Questions for the Record
Department of Justice
Assistant Attorney General
Makan Delrahim
U.S. House of Representatives
House Judiciary Committee
Subcommittee on Antitrust
At a hearing entitled
"Online Platforms and Market Power, Part 4:
Perspectives of the Antitrust Agencies"
November 13, 2019

Questions submitted by Ranking Member Jim Sensenbrenner

1. **Three years ago, the Division concluded a review of the ASCAP and BMI consent decrees, ultimately concluding that the decrees should not be modified. That multi-year review consisted of various rounds of public comments focused on very specific proposals. In June, the Division launched its current review by soliciting comment on a number of very high-level questions with regard to the decrees rather than any specific proposals. Yet, in August, it was reported that the Division might take action on the decrees before the end of this year.**

    a. **Why does the Division feel that it needs to take action on the decrees at this time? What prompted the Division's review, and subsequent announcement, and what does the Division hope to achieve with this review?**

Response:

From 1890, when the antitrust laws were first enacted, until the late 1970s, the United States frequently sought entry of antitrust judgments whose terms never expired. Recognizing that perpetual antitrust judgments rarely serve to protect competition, in 1979, the Antitrust Division adopted the practice of including a ten-year sunset provision in nearly all of its antitrust judgments. Perpetual judgments entered before the policy change, however, remain in effect indefinitely unless a court terminates them.

In 2018, the Antitrust Division embarked on a review of its more than a thousand outstanding perpetual antitrust judgments and, when appropriate, sought termination of them.

To date, seventy-six of seventy-eight jurisdictions have terminated legacy judgments. As part of the review of legacy antitrust judgments, the Division sought public comment on the ASCAP and BMI decrees. The Division advised Congress when it opened the comment period. That comment period ended in August 2019. The Division received over 800 comments from parties, stakeholders, and citizens, and these comments are publicly posted on the Division's website at https://www.justice.gov/atr/antitrust-consent-decree-review-public-comments-ascap-and-bmi-2019. As the Division reviews the comments, it continues to be engaged actively with the parties and industry stakeholders.

b. If the Division were to decide to make changes to the current decrees will you commit to ensuring the public, as well as the relevant Committees of Congress, have ample opportunity to review and respond to any specific proposed changes before moving forward?

Response:

Congress has a very important role with regard to this issue, and the Division intends to continue its engagement with Congress, and of course, will continue to abide by its obligations under the Music Modernization Act. Furthermore, we would welcome any views you have on these decrees.

2. Last year, Congress unanimously passed the Music Modernization Act, which was the product of years of legislative discussion between my colleagues in both chambers and stakeholders on all sides of the music industry. A key part of the MMA that led to consensus support was a provision that establishes an enhanced oversight role for Congress in any DOJ review of the ASCAP and BMI consent decrees. The inclusion of this provision reflected an understanding that terminating the ASCAP and BMI consent decrees, even over a long time period, creates significant risk of causing the exact kind of market chaos the MMA solves. I understand that the Department recently solicited comments relating to the decrees and you have made public comments suggesting that you intend to take additional steps to seek changes. If – at some point - the Division intends to sunset these decrees, close consultation with Congress is necessary to ensure that such chaos can be avoided through the implementation of an alternative framework before DOJ takes any action toward sunsetting them, and certainly before terminating them.

a. Should you take such action, can you detail how you would anticipate complying with those requirements, and additionally how you would anticipate working with Congress to develop an alternative music licensing framework in advance of any action?

Response:

Congress has a very important role with regard to this issue, and the Division intends to continue its engagement with Congress, and of course, will continue to abide by its obligations under the Music Modernization Act. Furthermore, we would welcome any views you have on these decrees.

b. Any termination, sunset or controversial modification of the decrees prior to implementation of an alternative framework will undoubtedly result in significantly increased litigation against ASCAP and BMI. To what extent is the Division factoring in this increased litigation risk in determining how to proceed on these decrees?

Response:

The Division appreciates the potential ramifications of an abrupt termination of the ASCAP and BMI decrees without some form of transition. The Division has engaged in extended discussions with numerous parties from all parts of the music industry and will continue to consult with Congress and with such industry stakeholders, as appropriate and as necessary under the Music Modernization Act, before reaching any conclusions with respect to the appropriate action regarding the ASCAP and BMI consent decrees.

c. How does the amount of resources devoted within the past five years to non-mandated reviews of the decrees – the first finding that the decrees remain necessary and should not be altered at all – compare to the resources expended by the Division in the actual administration of the decrees over the same period of time?

Response:

The Division's resources are not just limited, but have in fact declined in real terms by about thirty percent over the last decade. The vast majority of the Division's resources are now, and have been, devoted to directly enforcing the antitrust laws, and I am proud of the merger, conduct, and criminal cases we are bringing, as well the cases we are still developing. The judgment termination initiative is a low-cost, high-impact complement to our enforcement work.

3. For several decades, as you know, ASCAP and BMI have operated under consent decrees administered by the Department of Justice. Within the Antitrust Division Manual, the Department of Justice indicates that consent decrees should not be presumptively terminated "when there is a pattern of noncompliance with the decree or there is longstanding reliance by industry participants on the decree." The Antitrust Division Manual also suggests that consent decrees that fall into this category do not qualify for expedited review. U.S. Dep't of Justice, Antitrust Division, Antitrust Division Manual III-147–48 (5th ed. 2018).

a. Do you believe there has been "longstanding reliance by industry participants" on the consent decrees governing ASCAP and BMI? If so, wouldn't it be more appropriate to review the consent decrees under the Division's traditional approach, instead of an expedited review process?

Response:

The Division appreciates the potential ramifications of an abrupt termination of the ASCAP and BMI decrees without some form of transition. The Division has engaged in extended discussions with numerous parties from all parts of the music industry and will continue to consult with Congress and with such industry stakeholders, as appropriate and as necessary under the Music Modernization Act, before reaching any conclusions with respect to the appropriate action regarding the ASCAP and BMI consent decrees.

Questions submitted by Rep. Buck

4. **In recent months, several issues concerning Apple have raised attention. These include Apple's practices involving its App Store, as discussed in a July 2019 Wall Street Journal article.[1] Other issues include Apple's practices involving the online provision of news, Apple's expansion into audiovisual services, and European authorities' increased focus on and criticism of Apple's payment system. Finally, there may be questions concerning Apple's use of data. Will you consider these issues as you examine whether large online platforms are engaging in practices to consolidate dominant market power?**

Response:

Department policy limits my ability to comment on, confirm, or deny the existence of specific investigations, but please be assured that the Division thoroughly investigates allegations of potential antitrust violations and if such a violation is found, it will take whatever actions are necessary to protect competition and consumers.

Questions from Rep. Cicilline

Conduct Enforcement

5. **The *Financial Times* recently reported that criminal prosecutions for price-fixing have reached a historic low for the third consecutive year.[2] According to this report, the Trump Administration's Antitrust Division has brought fewer criminal antitrust prosecutions than any administration in the last 50 years. Is it your view that market participants are no longer engaging in price-fixing at the rates they previously had?**

Response:

The Division is committed to antitrust enforcement against cartels and collusion. These are some of the most egregious antitrust violations—price fixing, bid rigging, and customer and territorial allocation. The Division's criminal sections have been very busy and in FY2019, we brought the first charges in six criminal investigations involving government victims, the financial sector, electronic components, and the commercial construction industry, where victims of antitrust and fraud conspiracies include hospitals and schools. Underscoring how busy we are on developing new criminal matters, the Division closed FY2019 with over 100 pending grand jury investigations, the highest total since 2010. The Division also opened 38 new grand jury investigations in FY2019, more than any year since FY2009. Moreover, in support of our continuing efforts to combat antitrust crimes and related schemes in government procurement, grant, and program funding, in November 2019, the Justice Department announced the Procurement Collusion Strike Force (PCSF). The PCSF is an interagency

[1] *See* Tripp Mickle, *Apple Dominates App Store Search Results, Thwarting Competitors* (July 23, 2019) (available at https://www.wsj.com/articles/apple-dominates-app-store-search-results-thwarting-competitors-11563897221).

[2] Kadhim Shubber, *US price-fixing prosecutions at historic low for third straight year*, FIN. TIMES (Nov. 5, 2019), https://www.ft.com/content/a3b75c80-fe74-11e9-be59-e49b2a136b8d.

partnership among the Antitrust Division, 13 U.S. Attorneys' Offices, and investigators from the Federal Bureau of Investigation and four federal inspectors general.

Our efforts to develop new criminal matters continue to bear fruit. In a two-week span in February 2020, the Division announced charges against seven executives and one company, including the indictment of an executive and a guilty plea from a senior executive, in the Division's long-running investigation into collusion in the generic pharmaceutical industry.

6. Why has criminal enforcement been at a historic low for the past three consecutive years?

Response:

The Antitrust Division's mission is to protect American consumers and taxpayers by deterring, detecting, and prosecuting antitrust crimes. That mission cannot be evaluated purely in terms of criminal fines. There are other important measures of criminal enforcement, such as individual charges, guilty verdicts, prison sentences, and obtaining restitution for victims. Moreover, as our response to Question 5 indicates, not only are our investigations at a ten-year high, but we have recently announced significant charges in vital markets such as the generic pharmaceutical industry, rooted out collusion cheating the American taxpayer, fought to ensure competition for vulnerable victims such as schools and hospitals, and obtained guilty verdicts in trials against a former currency trader and the former chief executive officer of Bumble Bee Foods.

Resolutions of corporate criminal matters can result in significant fines, but they often are followed by individual resolutions and trials that require significant resources but do not yield blockbuster fines. These cases nevertheless are an important part of the Division's enforcement program. In recent years, Division fine totals were driven in substantial part by record-breaking fines obtained in our financial services and auto parts investigations. That resulted in "blockbuster" years—from 2012 through 2015, the Division assessed criminal fines over $1 billion each year, with a high of $3.6 billion in 2015—where criminal fines were greater than fines imposed in previous years. These investigations are now in their later stages, with corporate plea resolutions (the primary driver of the fine statistics) largely completed. Much of the Division's criminal resources have shifted, therefore, to trials of individuals and other high-priority matters that take time to become public. This is consistent with the typical life-cycle of criminal cartel investigations.

That said, our recent fines have been significant. In fact, fines obtained in Division cases doubled from FY2017 to FY2018, and doubled again from FY2018 to FY2019. By way of example, in September 2019, StarKist Co. was ordered to pay a $100 million, statutory maximum criminal fine after a judge rejected its inability to pay claims after nearly a year of litigation over the issue. In March 2019 and November 2018, five South Korea companies agreed to plead guilty to rigging bids for the supply of fuel to U.S. military bases and pay $156 million in criminal fines. In separate civil settlements, the same five companies also agreed to resolve parallel civil antitrust and False Claims Act violations and pay an additional $236 million in total.

Finally, in addition to and coupled with the cyclical nature of our casework, the 2011 decision to close half of the Division's existing criminal sections,[3] and the length of time it took to finalize those closures, has had a significant effect on criminal enforcement.

7. **Since your time leading the Antitrust Division, how many monopolization cases under Section 2 of the Sherman Act has the Division brought?**

Response:

Where there is evidence of anticompetitive conduct by a firm with significant market power, the Division is not afraid of investigating and, where warranted, challenging it. At the Division, we take our facts as we find them. If an investigation yields evidence a Section 2 violation has taken place, we will not shy away from bringing an appropriate case.

8. **Please identify, to the nearest 10 hours, the number of attorney hours that the Antitrust Division has devoted since January 2017 to its own enforcement actions.**

Response:

At this time, we are not able to provide exact statistics regarding personnel devoted specifically to these particular ongoing non-public matters, however the Division employs hundreds of attorneys whose primary duties are to conduct investigations of potentially anticompetitive conduct or mergers and take whatever actions are necessary to protect competition and consumers.

9. **Please identify, to the nearest 10 hours, the number of attorney hours that the Antitrust Division has devoted since January 2017 to any Section 2 investigations.**

Response:

At this time, we are not able to provide exact statistics regarding personnel devoted specifically to these particular ongoing non-public matters. Employees of the Division are salaried government employees whose duties often include handling multiple cases simultaneously.

Merger Enforcement

10. **Please identify the performance objectives for section chiefs.**

Response:

Sections chiefs are members of the Senior Executive Service, established by Congress under the Civil Service Reform Act of 1978. Under 5 USC § 3131, the Senior Executive

[3] Press Release, U.S. Dep't of Justice, Justice Department Announces More Than $130 Million in Cost Saving and Efficient Measures to Utilize Resources More Effectively (Oct. 5, 2011), https://www.justice.gov/opa/pr/justice-department-announces-more-130-million-cost-saving-and-efficiency-measures-utilize.

Service is administered so as to "ensure that compensation, retention, and tenure are contingent on executive success which is measured on the basis of individual and organizational performance (including such factors as improvements in efficiency, productivity, quality of work or service, cost efficiency, and timeliness of performance and success in meeting equal employment opportunity goals)." Division staff and employees are dedicated public servants who consistently demonstrate that their foremost objective is to advance the Division's mission of protecting competition and consumers.

11. Are any section chiefs evaluated based on the number of settlements they reach? If so, do you believe that this incentivizes reaching settlements over litigation?

Response:

Under 5 USC § 3131, the Senior Executive Service is administered so as to "ensure that compensation, retention, and tenure are contingent on executive success which is measured on the basis of individual and organizational performance (including such factors as improvements in efficiency, productivity, quality of work or service, cost efficiency, and timeliness of performance and success in meeting equal employment opportunity goals)." Division staff and employees are dedicated public servants who consistently demonstrate that their foremost objective is to advance the Division's mission of protecting competition and consumers.

12. How does the Division incentivize staff to recommend and litigate cases where it finds there has been—or is likely to be—harm to competition, even where that litigation may end in a loss?

Response:

The mission of the Antitrust Division is to promote economic competition through enforcing and providing guidance on antitrust laws and principles. The Division firmly believes in this mission and endeavors to hire staff who share that belief.

13. How does the Division factor in litigation risk when deciding whether to challenge a merger?

Response:

While litigation risk is one of many factors the Division considers in evaluating enforcement actions, it is important for the Division to bring cases, even risky ones, where it believes a transaction or conduct is illegal.

14. Is it appropriate for the Division to consider litigation risk when deciding whether to file a complaint in a merger or a case of anti-competitive conduct if the Division otherwise believes the transaction or conduct is illegal under antitrust law?

Response:

While litigation risk is one of many factors the Division considers in evaluating enforcement actions, it is important for the Division to bring cases, even risky ones, where it believes a transaction or conduct is illegal.

15. How do you think the Division should analyze transactions involving a private equity buyer? Do these transactions raise any unique issues?

Response:

Transactions involving a private equity buyer are subject to the same antitrust laws and standards as those governing any other buyer. In analyzing transactions, the Division considers all relevant market characteristics.

16. What percentage of the Division's second requests in the last six months have been issued for transactions involving or relating to the marijuana industry?

Response:

Department policy limits my ability to comment on specific investigations.

17. For each of the transactions relating to the marijuana industry in which the Antitrust Division has issued a second request, please identify:

a. Whether the transaction fell above the HSR threshold;

b. The pre-merger market share and predicted post-merger market share for the companies involved in the transaction; and

c. The attorneys reviewing the transaction and which section or office they work in.

Response:

Department policy limits my ability to comment on specific investigations.

Digital Markets

18. According to Columbia Law School Professor Tim Wu, dominant technology platforms have completed more than 350 mergers and acquisitions to date. Many of these involved Facebook and Google acquiring actual and nascent competitors. Professor Wu observed, "As with a basketball referee who never calls a foul, the question is whether the players have really been faultless—or whether the referee is missing something."[4] How do you respond to the Professor Wu's criticism that the

[4] Tim Wu & Stuart A. Thomson, *The Roots of Big Tech Run Disturbingly Deep*, N.Y. TIMES (June 7, 2019), https://www.nytimes.com/interactive/2019/06/07/opinion/google-facebook-mergers-acquisitions-antitrust.html.

antitrust agencies have been missing something when it comes to merger enforcement in digital markets?

Response:

Section 7 of the Clayton Act prohibits mergers and acquisitions "where the effect . . . may be substantially to lessen competition, or to tend to create a monopoly." Acquisitions of nascent competitors can be procompetitive in certain instances and anticompetitive in others. They can be beneficial to the extent they combine complementary technologies or bring products and services to market that would not have been made available to consumers otherwise. There is a myriad of ways in which such a transaction may harm competition in a digital market, particularly the potential for mischief if the purpose and effect of an acquisition is to block potential competitors, protect a monopoly, or otherwise harm competition by reducing consumer choice, increasing prices, diminishing or slowing innovation, or reducing quality. Such circumstances may raise the Antitrust Division's suspicions. The Division will not shrink from the critical work of investigating and challenging anticompetitive conduct and transactions where justified.

19. **In June 2019, Google announced its $2.6 billion acquisition of Looker Data Sciences, a leading startup in data analytics and business intelligence. The American Antitrust Institute and other experts observed that the deal risked eliminating an important competitor to Google and urged the DOJ to scrutinize several aspects of the proposed transaction. In November, the DOJ approved the transaction without pursuing a second request. The UK's Competition Markets Authority, by contrast, has initiated a full investigation into the transaction.**

    a. **How many attorneys at the Antitrust Division worked on reviewing the Google- Looker transaction?**

    b. **How many outside parties did the Antitrust Division interview as part of its review of this transaction?**

    c. **What factors led the Antitrust Division to conclude that this acquisition did not warrant a more in-depth investigation?**

    d. **The American Antitrust Institute identified three issues for the Antitrust Division to examine: (1) whether the acquisition would eliminate Looker as an independent competitor in data analytics and business intelligence tools; (2) whether the acquisition would harm competition in the broader cloud infrastructure market; and (3) whether the acquisition would enhance Google's incentive to withhold Looker's services to rivals. Does the Antitrust Division believe the acquisition will not have any of these effects? If so, please describe the evidence in support of this belief.**

Response:

Department policy limits my ability to comment on specific investigations; however, in typical merger investigations, the Division endeavors to speak with a wide array of market participants. In general, staffing on particular investigations can vary significantly based on, among other factors, the stage of the investigation, the scope of the investigation, and the complexity of the investigation.

20. Do you believe that antitrust enforcers' past reluctance to view concentrated control over data as an entry barrier was a mistake? If yes, what are you doing to make sure the Division does not repeat this error?

Response:

In November 2019, I gave a speech focusing on how we might think about data, arguably the most transformative input in the digital marketplace. That speech can be found here: https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-harvard-law-school-competition. It provides more significant detail on my views on this topic.

21. How many full-time technologists are on the staff of the Antitrust Division?

Response:

The Division employs a large and diverse workforce from a wide array of backgrounds. Among our many employees with relevant experience, the Division has an entire section devoted to the Technology and Financial Services sectors of the economy, and this section has extensive experience pursuing potential anticompetitive mergers and conduct in the industry. Moreover, our San Francisco Office employs attorneys with extensive experience pursuing potential anticompetitive conduct in the technology industry.

Qualcomm

22. In 2016, the FTC filed suit to challenge illegal monopolization by Qualcomm. This year DOJ took the remarkable step of intervening in the case—to file briefs in defense of Qualcomm. Please explain why it is a good or proper use of agency resources to intervene to defend an alleged monopolist in a monopolization case brought by another federal agency.

Response:

I am recused from that matter and so cannot comment on this topic.

23. As has been publicly reported, Qualcomm was your former client. You did not sign the Antitrust Division's amicus brief in favor of Qualcomm in *Federal Trade Commission v. Qualcomm* but you did sign the Antitrust Division's amicus brief in favor of Qualcomm in *Karen Stromberg, et al. v. Qualcomm*. What accounts for this discrepancy?

Response:

In determining when to recuse myself from matters, I consult with Department of Justice and Antitrust Division career ethics officials and follow their guidance.

24. What involvement did you have with the Division's decision to file its statement of interest and subsequent brief in *FTC v. Qualcomm*?

Response:

None. I am recused from that matter.

25. Since 1948, the Antitrust Division and the Federal Trade Commission have relied on a formal clearance process to allocate primary areas of enforcement responsibility and to avoid overlap and duplicative activity. In light of the Division's recent filing in *FTC v. Qualcomm*, what is the current status and scope of the clearance process? If certain types of activity or certain types of cases are not governed by the clearance process, please identify those instances, the reasons why, and whether this is a departure from past Division process.

Response:

I am recused from the Qualcomm case, so cannot comment on any specifics regarding that case.

The Division and the FTC share authority for civil antitrust enforcement. Over the years, the two agencies have developed a process for determining which agency will handle a particular matter generally on the basis of which agency has the most relevant experience in the particular markets involved. This process, although imperfect, enables both agencies to make the most effective use of enforcement resources and avoids duplicative investigatory requests to private parties.

T-Mobile/Sprint

26. Did the staff memorandum and staff attorneys reviewing the Sprint/T-Mobile transaction unanimously recommend blocking the merger?

Response:

Department policy limits my ability to comment on specific investigations; however, in all matters, the Division endeavors to foster robust internal discussion and debate in order to reach decisions that best protect competition and consumers.

27. The Department of Justice recently reached a settlement that will allow T-Mobile to acquire Sprint. As several leading economists noted in a court filing, the DOJ's proposed settlement does not address the significant anti-competitive effects that the

DOJ outlines in its complaint.[5] Why do you believe that Dish, a company with no history or experience in this market, will be a robust competitor as envisioned by the settlement?

Response:

Department policy limits my ability to comment on specific investigations; however, the Competitive Impact Statement,[6] Statement of Interest,[7] and Response to Comments[8] filed by the Division in this matter address these topics.

28. **These experts also noted that Dish has "repeatedly failed to meet" prior requirements stipulated by the Federal Communications Commission.[9] As these experts note, a T- Mobile attorney previously observed that "Dish has a track record of price increases for its services, speculative warehousing of spectrum, and failing to meet FCC-imposed deadlines to construct the facilities required."[10] In light of Dish's failure to meet previous build-out requirements, why do you believe Dish will be successful in building out a 5G network, despite lacking experience and presence in the market?**

Response:

See response to Question 27.

29. **As noted in the economists' comments, even if Dish meets its commitments to build a 5G network covering 70 percent of the population, it would not replace Sprint, which currently reaches over 90 percent of Americans.[11] How would you justify DOJ's settlement to Americans who were covered by Sprint's network but will not be covered by Dish's network?**

Response:

See response to Question 27.

30. **The DOJ has repeatedly cited the fact that Dish is committing to build a 5G network as a factor in favor of approving the transaction. But the DOJ's complaint is clear**

[5] Nicholas Economides et al., Economists' Tunney Act Comments on the DOJ's Proposed Remedy in the Sprint/T- Mobile Merger Proceeding, https://www.justice.gov/atr/page/file/1214781/download.

[6] Competitive Impact Statement, United States v. Deutsche Telekom AG, No. 1:19-CV-02232-TJK (D.D.C. filed July 30, 2019), *available at* https://www.justice.gov/opa/press-release/file/1189336/download.

[7] Statement of Interest of the United States, New York v. Deutsche Telekom AG, No. 1:19-CV-5434-VM-RWL (S.D.N.Y. filed Dec. 20, 2019), *available at* https://www.justice.gov/atr/case-document/file/1230491/download.

[8] Response of Plaintiff United States to Public Comments on the Proposed Final Judgment, United States v. Deutsche Telekom AG, No. 1:19-CV-02232-TJK (D.D.C. filed Nov. 6, 2019), *available at* https://www.justice.gov/atr/case-document/file/1215706/download.

[9] Economides et al. at 9-10.

[10] *Id.* at 9-10.

[11] *Id*.

that the transaction will harm some parties. Although the complaint states that the merging parties may offer some benefits to rural subscribers, it does not address the fact that the merger will harm other consumers. Is it your view that benefits to one set of customers can justify anti-competitive harms to another set of customers? If so, please describe the circumstances in which you view this to be the case.

Response:

See response to Question 27.

31. If it is your view that benefits to one set of customers can justify anti-competitive harms to another set of customers, how do you reconcile this position with *Philadelphia National Bank*, where the Supreme Court rejected the idea that some prospective economic or social benefits could remedy anti-competitive harm resulting from an illegal transaction?[12]

Response:

The Division's mandate is to enforce the antitrust laws to prevent harm to competition. When we determine that a merger threatens competition, we will take the actions necessary to preserve that competition and protect against consumer harm. The DOJ-FTC Horizontal Merger Guidelines note that "[i]n some cases . . . the [antitrust] Agencies in their prosecutorial discretion will consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s)."[13]

32. You have been deeply critical of the use of behavioral remedies, observing that they are "merely temporary fixes for an ongoing problem."[14] Yet the Division's proposed remedy includes a long list of commitments that T-Mobile must undertake for seven or more years to help Dish. These include offering operational support, handling billing support, and meeting specific traffic management requirements. The success of the remedy is contingent on the merging firms adhering to these behavioral conditions, yet this requires the merging firms to act against their economic interest by helping Dish

a. As a law enforcement agency, how is the Justice Department equipped to oversee and evaluate the relationship between T-Mobile and Dish in the years ahead?

b. How is this settlement warranted in light of your criticisms of behavioral remedies and commitment to structural remedies?

[12] United States v. Philadelphia Nat. Bank, 374 U.S. 321, 370 (1963).

[13] Horizontal Merger Guidelines, n. 14.

[14] Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice, Remarks at the Federal Telecommunications Institute's Conference in Mexico City (Nov. 7, 2018), https://www.justice.gov/opa/speech/assistant-attorney- general-makan-delrahim-delivers-remarks-federal-institute.

Response:

The Competitive Impact Statement notes that "[t]he proposed Final Judgment requires structural relief in the form of divestitures designed to ensure the development of a new national facilities-based mobile wireless carrier competitor to ultimately remedy the anticompetitive harms that flow from the change in the market structure that otherwise would have occurred as a result of the merger."[15] In enforcement actions resulting in a structural remedy, it is common for there to be a transition period, including often a transition services agreement, to best effectuate the structural remedy.

33. Nine states and the District of Columbia are suing to block the Sprint/T-Mobile merger. Has the Antitrust Division, at any time, made any formal or informal commitment to support T-Mobile/Sprint in their litigation against the state attorneys general? If so, please describe this commitment.

Response:

The Division reached an independent conclusion and filed a Statement of Interest jointly with the Federal Communications Commission in the states' lawsuit against Sprint and T-Mobile. The Division's views vis-a-vis the states' litigation are reflected in the filing.[16]

34. Based on comity and respect for the states challenging the deal, would you be willing to ask the court to delay approving your settlement until the trial court in New York has issued a decision regarding the state's challenge to the Sprint/T-Mobile transaction?

Response:

The Division's views on this topic are reflected in its Response to States' Motion to File Brief as Amici Curiae filed in the Tunney Act proceedings in the D.C. federal district court.[17] Following the trial in *New York v. Deutsche Telekom*, Judge Victor Marrero of the U.S. District Court for the Southern District of New York refused the request from a minority of state Attorneys General to block T-Mobile's proposed acquisition of Sprint. In his opinion, Judge Marrero cited the Justice Department's settlement as a key factor, noting that the Justice Department's settlement made Dish "well poised to become a fourth [Mobile Network Operator] in the market, and its extensive preparations and regulatory remedies indicate that it can sufficiently replace Sprint's competitive impact."[18]

[15] Competitive Impact Statement, United States v. Deutsche Telekom AG, No. 1:19-CV-02232-TJK (D.D.C. filed July 30, 2019).

[16] Statement of Interest of the United States, New York v. Deutsche Telekom AG, No. 1:19-CV-5434-VM-RWL (S.D.N.Y. filed Dec. 20, 2019).

[17] Response of the United States to States' Motion to File Brief as Amici Curiae, United States v. Deutsche Telekom AG, No. 1:19-CV-02232-TJK (D.D.C. filed Oct. 23, 2019).

[18] *New York v. Deutsche Telekom AG*, No. 19 CIV. 5434 (VM), 2020 WL 635499, at *36 (S.D.N.Y. Feb. 11, 2020).

35. The states' litigation recently revealed text messages between you and executives at Dish. In one of these texts, you wrote to Dish Chairman Charlie Ergen, "Today would be a good day to have your Senator friends contact the chairman," referring to FCC Chairman Ajit Pai.[19]

a. Please identify all other transactions in which you have offered merging parties political advice on how to secure approval for their merger.

b. Do you believe it is appropriate for the Assistant Attorney General of the Antitrust Division to offer merging parties political advice on how to secure approval for their merger?

c. Why did you undertake this action?

Response:

Communications with potential divestiture buyers when negotiating a potential settlement are necessary in order to effectuate settlements that provides the maximum benefit to consumers.

36. The trial also revealed that you gave Mr. Ergen your personal email address.[20]

a. Why did you give Mr. Ergen your personal email address?

b. Did Mr. Ergen send any emails to you about the Sprint/T-Mobile transaction at your personal email address?

c. Please identify all other instances during your tenure as AAG in which you have given your personal email address to parties whose transaction or conduct is being reviewed by the Antitrust Division.

Response:

Use of email and electronic messaging by Department employees, including requirements to preserve official communications, is governed by Department of Justice policy on records and information management. This policy implements federal recordkeeping requirements from statute and regulation at the Department-level. It is my practice to abide by these regulations, such as by forwarding work-related communications from my personal email to my official device. As Mr. Ergen testified at trial, he did not email me on my personal device.

[19] Sheila Dang, *Dish founder Ergen says he asked for senator's help on T-Mobile/Sprint*, REUTERS (Dec. 18, 2019), https://www.reuters.com/article/us-sprint-corp-m-a-t-mobile-us-dish-netw/dish-chief-ergen-says-he-asked-for- senators-help-on-t-mobile-sprint-idUSKBN1YM2D3

[20] Erik Larson, *Texts Show DOJ Effort to Enlist Senators in T-Mobile Deal*, BLOOMBERG (Dec. 19, 2019), https://www.bloomberg.com/news/articles/2019-12-18/doj-antitrust-head-told-dish-to-enlist-senators-in-t-mobile-deal.

37. Did you receive any commitment, gifts, or other benefit from Dish, Sprint, or T-Mobile in exchange for your work facilitating the Sprint/T-Mobile transaction?

Response:

No.

38. Please identify what steps you are taking to ensure that you are complying with government record-keeping requirements when you use your personal cell phone or personal email account to discuss Antitrust Division matters.

Response:

Use of email and electronic messaging by Department employees, including requirements to preserve official communications, is governed by Department of Justice policy on records and information management. This policy implements federal recordkeeping requirements from statute and regulation at the Department-level. It is my practice to abide by these regulations, such as by forwarding work-related communications from my personal email to my official device.

Vertical Integration

39. In its challenge to the AT&T/Time Warner transaction, the Justice Department argued that the merger would undermine competition despite the existence of new distribution channels available through Netflix, Amazon Prime, Sling TV, and other companies. Yet, in its recent press statement announcing that the Antitrust Division would be filing to terminate the *Paramount Pictures* consent decree, the Division cited the existence of new technology and distribution channels as a reason why the Paramount decrees were no longer necessary. Why, in your view, is the existence of new distribution channels insufficient to check the anti-competitive incentives created by the vertical merger of AT&T/Time Warner, but sufficient to check the anti-competitive incentives created by vertical integration in the film industry?

Response:

The Department's views are best reflected in the various court filings in those matters. I will note that those matters arose in very different industries, under very different circumstances. Antitrust is a very fact intensive inquiry, and the Division applies its analysis on a case-by-case basis.

40. The Writers Guild of America noted in its submitted comment to the Antitrust Division that "large theatrical distributors wield significant market power over theater owners" and that just three companies are likely to account for more than two-thirds of annual box office receipts. Given the degree of control wielded by distributors, what led the Antitrust Division to conclude that vertical integration by

dominant distributors will not result in anti-competitive practices like block-booking and circuit dealing?

Response:

The United States has moved to terminate the *Paramount* consent decrees that date from the 1940s. These decrees enjoined a number of movie studios from owning movie theaters and imposing certain types of movie licensing practices on theaters. Before moving to terminate the decrees, the Antitrust Division sought public comment. The Writers Guild of America, West, Inc. commented that it was concerned about the three largest theatrical distributors accounting for more than two-thirds of annual box office receipts. While the Guild is correct that the three largest studios may represent approximately two-thirds of box office receipts, it is important to note that they are not all *Paramount* movie studio defendants. Studio market shares have varied substantially over the course of the seventy years the decrees have been in place. For example, Disney, which was a smaller competitor in the 1940s, is the largest movie studio today, yet it is unencumbered by the *Paramount* decrees. While its actions are subject to the antitrust laws, it is not enjoined by the *Paramount* decrees from owning movie theaters or seeking to impose block-booking or circuit dealing licensing practices. Asymmetric obligations for firms similarly situated in an industry may have undesirable (and unintended) effects on competition in an industry over the long run, particularly when that industry has evolved significantly since the restrictions were first imposed.

The Division has not prejudged any potential vertical merger between a movie studio and a movie theater company. Because vertical mergers can combine complementary economic functions and eliminate contracting frictions, they have the potential to create efficiencies that benefit competition and consumers. If a movie studio seeks to acquire a movie theater chain, the Antitrust Division will have the opportunity to investigate the proposed merger. The Division will weigh the potential anticompetitive effects against the cognizable efficiencies that the vertical merger may achieve. If the Antitrust Division determines that the proposed merger will substantially lessen competition—including by increasing the incentive and ability to impose unreasonable block-booking or circuit dealing licensing practices—it can seek to enjoin the parties' transaction to protect competition and consumers. Therefore, terminating the *Paramount* decrees would not divest the Division of its critical, go-to tools for preventing antitrust harms.

Monopsony and Labor

41. Do you believe that anti-competitive restraints on workers that deliver some consumer benefits are permissible under the antitrust laws? If so, please explain why.

Response:

Anticompetitive harm in an upstream labor market does not require proof of downstream harm to be actionable under Section 7 of the Clayton Act. We typically do not credit out-of-market efficiencies in our merger review. Under Section 1 of the Sherman Act, naked restraints are condemned under the per se rule without further inquiry into the

anticompetitive effects of a naked restraint and notwithstanding purported justifications for the restraint. Accordingly, when independent firms that compete in the same labor market enter into agreements that eliminate competition between them for workers, they are considered per se unlawful. It is a fact-laden inquiry, however, whether a restraint in a labor market (or any product market) that is reasonably necessary to a separate, legitimate business transaction or collaboration is lawful. In such circumstances, Supreme Court precedent requires that courts undertake a balancing test that weighs the anticompetitive effects of a restraint in a defined antitrust market against the procompetitive justifications. A number of federal courts are currently assessing these and other kinds of labor market restraints, which were also an important part of our Public Workshop on Competition in Labor Markets in September 2019.

42. In its recent amicus filing in *William Morris Endeavor Entertainment, LLC v. Writers Guild of America, West, Inc.*, the Antitrust Division argued that—contrary to the view of the Writers Guild of America—certain individuals participating in the alleged group boycott are not covered by the labor exemption. The Division's argument seems to rest on the proposition that producers (or some producers) who are Guild members do not fall within the labor exemption either because they are not employees or because they operate in product rather than labor markets, or some combination of the two. How is this position consistent with the Supreme Court's holding in *American Federation of Musicians v. Carroll*?[21]

Response:

The Division did not take a position on the question of whether the statutory labor exemption applied, nor did it take a position on the question of whether the alleged boycott included non-labor groups for purposes of the labor exemption. Instead, we argued that further facts would need to be developed before determining whether showrunners constitute a labor group for purposes of the statutory exemption. We acknowledged the Writers Guild's argument that showrunners should be treated as a labor group as a matter of law because they were similar to the orchestra leaders in *Carroll*, but nonetheless concluded that it would be premature to make a factual comparison between showrunners and orchestra leaders at the pleading stage without further factual development. Having never taken a position on whether showrunners were a labor group, our argument was not inconsistent with *Carroll*.

43. Do you believe that the Court's holding in *Carroll* does not apply to coordination at issue here—a boycott called by the WGA involving its own members—and that producers operate in product markets and do not fall within the labor exemption? If so, how does this position reflect the business model of talent agencies, which involves aggregating bargaining power across multiple producers?

[21] Am. Fed'n of Musicians of U. S. & Canada v. Carroll, 391 U.S. 99, 115 (1968).

Response:

The Division took no position on the application of *Carroll* to the facts in *Writers Guild of America*. Further factual development in discovery is required before determining the extent to which *Carroll* applies.

40 U.S.C. § 559

44. 40 U.S.C. § 559 states: "An executive agency shall not dispose of property to a private interest until the agency has received the advice of the Attorney General on whether the disposal to a private interest would tend to create or maintain a situation inconsistent with antitrust law." Please provide a full list of matters on which executive agencies have consulted with the Attorney General on antitrust matters pursuant to this statutory provision.

Response:

The Division regularly reviews disposals of surplus property under 40 U.S.C. § 559. When a request for review comes to the Division, the matter is assigned to an attorney, who reviews the transaction for potential competition issues. After their review, the attorney prepares a memo for the Section Chief that analyzes whether there are antitrust concerns under the facts. In 2019, the Division reviewed 5 disposal requests – 4 from GSA and one from the Defense Logistics Agency. This number is consistent with prior years.

Amicus Program

45. Please identify, to the nearest 10 hours, the number of attorney hours that the Antitrust Division has devoted since January 2017 to statements of interest and amicus briefs in cases where the United States is not a party and where its participation has not been requested by a court.

Response:

At this time, we are not able to provide exact statistics regarding personnel devoted specifically to these particular ongoing matters. Employees of the Division are salaried government employees whose duties often include handling multiple matters simultaneously.

46. What effect has the Division's amicus program had on its ability to fulfill its obligation to enforce the antitrust laws?

Response:

The Amicus Program (along with the Competition Advocacy Program) is a vital, low-cost, high-impact complement to our enforcement work, and it is long-standing. The amicus program aims to promote precedent that helps clarify, strengthen, or advance sound interpretations of the antitrust laws – which apply in both private and government cases – enabling effective and appropriate enforcement. Without an amicus program, we would have

fewer low-cost, high-impact opportunities to make arguments in court that can shape antitrust jurisprudence. Making greater use of our amicus program is good stewardship of our limited resources.

Expert Costs

47. Please describe each step of the process by which the Antitrust Division selects an economic expert or consulting firm to retain, including any processing for setting up competitive bidding, for negotiating fees, and for determining fees.

Response:

As described in the Division Manual, the selection of prospective expert witnesses in Division investigations involves collaboration between the legal component, the Economics Analysis Group (EAG), the Deputy Assistant Attorney General (DAAG) for Economic Analysis, and the DAAG overseeing the matter. For economic expertise, EAG typically provides an initial list of candidates, which may include internal and external candidates. The EAG manager, often with staff attorneys, contacts potential candidates, discusses the candidates' interest, qualifications, and availability, and, if the candidate is a non-EAG economist, negotiates the scope of work and fees of the contract. The manager or staff point of contact prepares a package including a completed OBD-47 Form that estimates fees and costs for specific services and expenses, and supporting memo that is processed by the Division's Executive Office. All such packages for economist experts must be approved by the Assigned DAAG and the DAAG for Economic Analysis.

48. Please describe how contracts for outside experts and consulting firms are structured.

Response:

Contracts often are structured in two phases: evaluation of the case and preparation of testimony. The scope of work will be defined clearly for each phase. This provides a natural point at which to determine whether or not to continue with the expert. The Division also often incrementally funds the contract, so that performance can be evaluated at multiple times. In order to get a contract approved, the Division staff must provide a detailed estimate of fees, including the hours expected for various tasks and travel expenses, where relevant. In addition, the level of staffing (e.g., how many people can attend a meeting or deposition) typically is addressed, and limited to the minimum number of people needed for effective consultation. The contract defines specific people that are approved to work on the matter along with their rates and includes guidelines for travel and reimbursement. A statement of work with clear deliverables is included as part of the OBD-47 Form, and a requirement for regular invoicing (usually monthly). It is typical for outside experts to provide the Division with a discount from their regular consulting rates.

49. Please identify any features of the current contract structure that might incentivize outside experts and consulting firms to complete their work in a more or less cost-effective manner.

Response:

When the Division determines that an outside expert is needed, there are a number of terms that generally are included in the contract to keep costs down. For example, the level of staffing is addressed in the contract, with approval needed for any support staff the expert uses. In addition, the Division retains the services of less expensive staff from consulting firms to take on delegated tasks at an hourly rate that is less than the expert's rate. The Division also looks to substitute internal staff for external staff even if the expert is external. Contracts also often are incrementally funded. Moreover, in almost all cases, experts would like to be retained by the Division again in the future. This provides the consultant with an incentive to avoid problems being found in the above review (and to resolve any problems that are found).

50. Please identify what processes the Antitrust Division has in place to monitor and review the work performed by outside economic experts and consulting firms.

Response:

Staff works very closely with outside experts, and thus has significant visibility into the work they are performing. In addition, contracts with outside experts require that regular invoices describing their work and the amount of time on specific tasks be provided to the staff point of contact. For economic experts, EAG managers review these invoices in detail and look for any unauthorized tasks or excessive spending relative to tasks.

51. In its November 2019 report, the Justice Department's Office of Inspector General identified several instances where the Federal Trade Commission (FTC) failed to fully document the process by which it selects experts.[22] Please identify what steps the Division has taken to ensure this process is fully documented.

Response:

The Division Manual documents the process by which it selects experts. As described in the Division Manual, the selection of prospective expert witnesses in Division investigations involves collaboration between the legal component, the Economics Analysis Group (EAG), the DAAG for Economic Analysis, and the DAAG overseeing the matter. For economic expertise, EAG typically provides an initial list of candidates, which may include internal and external candidates. The EAG manager, often with staff attorneys, contacts potential candidates, discusses the candidates' interest, qualifications, and availability, and ultimately makes a written recommendation to the Front Office that addresses the selection. Through this recommendation, the process is further documented.

[22] Federal Trade Commission Office of Inspector General, Audit of Federal Trade Commission Expert Witness Services, OIG Report No. A-20-03 (Nov. 14, 2019), https://www.ftc.gov/system/files/documents/reports/final- report-audit-expert-witness-services/final_ftc_oig_report_on_expert_witnesses-redacted_11-14-19.pdf.

Political Influence

52. Earlier this year, the FTC opened an antitrust investigation of Facebook.[23] Reports suggest DOJ has also recently opened its own separate probe of Facebook.[24] What role, if any, did Attorney General William Barr play in deciding that the Antitrust Division would conduct an antitrust investigation into Facebook?

Response:

Department of Justice policy limits my ability to comment on specific investigations. However, Attorney General William Barr, in his role as Attorney General and head of the Department of Justice, oversees the various departmental components, including the Antitrust Division.

53. Has Attorney General William Barr attended or otherwise been involved in any of the reviews of mergers involving the marijuana industry?

Response:

Department of Justice policy limits my ability to comment on specific investigations. However, Attorney General William Barr, in his role as Attorney General and head of the Department of Justice, oversees the Antitrust Division.

54. If the Antitrust Division suspects anti-competitive conduct in a particular industry, what is the standard process for opening and conducting an investigation?

Response:

The Division's investigations may arise from a number of sources, including complaints from citizens or businesses, press reports of various practices, and Hart-Scott-Rodino filings, among other things. Investigations are opened and conducted in a manner appropriate to the particular facts and circumstances in light of overall work across the Division.

55. If the Antitrust Division suspects anti-competitive conduct in the agriculture industry, is it standard process for attorneys from the Transportation, Energy, and Agriculture Section to write the preliminary investigation memo?

Response:

While the Division's civil sections are organized by industry, there is flexibility regarding which section reviews a matter. This flexibility assists the Division in addressing resource constraints, and identifying staff that can most effectively handle a matter. Staff also

[23] Lucas Matney, *Facebook says it's under antitrust investigation by the FTC*, TECHCRUNCH (July 24, 2019), https://techcrunch.com/2019/07/24/facebook-says-its-under-antitrust-investigation-by-the-ftc.

[24] David McLaughlin, *Attorney General Barr Seeks DOJ Facebook Antitrust Probe*, BLOOMBERG (Sept. 25, 2019), https://www.bloomberg.com/news/articles/2019-09-25/attorney-general-barr-sought-doj-facebook-antitrust-probe.

may be detailed to matters outside of their section to lend their specific expertise. The recent Dow/Dupont merger is a good example. Despite having a number of agricultural products at issue, this transaction was investigated and negotiated by the Defense, Industrials, and Aerospace section.

56. MLex has reported that the investigation memorandum in the automakers investigation was written by the policy staff at the Competition Policy and Advocacy Section at the Division.[25] Was this a departure from standard practice and, if so, what accounted for it?

Response:

The policy of the Department of Justice limits my ability to comment on specific investigations. In this matter, as in any other, when allegations of a potential antitrust violation come to the Division's attention, career staff is asked to evaluate and, if they recommend opening an investigation, to draft a recommendation to that effect; and the recommendation is reviewed and approved consistent with appropriate procedures.

57. When the Antitrust Division sends out letters to parties informing them that the Division has initiated an investigation, is it standard practice for attorneys from the relevant enforcement section to be the signatories to these letters? For example, would lawyers from the Transportation, Energy, and Agriculture Section sign a letter to agriculture companies that were the subject of an investigation?

Response:

Investigations are opened and conducted in a manner appropriate to the particular facts and circumstances in light of overall work across the Division. The recent Dow/Dupont merger, despite having a number of agricultural products, was investigated and negotiated by the Defense, Industrials, and Aerospace section, for example, and staff in that section would have been the signatories to most correspondence with the parties, not attorneys with the Transportation, Energy, and Agriculture Section.

58. Did attorneys from the Defense, Industrials, and Aerospace Section sign the letter to the automakers stating that the Antitrust Division was investigating them? If not, why not?

Response:

Department policy limits my ability to comment on specific investigations.

59. Did the Justice Department contact the California Attorney General's office or the California Air Resources Board when deciding whether to initiate the

[25] Leah Nylen, *Probe of automakers' California emissions deal took uncommon route through DOJ*, MLEX (Oct. 24, 2019), https://mlexmarketinsight.com/insights-center/editors-picks/antitrust/north-america/probe-of-automakers- california-emissions-deal-took-uncommon-route-through-doj.

investigation? Has the DOJ been in touch with them since initiating the investigation?

Response:

Department policy limits my ability to comment on specific investigations.

60. If no, then why not? If the DOJ is investigating whether the emissions standards agreement that automakers entered into with California constitutes anti-competitive collusion, is understanding California's involvement—specifically when and how California was involved in drafting the emissions agreement—not imperative to getting the relevant facts?

Response:

Department policy limits my ability to comment on specific investigations.

61. For all cases in which the Division has filed statements of interest or amicus briefs, please identify any outside parties that the Antitrust Division consulted.

Response:

Department policy limits my ability to comment on specific investigations. However, in any matter, the Division often meets with a wide array of market participants and interested parties, including parties to the underlying litigation.

62. Please identify each official within the Antitrust Division who has attended meetings in the White House complex since January 2017 and please describe the circumstances of each meeting.

Response:

The Department has specific policies and guidance, including a memo by then-Attorney General Holder dated May 11, 2009, that limit discussions between the White House and the Department regarding ongoing cases or investigations. The Division remains committed to following and enforcing applicable policies related to such contacts.

Travel Costs

63. Please identify the travel costs associated with each speech you have given and conference you have attended during your tenure at the Antitrust Division.

Response:

Travel in my capacity as the Assistant Attorney General fits within Departmental regulations and policy. Travel represents a very small portion of the Division's overall budget

but plays an important role in furthering the mission of the Antitrust Division. For instance, travelling to meet with leaders from foreign competition authorities helped me to organize the community of international enforcers to agree upon a first of its kind multilateral framework on due process in antitrust enforcement. I am proud that on April 3, 2019, the Steering Group of the International Competition Network (ICN) unanimously approved the Framework on Competition Agency Procedures, or CAP, and invited all antitrust agencies, whether ICN members or not, to participate in the framework to promote fundamental due process in antitrust enforcement globally. The CAP came into effect on May 15, 2019, and over seventy competition agencies have committed to the framework, a major accomplishment for the Antitrust Division.

Morale

64. The 2018 Federal employee viewpoint survey reports that the Antitrust Division's employee engagement dropped from a score of 74% in 2015 to a score of 59% in 2018. According to the survey, employee engagement evaluates factors that lead to an engaged workforce, including supporting employee development and communicating agency goals. By comparison, for 2018, the government-wide average was 68% and the FTC score was 83%. What accounts for the Division's below average score? What are you doing to address this significant decline in employee engagement?

Response:

The Division employs very talented lawyers, economists, and staff, and I am proud to serve alongside them every day. Whether in our enforcement or policy efforts, I am a firm believer that key to our success is maintaining a talented and devoted staff. The Division must continue to attract and retain bright, talented, and passionate individuals—whether they be attorneys, economists, paralegals, or support staff. We have taken a number of initiatives to ensure we continue attracting and keeping a talented staff, including establishing the James F. Rill Fellowship program, the Jackson-Nash addresses, and a rotation program for Division attorneys.

Questions from Rep. Jayapal

65. Please explain whether and how the DOJ weighed the best interests of workers when choosing to file a brief in *Stigar v. Dough Dough* (WA Eastern District).

Response:

As I explained during my testimony on November 13, 2019, franchise no-poach agreements potentially maintain the incentive of franchise owners to invest in the training of their workers. More employers willing to invest in worker training would create more job opportunities for entry-level workers. The Division recognizes that courts are likely to treat restrictions on the mobility of managerial workers differently from low-skilled workers. The Division also took into account the effect that categorizing franchise no-poach agreements as

per se unlawful would have on challenges to the Division's application of the per se rule in future criminal cases.

66. Please explain whether and how the DOJ weighed the best interests of consumers when choosing to file a brief in *Stigar v. Dough Dough* (WA Eastern District).

Response:

In its Statement of Interest in *Stigar v. Dough Dough*, the Division focused on the applicable law rather than which parties benefit from a particular position the Department has taken.

67. Please explain the reasoning behind the DOJ's exercise of prosecutorial discretion to file a brief in *Stigar v. Dough Dough* (WA Eastern District), given the DOJ's wide focus and limited resources.

Response:

While the vast majority of the Division's resources are devoted to directly enforcing the antitrust laws, the amicus program is a valued complement to enforcement. Private litigation is an important aspect of the antitrust regime that Congress created, and in particular its treble damage provision provides an additional tool to deter anticompetitive acts. The Division's involvement in these cases, however, is important in providing guidance to the courts, to ensure they reach sound interpretations of the antitrust laws – which apply in both private and government cases – enabling effective and appropriate enforcement.

Making greater use of our amicus program also is good stewardship of our limited resources. For example, from start to finish, the Division's case against Atrium Health regarding anticompetitive steering restrictions cost over seven million dollars, approximately 100 times what the Division spent in connection with its statement of interest and motion to intervene in *Seaman v. Duke University*, litigation regarding no-poach agreements. Notably, both cases reached the same result from an enforcement perspective.

68. Please detail any meetings, phone calls, emails or interactions that you or others at the DOJ had with the International Franchise Association, the U.S. Chamber of Commerce or Littler Mendelson P.C. regarding *Stigar v. Dough Dough* (WA Eastern District).

Response:

Department policy limits my ability to comment on specific investigations or matters; however, in any matter, the Division often meets with a wide array of market participants and interested parties.

69. Please respond to the American Antitrust Institute's May 2, 2019 letter regarding your department's position in *Stigar v. Dough Dough* (WA Eastern District).

(https://www.antitrustinstitute.org/wp-content/uploads/2019/05/AAI-No-Poach-Letter-w- Abstract.pdf)

Response:

I described the Division's position in *Stigar v. Dough Dough* above. The Division's position remains the same despite support or criticism from outside interest groups such as the American Antitrust Institute.

Questions from Rep. Scanlon

70. In addition to the examining how antitrust agencies might take enforcement actions to curtail abusive market practices by the large tech companies, I am interested in looking at how these same companies may be taking advantage of prior enforcement actions to unfairly benefit themselves under the auspices of the antitrust laws.

In 1941, ASCAP and BMI, two performance rights organizations representing songwriters for licensing public performances of musical works, entered into consent decrees with the Antitrust Division. These legacy decrees were necessary to protect traditional licensees - restaurants, bars, venues and a fledgling broadcast industry from anticompetitive behavior by the PROs. These protections were deemed necessary because individual licensees lacked market power and needed licenses to virtually all musical works in order to avoid significant liability for statutory damages under copyright law. When they were negotiated there was no imagining the giant tech companies of today.

Each of the largest tech companies possess significant market power as compared to songwriters/publishers and as compared to smaller radio stations and hospitality venues. This is a complex economic ecosystem that needs nuanced and comprehensive action to evaluate and modernize the decrees for a new era.

AAG Delrahim, if there are any discussions about the future of the consent decrees, will any next actions be thoughtful and comprehensive, and take into account the relative negotiating market power of songwriters/publishers, independent hospitality venues like restaurants and wineries, and large tech companies that could not have been imagined in 1941. How can we bring performance rights to a free and fair market given technological developments, while maintaining the efficiency of traditional/general licensing through ASCAP and BMI?

Response:

In June 2019, the Antitrust Division announced its intention to review the ASCAP and BMI decrees and opened up a public comment period. That comment period ended in August 2019. The Division received over 800 comments from parties, stakeholders, and citizens, and these comments are publicly posted on the Division's website at https://www.justice.gov/atr/antitrust-consent-decree-review-public-comments-ascap-and-bmi-

2019. As the Division continues to review the comments, it continues to engage actively with parties and industry stakeholders. The Division appreciates the potential ramifications of an abrupt termination of the ASCAP and BMI decrees without some form of transition. The Division intends to reach a conclusion about modifying, sunsetting, terminating, or keeping the decrees in place in the coming months.