and waivers facilitate that.

MR. FRIEDMAN: So, playing off the idea of transparency, one of the things that struck me about the entire, you know, administration's approach to technology policy has been an attempt to use soft power -- that was Joe Nye's framing -- so legislation hard to get through, regulation's unpopular, so what can you do that sort of gets companies to do what you want just voluntarily? I'm curious -- and you talk a little about closing statements -- are there other things you can tell us about how your office approaches this just to get companies to embrace the idea of competition in general without having to go through litigation?

MS. POZEN: Sure. I do -- again, along the lines of transparency, I think the FTC and DOJ revised the Horizontal Merger Guidelines. And I think that was an exercise in transparency so that parties had certainty. They knew what analysis we were employing. We updated them. They hadn't been updated for 17 years. The same with our Mergers Remedy Guide, you know. So, folks knew what to expect in this emerging transnational global marketplace what we were going to do on vertical and horizontal mergers.

We also give a lot of speeches. If you look on our website, you know, we talk a lot about what we're doing, and the other way you see that is in our competitive

impact statements. When we file a consent agreement, the court requires -- we file them before a court in a Tunney Act proceeding, and the court requires that we analyze and discuss in what's called a competitive impact statement how that consent agreement resolves the competitive concerns outlined in our complaint that we file with the court as well.

So, those are some of the main ways. I also think, you know, actions speak louder than words, and so what you see, particularly in two of the matters that I mentioned -- in Comcast/NBCU, in the, you know, technology market and even in Ticketmaster, Live Nation, and in Google/ITA, I think all three -- you saw, you know, verticality addressed in a way that I thought was, you know, I don't want to say "light-handed," because then it doesn't look like we had a remedy, but in a fashion that we think eliminated the foreclosure and the harm that we saw in those industries so that, again, as I said, the playing field was open and fair, that there were -- that these technology markets were allowed to go forward and flourish, but we weren't going to have bottlenecks that were resulting in this kind of verticality and this kind of market power being formed in that way.

MR. FRIEDMAN: Okay, I think there's a question in front here. Go ahead. Thank you.

MS. BRYSON-BROYDUS: Actually, I have a couple of questions. I'll go until he stops me. (Laughter)

I'm Diane Bryson-Broydus. When you guys think about spectrum, do you think of spectrum as being something --

MR. FRIEDMAN: Diane, a little --

MS. BRYSON-BROYDUS: -- that's finite or --

MS. POZEN: We can't hear you.

MR. FRIEDMAN: Speak into the mike a little bit -- whatever.

MS. BRYSON-BROYDUS: Okay.

MR. FRIEDMAN: There.

MS. BRYSON-BROYDUS: Do you think of spectrum as something that is finite? Do you feel like there's a lot of spectrum out there? Is it that good spectrum is finite? When you think about spectrum, how do you think about it?

MR. FRIEDMAN: How do you interpret the question do you think spectrum is finite? How do you think about it in (inaudible) terms?

MS. POZEN: So, you know, we work very closely with our colleagues at the Federal Communications Commission, and they are the expert agency on telecommunications, you know, and have worked very closely with them on NBC/Comcast in particular, and in the AT&T/T-Mobile merger. So, to some extent, you know, again, they are set forth as an independent agency that's expert in this area. So, we rely heavily on, you know, their view of spectrum and other issues related to that industry.

In terms of, you know, its finiteness or nonfiniteness, I mean, that's really an evolving, difficult question that I don't that I can answer on this stage in five minutes -- or two minutes even -- because there's a lot of complexity to it. But what we do see, for example, when we're looking at mergers or -- we see what the parties say in their internal documents, right? You know, we -- in a merger scenario, parties -- if we're concerned about the merger, we issue a second request. And they comply with that second request and we see what they say in their internal documents about the availability of spectrum, about how they can get it, what the sources are. So, that's really an important input, along with, as I said, the Federal Communications Commission and their expertise on spectrum,

MS. BRYSON-BROYDUS: Second question goes back to eBooks, which is --

MR. FRIEDMAN: One more question.

MS. BRYSON-BROYDUS: -- when I read the eBooks complaints that you filed in your -- and when I read the LCD price-fixing complaints, there's a lot of overlap, a lot of similarities. So, why is one criminal and the other civil?

MS. POZEN: So, question about why we brought eBooks on a civil basis and not criminally. And that question has been asked quite a bit, particularly given the kinds of settings where we saw competitors sitting down and talking about competitively sensitive information. At the same time, in any case where we're looking at whether we should prosecute it criminally or bring it civilly, we really do look at the end game and what can we do to ensure that competition thrives. In this industry -- it's an evolving industry. We thought the settlements that we entered into with the three publishers and the remedy we're seeking in our litigation will have -- and we've already seen it -- immediate impact on the marketplace and ensure that consumers get the lowest prices they deserve for eBooks.

MR. FRIEDMAN: We have time for one more question if there is one in the audience. Oh, so --

MS. POZEN: That's it.

MR. FRIEDMAN: Looks like you've had some lasting impact. So, thank you very much.

MS. POZEN: Thank you.

MR. FRIEDMAN: And we appreciate your coming this morning, and thanks to all of you for attending. (Applause)

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I, Carleton J. Anderson, III do hereby certify that the forgoing electronic file when originally transmitted was reduced to text at my direction; that said transcript is a true record of the proceedings therein referenced; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken; and, furthermore, that I am neither a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

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