UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA
Plaintiff,

v.

Case No. 97-CV-1206

ALBANK, FSB, and
ALBANK FINANCIAL CORPORATION,
Defendants.

CONSENT DECREE

I. INTRODUCTION AND SUMMARY

The United States has entered into this Consent Decree with defendants ALBANK, FSB and its parent corporation ALBANK Financial Corporation (collectively, "Albank" or "the lender"), simultaneously with the United States' filing of its Complaint alleging that Albank has violated the Fair Housing Act (42 U.S.C. §§ 3601-3619) and the Equal Credit Opportunity Act (15 U.S.C. §§ 1691-1691f) ("ECOA").

Albank is a federally chartered savings bank with $3.5 billion in assets headquartered in Albany, New York. Albank makes slightly more than half of its home mortgage loans through "correspondents" -- mortgage bankers or brokers.(1) It has made mortgage loans in Connecticut and in Westchester County, New York, since the late 1980's, entirely through correspondents.

The United States' Complaint alleges that Albank gave its correspondents oral and written instructions that Albank would not fund loans from Westchester County below Interstate 287 and certain cities and other areas in the State of Connecticut, each of which areas contains communities that are identifiable as African American or Hispanic.(2)

In Connecticut, Albank explicitly stated that it would not fund loans secured by residential properties located within the five cities of Hartford, New Haven, Bridgeport, New Britain, and Waterbury. In three of these cities, African Americans and Hispanics approach or exceed a majority of the population (Hartford, New Haven, and Bridgeport); in two of these cities, African Americans and Hispanics constitute approximately 25 percent of the population (New Britain and Waterbury). Albank also would not fund loans secured by residential properties located in the corridor along Interstate 95 and Long Island Sound. This area includes the cities of Stamford and Norwalk, Connecticut, where African Americans and Hispanics constitute approximately 25 percent of the population. In Westchester County, New York, Albank excluded the part of the county south of Interstate 287, where more than 75 percent of the county's African American residents live and where more than 66 percent of the county's Hispanic residents live. When Albank made exceptions to these policies in Westchester County or Connecticut, it did so predominately for white borrowers.

The United States contends that the defendants' refusal to fund loans secured by residential properties in the identifiably African American and Hispanic geographic areas has no sound business justification, and, in fact, departs from what the United States contends are accepted mortgage banking and loan purchase practices regarding the location and type of residential properties that may secure residential mortgage loans. For example, the restrictions established non-contiguous enclaves within the geographic area where the bank otherwise funded loans, and persons residing within such enclaves were not eligible to obtain Albank residential mortgage loans, without regard to their qualifications for credit or the values of their homes. The United States contends that the redlining policies, and the exceptions to those policies, were implemented with the purpose of discriminating on the basis of race and national origin in the extension of residential mortgage financing.

Albank denies that any act or omission on its part as alleged in the government's complaint or this Consent Decree as violative of federal law was motivated or influenced in any manner by discriminatory intent or considerations of race or national origin of any kind, including, but not limited to, racial or ethnic bias. Albank has agreed to the undertakings set forth in this Consent Decree to settle the government's claims against it and because it believes the affirmative mortgage activities and practices described will assist in better serving all members of the communities where it funds mortgages through its correspondents and because it believes that such actions and practices are consistent with Albank's practices in the areas in which it has a physical presence and is actually located.

There has been no factual finding or adjudication with respect to any matter alleged in the Complaint. The parties enter into this Consent Decree to resolve voluntarily the claims raised in this suit in order to avoid litigation, and agree that the terms of this Decree provide a reasonable means of addressing the concerns of the United States and Albank. The entry of this Consent Decree is not and is not to be considered an admission or finding of any violation of law by Albank.

Through this Consent Decree, Albank states its commitment to make its business decisions without regard to race, color, or national origin and to serve all communities in the areas in which it does business, regardless of the race, color, or national origin of those residential areas' residents. To provide increased access to credit opportunities for individuals in the previously excluded areas, Albank has devised a remedial special mortgage lending program which includes homebuyer counseling and marketing tailored to the communities that previously were excluded. Albank also will implement a program to underwrite approximately $55 million in residential mortgage financing in the previously excluded communities and to offer such financing at interest rates below the market. Albank has also initiated a bank-wide Fair Lending Action Plan that is incorporated in this Decree. The United States agrees that Albank's subsidy for the special lending program, which approximates $8.2 million, together with Albank's plan for providing its mortgage loan products to the previously excluded communities, constitutes an appropriate remedy for the violation alleged in the complaint.

Now, therefore, on the basis of the foregoing representations of the United States and Albank, it is hereby

ORDERED, ADJUDGED, AND DECREED, as follows:

II. GENERAL INJUNCTIVE RELIEF

1. Albank and all officials, employees, agents and successors thereof, including such newly formed affiliated entities as ALBANK Commercial, are permanently enjoined from engaging in any act or practice that discriminates on the basis of race, color, or national origin in any aspect of residential real estate-related transactions, in violation of the Fair Housing Act, 42 U.S.C. §§ 3601-3619, and in any aspect of credit transactions, in violation of the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f. This injunction includes, but is not limited to, any use of race, color, or national origin in defining a market area and determining geographic areas from which Albank will accept loan applications.

2. Albank shall permanently remove all geographic limitations on the scope of its mortgage lending activities in Connecticut and in Westchester County. In expanding its lending

business into new territories, Albank shall select and define its markets in a manner that does not discriminate on the basis of race, color, or national origin.

III. SPECIAL MORTGAGE LENDING PROGRAM FOR PREVIOUSLY EXCLUDED AREAS

1. To provide increased access to credit opportunities for individuals in the previously excluded areas, Albank will implement a special mortgage lending program which includes outreach to the excluded minority areas, homebuyer education and counseling services, and a commitment of $55 million of below-market loans in these areas.(3)

2. To implement the special mortgage lending program, Albank will institute a targeted marketing program in designated census tracts of the cities of Hartford, New Britain, Stamford, Norwalk, New Haven, Bridgeport, and Waterbury in Connecticut and in southern Westchester County, New York.

3. The targeted marketing program in the designated Census tracts will include the following:

    a. Albank will advertise the availability of its residential mortgage loan products, through mortgage bankers and brokers and directly, in media directed to members of minority communities in the designated census tracts. Advertisement in these media will note the availability of the discounted mortgage loan product and the method of accessing the product, i.e., through mortgage broker and mortgage banker correspondents. Albank will create a brochure describing the special mortgage lending program to be distributed primarily through mortgage brokers, mortgage bankers, real estate agents, community groups, and churches; and Albank will utilize direct mail to target borrowers in the designated census tracts.

    b. Albank will contact community housing, neighborhood preservation and community development organizations to build awareness of, and support for, the special lending program. Albank will work through the applicable real estate brokers and agents to disseminate information about the special mortgage lending program. This will include direct mail to real estate brokers and agents serving the targeted communities, offers by Albank mortgage personnel to speak at organization events and print ads in the organization newsletter. An Albank mortgage loan officer also will personally visit each correspondent mortgage broker and mortgage banker serving the designated census tracts to explain and promote the discount mortgage loan program.

4. Albank will implement a homebuyer education and counseling program designed to assist residents of the listed Census tracts in obtaining mortgage loans. As described below, Albank has agreed to contribute $350,000 for homebuyer counseling to assist prospective loan applicants in the targeted Census tracts in Connecticut and Westchester County, and to expend internally, principally in the form of services, at least an additional $350,000 in implementing the lender's own homebuyer education programs in these designated areas.

5. Albank's own homebuyer education program shall consist of sponsoring, on its own, or with its correspondents or community organizations, as it deems appropriate, "Homebuyers Seminars", on a semi-annual basis during the five-year period covered by the Consent Decree, in each of the following areas: Bridgeport, Hartford, New Britain, New Haven, Waterbury, Stamford and Norwalk, in Connecticut; and Yonkers, Mt. Vernon and New Rochelle, in Westchester County, New York. These seminars will include presentations by attorneys, real estate agents, consumer debt counselors and property inspectors, and include such topics as buying versus renting, how to determine how much home a buyer can afford, qualifying for a home mortgage loan, the credit approval process, and working with a real estate agent or a "buyer's broker".

6. Albank will also provide longer term, more in-depth educational services to potential homebuyers in designated census tracts through organizations providing homebuyer

education and assistance, debt counseling and/or similar services in a comprehensive, individualized, and situation specific manner. Within 90 days of the entry of this Consent Decree, Albank will submit to the United States for approval, a list of organizations proposed to provide the education and counseling services and a description of the programs to be provided.

7. Over the next five years Albank shall make at least $55 million in loans in designated Census tracts (see Attachments A-C) within the previously excluded areas in Connecticut and Westchester County. These loans shall have an interest rate 1.5 percentage points below the interest rate the lender would otherwise charge. Such loans shall be available to any qualified borrower seeking to obtain a mortgage loan (including purchase money or refinancing loans) up to $214,600 in value, to be secured by a home located in a designated Census tract. Loans made by any subsidiary of Albank in accordance with the parameters of the special mortgage lending program will also count toward the $55 million goal. All loans will be underwritten consistent with the safety and soundness of the lender.

8. Albank shall make at least $20 million in below-market loans as described above on properties located in majority minority Census tracts south of Interstate 287 in Westchester County, New York (see Attachment A). These loans shall be made within 26 months of the date this Decree is entered. Albank shall use its best efforts to make at least $10 million of such loans within the first 14 months and $10 million within the next 12 months.(4)

9. Albank shall make at least $35 million in below-market loans as described above, on properties located in Census tracts within the cities of Hartford, New Haven, New Britain, Waterbury, Bridgeport, Stamford, and Norwalk, and which are located in 25% or greater non-white Census tracts. (See Attachments B-C). These loans shall be made within five years of the date this Decree is entered. Albank shall use its best efforts to make at least $7 million of such loans in each of the five years. Further, at least 40% of the $35 million in loans shall be made in listed Census tracts within the cities of Hartford, Bridgeport, and New Haven (Attachment C.)

10. The total value of Albank's below-market loan program under this Decree represents (over the average life of these loans) a cost to Albank of $3.3 million for Westchester County and $4.9 million for Connecticut. If, at the end of the relevant time period (26 months for Westchester County, five years for Connecticut), Albank has not made the requisite amount of below-market loans ($20 million in Westchester County, $35 million in Connecticut) in the designated census tracts, it shall make a contribution, in an amount equal to the remaining balance of the total value of the program as calculated above, to community organizations dedicated to the improvement of housing or home ownership in the relevant area.(5) If a contribution is required by this paragraph, Albank shall make a proposal, within 60 days after the expiration of the relevant time period as described above, to the United States for approval. This proposal shall identify the dollar amount of the contribution, the organizations selected, the projected use of the funds, and the fund disbursement schedule.

11. Albank will retain discretion to implement additional actions that it believes appropriate to achieve the remedial goal, without prior approval of the United States or this Court except as otherwise provided in this Order.

IV. ALBANK'S FAIR LENDING ACTION PLAN

1. Albank is committed to fair lending throughout its institution as demonstrated by its Fair Lending Action Plan. In conjunction with the fair lending and community reinvestment programs already undertaken by Albank as described in Attachment D, Albank will implement the Fair Lending Action Plan that its Board of Directors approved and proposed to the Office of Thrift Supervision in early 1997. The Fair Lending Action Plan includes the following components:

2. Albank will appoint one or more fair lending officers and create a fair lending committee and appropriate subcommittees to oversee all efforts regarding the implementation of the Fair Lending Action Plan, development of a fair lending policy statement, training, demographic research, and affirmative marketing.

3. The fair lending committee will review all lending-related policies and procedures to ensure that the bank's policies do not have the purpose or effect of discriminating against particular racial or ethnic groups and also that all standards and practices are supported by legitimate business needs. Within 45 days of the entry of this Decree, Albank will adopt a fair lending policy statement and submit it for approval by counsel for the United States. The statement shall be distributed to all employees whose responsibilities include contacts with customers or correspondents, within 30 days of the United States' approval of the statement.

4. Albank will conduct demographic research to identify the credit needs of all the communities in the previously excluded areas and determine the mortgage loan product or programs that will best meet the needs of each area. Albank will also develop marketing strategies designed to ensure its products are available to all segments of the markets it serves and monitor the effectiveness of these strategies. These strategies will include the following: advertising in media directed to members of racial and ethnic minority communities; including equal housing opportunity logotypes, statements, or slogans in its advertisements that are consistent with the standards specified in 12 C.F.R. 338.1-338.4; ensuring that the use of human models in advertisements will reasonably represent all races residing in areas where Albank's loans are marketed; identifying mortgage bankers and brokers that serve racial and ethnic minority communities; and contacting real estate brokers and agents, community groups, neighborhood preservation groups, and community development organizations that serve racial and ethnic minority communities.

5. Albank's training subcommittee and the corporate training and development department have begun implementing a fair lending training program. Within 90 days from the entry of this Decree, Albank will fully implement this program by training all personnel whose assigned duties include contacting customers or correspondents, as well as all personnel responsible for making underwriting decisions and determining the regions where Albank will market its products. The program will include training of new employees and officers to develop their understanding of fair lending laws and regulations before providing services on Albank's behalf. This training will include specific components designed according to a staff member's level of need and involvement in the lending process. However, each individual who participates in the training will receive, at a minimum, the following: Albank's fair lending policy statement; a copy of this Consent Decree; instruction regarding the obligations of Albank and its employees pursuant to this Decree; and instruction regarding all applicable federal laws, including the Home Mortgage Disclosure Act, the Fair Housing Act, the Equal Credit Opportunity Act and the Community Reinvestment Act. In addition, Albank's training program will establish a standard and consistent manner in which to treat all customers; educate employees to respond to the needs of customers in racially and ethnically diverse markets; and counsel employees as to the potential individual and bank penalties for discriminatory behavior or violations of this Decree, including Albank's disciplinary policy for violations of fair lending laws and regulations.

6. Within 60 days of the entry of this order, Albank shall implement procedures to monitor and assess the progress of the Fair Lending Action Plan, including requiring regular written reports to the fair lending committee.

V. <u>NOTIFICATION AND EDUCATION OF CORRESPONDENTS</u>

1. Within 30 days of the entry of this Decree, Albank shall inform the mortgage brokers and mortgage bankers with whom it does business of Albank's commitment to fair lending. All of Albank's contracts with its correspondents will be amended to reference the parties'

respective obligations under fair lending laws as well as to reiterate Albank's commitment to fair lending practices and its expectation of a similar commitment from the correspondents. To further ensure that Albank's correspondents are aware of Albank policies, Albank's fair lending policy statement shall be provided to them in writing prior to entering a business relationship. Existing correspondents shall also be provided with a copy of this policy statement. Albank will make available to its correspondents Home Mortgage Disclosure Act data regarding their own lending activity in order to assist such entities with their own self-assessment.

2. Albank will make fair lending training and informational materials, obtained from organizations such as the Mortgage Bankers Association, available to its correspondents and encourage them to utilize these materials. These will consist of items such as manuals, videos, regulatory information and similar materials.

3. All existing correspondents in Connecticut and Westchester County, New York, have been informed that no geographic restrictions are in effect. Albank mortgage origination staff will utilize their best efforts to meet on a quarterly basis with mortgage brokers and mortgage bankers providing loans in the designated census tracts. Albank staff will utilize these meetings to reiterate Albank's commitment to fair lending, to provide appropriate training and information on the special lending program and to assess existing efforts to implement the program and meet the program goals.

VI. RECORDKEEPING AND REPORTING

1. During the term of this Consent Decree and for two years thereafter, Albank shall retain all records relating to its obligations or compliance with this Decree, including its lending in the affected areas, notice to employees and correspondents, marketing and advertising, and training. This includes itemized accounts of all expenditures made pursuant to this Decree, including, but not limited to, the $700,000 required to be expended for the homeownership counseling programs. The United States shall have the right to review and copy such records upon request.

2. Albank shall provide the United States annually for the duration of the Consent Decree, on magnetic tape in standard EBCDIC format, the Home Mortgage Disclosure Act data provided by it to the OTS within 30 days of providing such data to the OTS. The data provided to the United States shall be augmented to add the following information to the database: a) whether a loan was made directly by Albank or through a correspondent; b) if through a correspondent, which correspondent; c) the interest rate for each loan; and d) whether a loan was made pursuant to the special lending program loan described above.

3. Albank shall submit annual reports to the United States, during the life of the Decree, with an information copy to OTS, detailing its progress in complying with the Decree's terms. The annual reports shall cover the 12 month periods starting from the entry of the Decree, and shall be submitted within 30 days of the close of the applicable reporting period. The reports shall take the form of a paragraph-by-paragraph summation of Albank's efforts in complying with each requirement of the Decree and an assessment of the extent to which the requirement was met.

4. All notices, correspondence, reports or documents required to be provided under this Consent Decree will be mailed to the following addresses:

   Chief, Housing and Civil Enforcement Section
   U.S. Department of Justice
   P.O. Box 65998
   Washington, DC 20530-5998
   (202) 514-4713
   FAX: (202) 514-1116

Freling H. Smith
Senior Vice President and General Counsel
ALBANK, FSB
10 North Pearl Street
Albany, NY 12207
(518) 445-2077
FAX: (518) 445-2140

VII. ADMINISTRATION OF CONSENT DECREE

1. The Court shall retain jurisdiction for the purpose of enforcing the terms of the Decree for a period of six years from the date this Consent Decree is entered by the Court, or until the final disbursement of funds pursuant to paragraph III.10, whichever is later. The Consent Decree shall be binding on Albank and any of their employees, agents, representatives, officers, heirs, assigns, subsidiaries, or successors in interest. All provisions of this Decree except Section III shall apply to every geographic region where Albank does business, directly or through correspondents.

2. The parties to this Consent Decree shall endeavor in good faith to resolve informally any differences regarding interpretation of and compliance with this Consent Decree prior to bringing such matters to the Court for resolution. This Consent Decree may be modified by written agreement of Albank and the United States Department of Justice. Any such modification must promptly be submitted to the Court for approval, and shall be deemed effective immediately upon execution by the parties until such time, if any, that the Court indicates a lack of such approval.

3. At any time prior to sixty (60) days after counsel for the United States receives Albank's final report submitted pursuant to Section VI, the United States may file a motion with the Court for an extension of this Decree. If no such motion is filed or if the United States files such motion but fails to demonstrate why the Decree should be extended, the Decree shall terminate and the case shall be dismissed with prejudice.

4. Each party to this litigation will bear its own costs.

It is so ORDERED this ___ day of _________, 1997.

____
United States District Judge

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ATTACHMENT A

Targeted Census Tracts in Westchester County, New York
South of I-287

1.01 1.03 1.04 2.01 3 4.01 4.02 5 7.02 10 11.01 12 13.03 18 26 27 28 29 30 31 32 33 34 35 40 41 63 64 65 92 93 109.02 109.03 110

ATTACHMENT B

Targeted Census Tracts in Connecticut

City of New Britain

4159 4161 4162 4165 4166 4167 4171

City of Norwalk

432 434 437 438 440 441 442 444 445

City of Stamford

201 213 214 215 216 217 218 220 221 222 223

City of Waterbury

3501 3502 3503 3504 3505 3506 3507 3508 3511 3512 3514 3517 3522 3524

ATTACHMENT C

Targeted Census Tracts in Connecticut

City of Bridgeport

702 703 704 705 706 707 708 709 710 711 712 713 714 715 716 717 718 719 720 724 727 728 729 732 733 734 735 736 737 738 739 740 741 742 743 744

City of Hartford

5001 5002 5003 5004 5005 5006 5007 5008 5009 5010 5011 5012
5013 5014 5015 5016 5017 5018 5019 5020 5021 5022 5024 5025
5027 5028 5029 5030 5031 5032 5033 5034 5035 5036 5037 5038
5039 5040 5041 5042 5043 5044 5045 5046 5047 5049

City of New Haven

1401 1402 1403 1404 1405 1406 1407 1408 1409 1412 1413 1414
1415 1416 1417 1418 1421 1423 1424 1425

ATTACHMENT D

Albank has voluntarily been involved in a variety of efforts geared to fair lending performance, most of which predate the United States' investigation, which began in May of 1997.

Over the past few years Albank has continuously both developed and participated in programs designed to meet the credit needs of all segments of the community, including minority neighborhoods and areas, which are located in and are a part of Albank's Community Reinvestment Act ("CRA") Assessment Area. Albank received "outstanding" ratings in each of its last three biannual CRA examinations.

Since 1994 Albank has offered a proprietary affordable housing program, Albank Community Home Investment Program (CHIP). This program is designed for first time homebuyers whose household income is 80% or less of the median income for the county where the mortgaged property is located.

Since 1987, Albank has been an active participant in the Affordable Housing Partnership and its funding arm, the Capital Affordable Housing Corporation, both of which serve the Capital Region of New York State. The Partnership offers mortgage loans to low-and moderate-income homebuyers and to affordable housing projects that cannot qualify for conventional financing. Albank provides both below market rate loan funds and serves as the servicing agent for the loans. Albank personnel have also served on the boards of directors, and as officers, of these groups.

Since March of 1994 Albank has been a participant in the Utica Housing Partnership, a public/private partnership to provide affordable permanent financing for dwellings in the city of Utica which the city constructs or rehabilitates in certain targeted areas. Albank provides contributions to the group's operating expenses as well as making loan funds available. Available loans require low down payments and no private mortgage insurance. Albank has participated in mortgage loan programs through a variety of community agencies and governmental entities including: Inter-Faith Homes Inc.; Better Albany Living; Capital Hill Improvement Corporation; Rockland County Rehabilitation and Grant Program; Beacon Community Development Agency; Kingston Council; Newburgh Community Development Department; and the City of Oneida's Block Grant Program.

Albank has participated in a variety of other programs including: the City of Albany's Capital City Housing Development Fund, Inc., which has consistently had Albank personnel on its board of directors and which has received assistance for its affordable housing development activities, as well as funds for permanent financing for scattered site housing; the Capitol District Community Loan Fund, to which Albank has been both an equity contributor and a lender; the Albany Community Land Trust, a group for which Albank served as a conduit for two Federal Home Loan Bank grants; the Albany Development Corporation, for which Albank similarly served as a conduit for Federal Home Loan Bank funds; the New York Business Development Corp., which received funds for a line of credit to be used for loans to small businesses; the Orange County Minority and Women Business Revolving Loan Fund, to which Albank and other Orange County lenders each committed \$30,000; the Mid-Hudson Small Business Loan Fund, to which Albank committed funds to guarantee a portion of each loan made by the fund; the Madison County First Time Home Ownership Assistance Program; the Saratoga County Economic

Development Fund; the Community Commercial Assistance MicroLoans Fund in Johnstown, New York; the Rensselaer County Business Assistance Fund; and the Herkimer County Chamber of Commerce Loan Fund.

Albank granted the first mortgages for rehabilitation of older properties in Arbor Hill, an African-American community in Albany, NY. Albank also financed the first low/moderate income housing project in Albany, with low down payment mortgages through the FHA Sections 221(d) and 235 programs.

In 1995, Highwick Financial Corporation was retained to assist in the expansion of Albank's participation in the U.S. Small Business Administration guaranteed loan program. Also in 1995, Albank restructured its Commercial Loan Department into a

"Commercial Loan Group" and a separate "Community Lending Group". The members of the latter have particular expertise in community lending needs.

In general, Albank advertises over its entire CRA Assessment Area without regard to community racial or ethnic composition in terms of geographic focus. However, some advertising dollars have been devoted to periodicals and radio stations that are directed to predominately minority communities, especially those consisting of majority African-American, Portuguese and Hispanic persons. These advertising vehicles and efforts include target marketing in the Springfield, Massachusetts area through home equity and auto loan advertisements over a local Spanish language radio station and advertising in the yellow pages of the Spanish telephone directory. Advertising in that area has also targeted the Portuguese members of the community through advertisements in LUSO, the local Portuguese language newspaper. Loan products are also advertised in the Hudson Valley Black Press, a Newburgh, New York based publication.

Albank sponsors periodic seminars on home buying. These are frequently targeted to low/moderate income and minority communities and have titles such as "How To Own A Home of Your Own" featuring a panel of housing and real estate experts and also offer advice to persons with past credit problems.

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1. Albank solicits home mortgage loan applications through its own loan officers and through independent loan brokers and bankers (called "correspondents") that submit applications to Albank for underwriting and, if approved, for funding (or "purchase") by Albank.

2. In early 1997, the Office of Thrift Supervision (OTS) conducted a special fair lending examination of Albank, focusing on Albank's geographic restrictions for correspondent loans. OTS found reason to believe that Albank had engaged in a pattern or practice of discrimination and referred the matter to the Department of Justice.

3. Albank presently has no branches or offices in Connecticut or southern Westchester County. Nothing in this Consent Decree requires Albank to establish any office or branch.

4. In March 1997, Albank Financial Corporation submitted an application to the Banking Board of the State of New York to organize a New York State-chartered commercial bank, ALBANK Commercial. The Superintendent of Banks of New York State has the authority under section 296-a of the New York Executive Law to remediate discriminatory practices in relation to credit. As part of its review of the charter request, the New York State Banking Department (NYSBD) reviewed OTS's findings concerning Albank's geographic lending restrictions in Westchester County and conducted its own analysis. NYSBD and Albank Financial recently entered into a "Remediation Agreement" resolving NYSBD's concerns regarding this issue. This paragraph of the Consent Decree incorporates the component from the Remediation Agreement pertaining to the below-market lending requirements in Westchester County.

5. This balance for each region shall be calculated as proportional to the amount of lending "shortfall" (the difference between the required amount and the amount Albank lent) in each region. Thus, if Albank fails to make $20 million in below- market Westchester County loans within 26 months, the Westchester County contribution shall equal [{amount of shortfall}/$20 million] multiplied by $3.3 million. Similarly, if Albank fails to make $35 million in below-market Connecticut loans within five years, the Connecticut contribution shall equal [{amount of shortfall}/$35 million] multiplied by $4.2 million.

THE ENVIRONMENT AND NATURAL RESOURCES DIVISION: AN OVERVIEW

Lois J. Schiffer
Assistant Attorney General

The Environment and Natural Resources Division is the nation's largest environmental law firm. Our mission is to ensure that the American people have clean air and water, live in healthy communities, and benefit from and enjoy our nation's natural resources. We also work to protect wild life; implement our government's trust responsibility to Indian tribes; acquire land on behalf of federal agencies; and defend challenges to federal agency decision making related to these areas of law. The Division's career attorneys and other staff have built a record that shows their abiding commitment to environmental protection and effective legal representation of federal agencies. I am proud to serve with these able lawyers and dedicated public servants.

Critical to our success are the partnerships we have forged with U.S. Attorney's Offices across the country. Our accomplishments reflect the spirit of teamwork and cooperation that is the hallmark of sound environmental protection and effective legal representation.

The Division consists of nine sections: the Environmental Enforcement Section; the Environmental Crimes Section; the Environmental Defense Section; the Wildlife and Marine Resources Section; the General Litigation Section; the Indian Resources Section; the Land Acquisition Section; the Appellate Section; and the Policy, Legislation, and Special Litigation Section. The Division also has an Executive Office that oversees administrative and organizational support functions.

Set forth below is a brief description of each section and examples of recent accomplishments.

Environmental Enforcement Section

The Environmental Enforcement Section is the Division's largest section. It handles most of the affirmative civil litigation brought on behalf of the Environmental Protection Agency (EPA). It also brings suits for damages to our natural resources, contribution claims against private parties for contamination of public land, and claims to recoup money spent to clean up oil spills.

The Section enforces the Clean Air Act, the Clean Water Act, federal hazardous waste requirements under the Resource Conservation and Recovery Act, the Safe Drinking Water Act, the Oil Pollution Act of 1990, and several other statutes. It also files actions under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or the Superfund statute) to compel polluters to clean up toxic waste sites and to recover cleanup costs incurred by the federal government.

In fiscal year 1998, there were record filings of civil enforcement actions. Over $311 million was recovered from defendants in CERCLA cost recovery litigation. Defendant companies and corporations spent another $229 million to clean up hazardous waste sites and were assessed $71 million in penalties in litigation. Fiscal year 1998 also marked the expanded use of alternative dispute resolution in order to achieve effective and fair settlements without protracted litigation. Environmental Justice concerns continued to be a focus with the number of cases affecting minority and low-income communities increasing three-fold since 1994.

Recent civil enforcement successes include the largest Clean Air Act settlement in history. In a June 1998 agreement described by Attorney General Reno as "good for the environment and good for American consumers," the federal government, the State of California, and American Honda Motor Company resolved claims that the company sold more than 1.6 million cars and trucks with disabled emission monitoring devices in violation of the Clean Air Act. If the violations had gone undetected, the vehicles would have emitted an estimated 8,000 tons of smog-producing hydrocarbons. Under the settlement, Honda will provide extended emissions warranties and free tune-ups for affected vehicles, injunctive relief valued at more than $250 million,. The settlement requires Honda to pay $12.6 million in civil penalties, the largest civil penalty in Clean Air Act history. (United States v. American Honda Motor Co. (D.D.C.))

In September 1998, Attorney General Reno and EPA Administrator Carol Browner announced the Mississippi River Initiative, a comprehensive federal effort to keep illegal pollution out of the River and restore the River and surrounding communities to their historic grandeur. The cornerstone of this federal effort is a settlement with Shell Oil Company resolving alleged violations of the Clean Air Act, the federal hazardous waste laws, and other federal statutes at the Wood River Refinery in Roxana, Illinois. The settlement requires Shell and its affiliates to pay a $1.5 million civil penalty and to spend another $10 million on projects to protect the environment. (United States v. Shell Oil Co. (S.D. Ill.))

In August 1998, in United States v. Asarco (D. Utah), the district court entered a consent decree settling claims for past and future response costs and for performance of remedial actions at the Murray Smelter Site in Murray, Utah. The Site was the location of one of the nation's largest lead and arsenic smelters. It is currently home to several light industrial and manufacturing facilities. Under the consent decree, Asarco agreed to pay 100% of EPA's past and future response costs, perform all the remedial action work, and to perform work on two tall smoke stacks at the Site. The expected cost of the remedy is approximately $13 million. In addition, the decree requires all current owners and operators to implement and abide by both private and public institutional controls, and to allow access to the Site during remediation. The City of Murray is charged with enforcing the public institutional controls. Finally, the decree settles potential claims against the United States for a payment of approximately $860,000 to Asarco based upon the United States' status as a waste generator at the Site. In conjunction with the decree, EPA entered into an administrative prospective purchaser agreement with a developer which contains options to purchase the property. The development, which will proceed during the cleanup, includes a hospital, a movie theater complex, and other retail establishments.

Environmental Crimes Section

The Environmental Crimes Section seeks to deter knowing violations of federal environmental laws and promote compliance with federal protections for human health and natural resources. In addition to prosecuting criminal enforcement actions around the country, section attorneys provide training to prosecutors, investigators, and regulators, and they set priorities for the use of criminal enforcement resources.

In May 1998, the largest criminal fine for a Clean Air Act violation was obtained when Louisiana-Pacific Corporation (L-P) pled guilty to 18 felonies at its Montrose, Colorado paper mill. Between 1989 and 1994, L-P employees tampered with the mill's air pollution monitor and made false statements to the Colorado Department of Health about air permit violations. L-P also misrepresented to its customers that the mill conformed to quality assurance testing requirements. L-P agreed to pay $31.5 million in penalties for consumer fraud and $5.5 million for Clean Air Act violations. The corporate plea followed guilty pleas by two L-P supervisors at the mill. (U.S. v. Louisiana-Pacific Corp. (D. Col.))

Th largest criminal fine ever obtained in a vessel pollution case was secured when Royal Carribean Cruise, Ltd. agreed to pay an $8 million fine in Puerto Rico and an additional $1 million fine in Miami. The fines stemmed from an investigation of fleetwide Clean Water Act violations, including the dumping of oily bilge waste into the ocean and falsification of oil record books. (U.S. v. Royal Caribbean Cruises (D.P.R.)) The investigation is on-going.

Section attorneys helped obtain guilty pleas from American Oxygen Company (AOC), its owner, and its manager for falsifying safety tests on compressed gas cylinders. AOC was registered under federal law to conduct hydrostatic testing of the cylinders, which is necessary to ensure that they will not explode during transport. From 1988 through 1996, AOC and its employees falsely stamped hundreds of compressed gas cylinders as being hydrostatically tested and filled them with compressed gases. By punishing AOC and deterring would-be violators, this criminal prosecution will help protect fire departments, hospitals, rehabilitation clinics, and others that use compressed gas. (U.S. v. American Oxygen Company, et al. (D.N.M.))

Following a ban on the importation of certain chloroflurocarbons (CFCs), which are used principally in car air conditioners, a black market in illegally imported CFCs developed in the United States. In 1997 the Section, various USA Offices, the EPA's Criminal Investigation Division and Stratospheric Ozone Protection Program, the U.S. Customs, the FBI and the IRS initiated a wholesale attack on the smuggling of CFCs. A result of this initiative was Jack Katzman, the owner and operator of Aire-Right's Air Conditioning and Heating Supplies, guilty plea to two felony violations of the Clean Air Act for smuggling 30-pound cylinders of CFS-12 into the United States from Mexico. Katzman was sentenced on September 14, 1998, and given a $10,000 fine, three years of probation, and 1,000 hours of community service. United States v. Jack Stewart Katzman (C.D.Cal.).

On April 2, 1998, a grand jury in the Western District of Wisconsin returned a 16-count indictment charging three labor subcontractors with using homeless men in the course of unlawful asbestos removal at an aging manufacturing plant. On April 24, 1998, in conjunction with the unsealing of the indictment, the Attorney General and EPA Administrator Carol Browner held a joint press conference to announce a plan by the Department of Justice and the EPA to join the National Coalition for the Homeless to distribute advisories to homeless shelters, soup kitchens, and other care providers around the country, warning homeless and itinerant workers of the dangers of asbestos work. This action was taken in response to having investigated and prosecuted several cases around the country, including cases in Florida, Pennsylvania and New York, involving similar exploitation of homeless persons for illegal asbestos work. In October 1998, all three defendants pled guilty to engaging in a dual object conspiracy: 1) to strip asbestos in violation of Clean Air Act regulations; and 2) to use social security account numbers fraudulently to obtain Wisconsin identification documents for untrained asbestos workers. The defendants have not yet been sentenced. United States v. Frazier, et al. (W.D. Wisc.).

Environmental Defense Section

The Environmental Defense Section represents EPA and other federal agencies in suits challenging the administration of federal environmental laws, principally the pollution-control statutes. Its cases include claims by industry that federal rules are too strict, claims by environmental groups that the rules are too permissive, and claims by states and citizens that federal agencies themselves are out of compliance with environmental standards. The Section also defends federal agencies challenged for failure to comply with the environmental laws, including Superfund cases. In addition, the Environmental Defense Section prosecutes affirmative cases to enforce federal protections for wetlands and other U.S. waters under section 404 of the Clean Water Act.

In 1998 there were a string of successes in defending natural resource damage regulations. Under CERCLA and the Oil Pollution Act, natural resource trustees may recover damages for injury to natural resources resulting from the spill of oil or hazardous substances, and the trustee's damage claim is entitled to a rebuttable presumption if the damages are assessed in accordance with the regulations. In National Ass'n of Manufacturers v. Department of the Interior, the D.C. Circuit rejected a broad challenge to the Interior Department's procedures for simplified natural resource damage assessments under CERCLA. In General Electric v. NOAA, the D.C. Circuit upheld in most respects regulations under the Oil Pollution Act for assessing natural resource damages caused by oil spills. Together, these two rulings will allow natural resource trustees to move forward to assess and collect natural resource damages under CERCLA and OPA.

There was also success in protecting wetlands. In United States v. John Conner, Jr. (E.D. Ark.), the court directed Mr. Conner to pay a $400,000 penalty, restore or create approximately 140 acres of wetlands, and preserve approximately 100 acres of existing forested wetlands to compensate for more than 70 wetland acres he had illegally filled. The areas to be restored are in the Mississippi Delta region of Eastern Arkansas, one of the nation's most important wintering grounds for migratory waterfowl.

There were Superfund cases where liable parties sought payments from the United States for cleanup costs at privately owned sites. For example, Texas Instruments sought to recover the costs of cleaning up a facility that supplied the government with components for the Nuclear Navy and other programs. The Section recently negotiated a settlement in which the government paid $8.2 million, reducing the plaintiff's claim by more than $19 million. Texas Instruments v. Department of Energy. In another Superfund contribution case, a mining company claimed that, as a result of decades of federal procurement activities, the federal government should pay more than one-third of the costs of cleaning up a lead mining operation in Utah. The Section negotiated a settlement under which the government paid approximately $860,000. United States v. Asarco (D.Utah).

Wildlife and Marine Resources Section

The Wildlife and Marine Resources Section litigates both civil and criminal cases under federal wildlife laws.

Its civil litigation, particularly under the Endangered Species Act (ESA), often arises out of tension between the needs of protected species and pressure for development. For example, the court upheld the U.S. Fish and Wildlife Service's decision to deny a federal permit to operate commercial catamaran tours to extremely sensitive portions of the Key West National Wildlife Refuge. After a 14-day trial, the court ruled for the government, finding that the permit denial was rationally based and supported by the administrative record. (McGrail & Rowley, Inc. v. Babbitt (S.D. Fla.))

In consolidated cases plaintiffs sought a broad injunction against the Forest Service to prohibit all cattle grazing on 150 allotments on National Forests in Arizona and New Mexico. Plaintiffs alleged that the Forest Service failed to consult with the Fish and Wildlife Service regarding the effects of grazing on these allotments on several newly listed species and fish and wildlife. The parties entered into a stipulation pursuant to which the government agreed to meet compliance goals regarding consultation on the allotments. The court agreed, over the Cattlegrowers' Associations objection, that the Forest Service's actions were necessary under the Endangered Species Act. (SWCBD v. U.S. Forest Service; Forest Guardians v. U.S. Forest Service (D. Ar.))

Prosecutors from the Wildlife and Marine Resources Section, in conjunction with the U.S. Attorneys' Offices, have brought prosecutions to break up several international wildlife smuggling rings. For example, they achieved trial and appellate court victories in the prosecution of Tony Silva, an internationally prominent Chicago-area writer and lecturer on the plight of endangered parrots in the wild. He was sentenced to 82 months of imprisonment for leading an international parrot smuggling conspiracy and for a related income tax violation. Silva and his co-conspirators smuggled into the United States highly protected species of birds trapped in South America, most significantly a substantial number of very rare Hyacinth Macaws. At Silva's sentencing, the judge found that the value of the smuggled wildlife was over $1.3 million. Silva's 82-month sentence constitutes the longest prison term ever handed out for bird smuggling, and one of the longest for any federal wildlife crime. (Other wildlife smuggling prosecutions are discussed elsewhere in this issue.)

General Litigation Section

The General Litigation Section conducts litigation arising under more than 80 statutes dealing primarily with environmental and cultural resource protection procedures, federal land management, mineral development, water rights, reclamation, Fifth Amendment takings, and Native American issues.

There were recently a series of victories in defending vital federal programs. For example, the Navy sonar research program was defended in four emergency actions, victories that allowed the Navy to proceed with important research on the impact of low-frequency sound on whales off the coast of Hawaii. In a challenge to the Department of Energy's nuclear non-proliferation program, Section attorneys successfully defended Energy's efforts to accept spent nuclear fuel containing enriched uranium of U.S. origin from foreign research reactors. They also defended the President's American Heritage Rivers Initiative, a voluntary program that allows river communities across the nation to implement community-driven plans for using existing government programs to protect the rivers and their resources.

Several cases involved U.S. claims for water needed to serve vital federal programs. For instance, the Idaho Supreme Court held that the United States is entitled to reserved water rights for its grazing program, a decision that will protect over 6,300 springs throughout the State.

There were important victories to protect vital ecosystems and public lands. The cleanup of agricultural pollution flowing into the Florida Everglades can continue on schedule due to their successful defense of a consent decree.

The Section helped protect land management officials in so-called "county supremacy" litigation. Most recently, in Nevada v. Glickman (D. Nev.), the federal district court dismissed the Elko County Grand Jury's lawsuit challenging the U.S. Forest Service's refusal to honor subpoenas issued by the Grand Jury during a purported investigation of a Forest Service employee.

Indian Resources Section

The Indian Resources Section represents the United States in civil litigation initiated by the federal government to enforce rights guaranteed to Indian tribes and tribal members by federal treaties, statutes, or executive orders. The Section also represents federal agencies, primarily the Department of the Interior, that are sued by non-Indians seeking judicial review of agency actions favorable to tribes. In conjunction with other Division components, the Indian Resources Section handles litigation involving the enforcement of federal environmental laws in Indian Country.

The Section's case load includes suits to establish and quantify water rights reserved for Indians; actions to protect federally guaranteed hunting and fishing rights; suits defending tribal sovereignty; cases involving the application of state law, including taxation and regulatory law, within the boundaries of reservations; suits to recover compensation for damages to, and pollution of, Indian trust property; suits concerning the location of the boundaries of Indian County; and litigation defining the matrix of federal, state, and tribal jurisdiction in Indian county.

In recent months, the Indian Resources Section helped in a successful quiet title case against the State of Idaho, involving the bed and banks of the southern third of Lake Coeur d'Alene in trust for the Coeur d'Alene Tribe of Idaho. Section attorneys also worked in the successful defense of an EPA decision to allow the Confederated Salish and Kootenai Tribes of the Flathead Reservation in Montana to set water quality standards for all waters within the boundaries of the reservation.

The Section also helped secure a favorable appeals court ruling upholding tribes' right to harvest shellfish on public and private tidelands in Washington, reversing other rulings that restricted tribal harvests. This decision is another in a string of victories in longstanding and complex litigation over the fishing rights of tribes in the Pacific Northwest, which were reserved in treaties dating back to 1854.

The Section is involved in several land claim cases brought by various Indian tribes against the State of New York in which the Department of Interior determined it wanted to intervene. The basis for the Indian tribes' claims against the State is that transactions by which the various tribes sold their lands to New York in the 18^{th} and 19^{th} centuries are void because they were not approved by Congress as required by the Trade and Intercourse Act of 1790 and its successors. Cayuga Indian Nation of New York v. Pataki, et al. (N.D. New York)(United States' motion to intervene granted); Seneca Nation v. State of New York, et al. (W.D. New York)(Cuba Lake)(United States' motion to intervene granted); Seneca Nation v. State of New York, et al. (W.D. New York)(Grand Island)(motion to intervene pending); St. Regis Mohawk Tribe v. State of New York (N.D. New York)(motion to intervene pending); U.S. obo Onondaga Nation v. New York (proposed action in N.D. New York).

The Section continually engages in substantial outreach and partnership-building through conferences and other public gatherings to increase environmental protection and enforcement in Indian Country.

Land Acquisition Section

The Land Acquisition Section prosecutes eminent domain actions throughout the United States. Its condemnation cases are handled either directly by Assistant U.S. Attorneys with assistance as needed from Section attorneys, or by Section attorneys. The Section has saved U.S. taxpayers tens of millions of dollars in recent years by achieving settlements and judgments based on fair market values, which were far below the inflated valuations asserted by claimants.

The Section also plays an increasingly important role in consulting with other Sections in its area of expertise. Prominent among the Section's success stories during 1998 was its role in Utah v. United States (D. Utah). This litigation, brought under the Utah Schools and Lands Improvement Act of 1993, involved the valuation of thousands of acres of State-owned lands within national parks, monuments, and forests, and Indian reservations. Interior Secretary Babbitt and Governor Leavitt reached a settlement agreement that recently was approved by Congress. The settlement results in the exchange of more than 425,000 acres of land between the United States and Utah, the largest such land exchange in history. The agreement will be worth at least $1 billion to the State's school endowment over the next 30 years, and it ends more than six decades of controversy surrounding State school lands.

The Land Acquisition Section's Title Unit fulfills the Attorney General's obligations to see to the sufficiency of title in direct purchases of real property by federal agencies. It has played a vital role in many recent cases, including the federal government's purchase of the New World Mine properties just north of Yellowstone National Park to protect the park from pollution from mining.

The Section's Appraisal Unit provides appraisal reviews and advice on the valuation issues. For example, in southern Florida, where the National Park Service is seeking to expand both the Everglades National Park and the Big Cypress National Park, the Unit reviewed and approved market studies for use in appraisals of properties to be acquired for those projects.

Appellate Section

The Appellate Section is responsible for circuit court litigation involving the environmental laws. Section attorneys formulate recommendations and prepare requests to the Solicitor General for authority to appeal unfavorable decisions, and they draft the briefs for Division cases that reach the U.S. Supreme Court.

Appellate attorneys deal with the full range of issues litigated by the Division. Two examples follow. In United States v. The Telluride Company (10th Cir.), the Court of Appeals reversed the district court, ruling that an action seeking restoration of filled wetlands is not barred by the statute of limitations. The Tenth Circuit found that a claim for equitable relief in governmental enforcement actions would not be barred even if a concurrent legal remedy were barred by the statue of limitations. This ruling will be significant for federal enforcement efforts involving injunctions in both environmental and non-environmental cases.

The Sixth Circuit rejected an attempt to interpret the criminal provisions of the Resource Conservation and Recovery Act as requiring specif intent. The court affirmed criminal convictions and sentences for knowing violations of environmental laws. The court rejected the defendants' argument that the government should have been required to prove that the defendants knew that the material in question was regulated as hazardous waste and knew that a permit was required. United States v. Kelley Technical Coatings, Inc., et al. (6th Cir.).

Policy, Legislation, and Special Litigation Section

The Policy, Legislation and Special Litigation Section (PLSL) furthers the Division's mission by coordinating important issues within the Division and with other components in the Department.

For example, within the Division PLSL coordinates the Division's program to make effective use of Alternative Dispute Resolution; to address ethics issues; to respond to Freedom of Information Act requests; and to respond to mail from Congress, states and localities, Indian tribes and citizens. PLSL also coordinates the Division's review of important cross-cutting litigation issues that arise across the areas handled by multiple Sections within the Division, as well as the Division's responses to requests from other agencies for comment on regulatory and policy initiatives. PLSL's litigation responsibilities include coordinating the preparation of amicus briefs by the Division, and litigating cases at the trial and appellate levels, particularly cases that implicate important policy issues. To fulfill the Department's statutory responsibilities, PLSL monitors citizen suits under various environmental statutes and participates in these suits when appropriate.

On legislative issues, PLSL coordinates with the Department's Office of Legislative Affairs in responding to Congressional requests for information and technical assistance, and in explaining the Department's position on pending legislative proposals.

Executive Office

The Division's Executive Office is responsible for the overall management programs of the Division. Specifically, the Executive Office oversees the planning and direction of all financial management programs and contracts, procurement, human resource policies and programs, training and development, information technology and development, litigation support functions, and other administrative and organizational management support functions. The Executive Office has spearheaded a number of recent projects to enhance the effectiveness and cost-efficiency of Division operations.

U.S. Department of Justice
Antitrust Division

Antitrust Division
United States Department of Justice

Annual Report

FY 1999

The Criminal Enforcement Program

The Antitrust Division institutes criminal enforcement of Section One of the Sherman Act, 15 U.S.C. Section 1, against hardcore cartel activity such as price-fixing, bid-rigging, and market-allocation agreements. Such conduct causes substantial harm to purchasers of goods and services.

The Antitrust Division recently has prosecuted international cartels operating in a broad spectrum of commerce, including vitamins, food and feed additives, chemicals, graphite electrodes (used in steel making), and marine construction and transportation services.

The prosecution of such domestic cartel activity has been at the heart of the Department of Justice's antitrust enforcement efforts ever since the enactment of the Sherman Act in 1890 and continues unabated. In the last several years, however, the Antitrust Division has made the prosecution of international cartels that victimize American businesses and consumers one of its highest priorities. This strategy recognizes that in many instances international cartels pose an even greater threat to American businesses and consumers than do domestic conspiracies because they tend to be highly sophisticated and extremely broad in their impact—in terms of geographic scope, the amount of commerce affected, and the number of businesses and consumers victimized by the conspiracy.

The Antitrust Division recently has prosecuted international cartels operating in a broad spectrum of commerce, including vitamins, food and feed additives, chemicals, graphite electrodes (used in steel making), and marine construction and transportation services. Since the beginning of FY 1997, the Antitrust Division has prosecuted international cartels affecting over $10 billion in U.S. commerce. The cartel activity in these cases cost U.S. businesses and consumers many hundreds of million of dollars annually.

The Antitrust Division's strategy of concentrating its criminal resources on international cartels has led to unprecedented success in terms of cracking those cartels, securing the conviction of the major conspirators, and obtaining record-breaking fines.

Since the beginning of FY 1997, the Antitrust Division has obtained over $1.5 billion dollars in criminal fines, well over 90 percent of which were imposed in connection with the prosecution of international cartel activity. To put this fine figure into perspective, consider that the highest amount of fines obtained by the Antitrust Division in any given year prior to FY 1997 was roughly $42 million. In FY 1997, the Antitrust Division shattered that mark when it collected $205 million in criminal fines—nearly 500 percent higher than during any previous year in the Antitrust Division's history. In FY 1998, the Antitrust Division topped that number when it obtained over $265 million in criminal fines. And then, in FY 1999, the Antitrust Division thrust the new record still another 400 percent higher when it secured over $1.1 billion in criminal fines. The amount of fines obtained since FY 1997 is many multiples higher than the sum total of all criminal fines imposed for violations of the Sherman Antitrust Act dating back to the Act's inception in 1890.

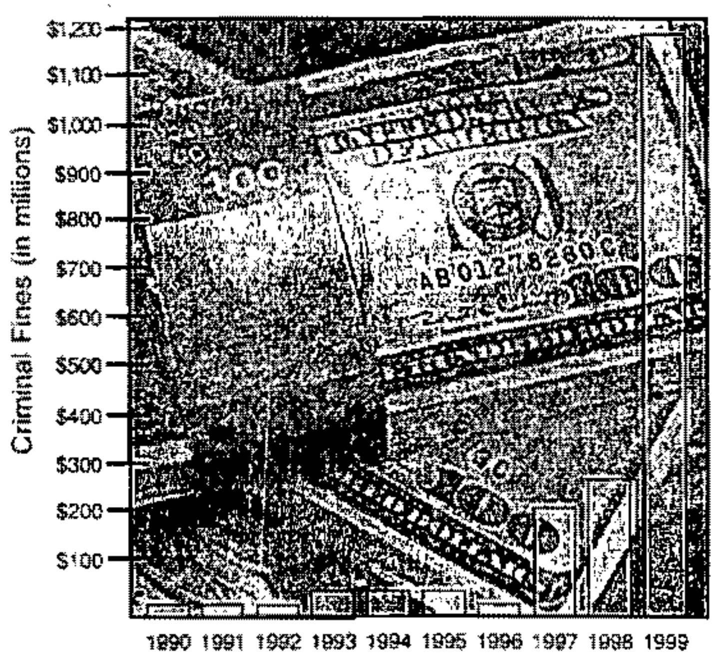
The dramatic increase in fines reflects the fact that the major international cartels prosecuted over the past few years have been bigger, in terms of the volumes of affected commerce and the amount of harm caused to American businesses and consumers, than any conspiracies previously encountered by the Antitrust Division.

For example, the international vitamin cartel, which affected over $5 billion in U.S. commerce, was the most harmful and elaborate conspiracy ever uncovered by the Antitrust Division. The members of the vitamin cartel reached agreements on everything from how much product each company would produce, to how much they would charge, to which customers they would sell. The victims who purchased directly from the cartel members included companies with household names such as General Mills, Kellogg, Coca-Cola, Tyson Foods, and Proctor & Gamble. However, these companies were just the first to feel the effects of this conspiracy. In the end, for nearly a decade, every American consumer—anyone who took a vitamin, drank a glass of milk, or had a bowl of cereal—ended up paying more

Fine Amounts

1990:	$23,575,000
1991:	$20,379,000
1992:	$23,705,000
1993:	$42,296,000
1994:	$40,236,000
1995:	$41,653,000
1996:	$26,817,000
1997:	$205,178,000
1998:	$266,924,000
1999:	$1,105,654,316

Antitrust Division Criminal Fines



Sherman Act Violations Yielding a Fine of $10 Million or More

Defendant (Fiscal Year)	Product	Fine (million)	Geographic Scope	Country
F. Hoffman-La Roche, Ltd. (1999)	Vitamins	$500	International	Switzerland
BASF AG (1999)	Vitamins	$225	International	Germany
SGL Carbon AG (1999)	Graphite Electrodes	$135	International	Germany
UCAR International, Inc. (1998)	Graphite Electrodes	$110	International	United States
Archer Daniels Midland Co. (1997)	Lysine & Citric Acid	$100	International	United States
Takeda Chemical Industries, Ltd. (1999)	Vitamins	$72	International	Japan
Haarmann & Reimer Corp. (1997)	Citric Acid	$50	International	German Parent
HeereMac v.o.f. (1998)	Marine Construction	$49	International	Netherlands
Eisai Co., Ltd. (1999)	Vitamins	$40	International	Japan
Hoechst AG (1999)	Sorbates	$36	International	Germany
Showa Denko Carbon, Inc. (1998)	Graphite Electrodes	$32.5	International	Japan
Daiichi Pharmaceutical Co., Ltd. (1999)	Vitamins	$25	International	Japan
Nippon Gohsei (1999)	Sorbates	$21	International	Japan
Pfizer Inc. (1999)	Maltol/Sodium Erythorbate	$20	International	United States
Fujisawa Pharmaceuticals Co. (1998)	Sodium Gluconate	$20	International	Japan
Dockwise N.V. (1998)	Marine Transportation	$15	International	Belgium
Dyno Nobel (1996)	Explosives	$15	Domestic	Norwegian Parent
F. Hoffmann-LaRoche, Ltd. (1997)	Citric Acid	$14	International	Switzerland
Eastman Chemical Co. (1998)	Sorbates	$11	International	United States
Jungbunzlauer International (1997)	Citric Acid	$11	International	Switzerland
Lonza AG (1998)	Vitamins	$10.5	International	Switzerland
Akzo Nobel Chemicals, BV & Glucona, BV (1997)	Sodium Gluconate	$9	International	Netherlands
ICI Explosives (1996)	Explosives	$10	Domestic	British Parent
Mrs. Baird's Bakeries (1996)	Bread	$10	Domestic	United States
Ajinomoto (1996)	Lysine	$10	International	Japan
Kyowa Hakko Kogyo, Co., Ltd. (1996)	Lysine	$10	International	Japan

so that the conspirators could reap hundreds of millions of dollars in additional revenues.

To date, the vitamin investigation has resulted in convictions against Swiss, German, Canadian, and Japanese firms and over $875 million in criminal fines against the corporate defendants, including a $500 million fine imposed on F. Hoffmann-La Roche Ltd. (HLR) and a $225 million fine imposed on

BASF AG. The $500 million fine imposed against HLR is the largest fine ever imposed in any Department of Justice proceeding under any statute. The Antitrust Division also has thus far prosecuted seven American and foreign executives who participated in the vitamin cartel. All of these individuals, including the foreign defendants, are either already serving time in federal prison or are awaiting sentencing and face potential jail sentences as well as heavy fines. For example, Kuno Sommer, the former director of Worldwide Marketing for Vitamins at HLR, and Roland Brönnimann, the former president of the Fine Chemical and Vitamin Division at HLR, were recently sent to prison and ordered to pay substantial fines for their roles in the vitamin cartel. Messrs. Sommer and Brönnimann are the first European nationals to serve time in a U.S. prison for engaging in cartel activity. The imposition of jail sentences against foreign nationals residing outside this country, together with the unprecedented fines obtained in this matter, sends a powerful deterrent message that the United States is committed to vigorous antitrust enforcement against international cartel activity.

The increased effectiveness of the Antitrust Division's anticartel efforts result from more effective investigation as well as good trial work. The Antitrust Division's Amnesty Program has been a major contributor to its investigative success. In August 1993, the Antitrust Division expanded its Amnesty Program to make it easier and more attractive for companies to come forward and cooperate with the Antitrust Division in exchange for a complete pass on prosecution. Today, that program is the Antitrust Division's most effective generator of large cases, and it is the Department of Justice's most successful leniency program. During the past year, the Antitrust Division has been receiving amnesty applications at the rate of approximately two per month—a more than twenty-fold increase compared to the prior Amnesty Program. Moreover, in the past year alone, the Amnesty Program has led to dozens of convictions and over $1 billion in criminal fines.

The Merger Enforcement Program

Section 7 of the Clayton Act (15 U.S.C. Sec. 18) prohibits mergers that may substantially lessen competition. The Antitrust Division's goal in enforcing Section 7 is to preserve for consumers—individuals, businesses and government—the price-reducing and quality-enhancing effects of competition.

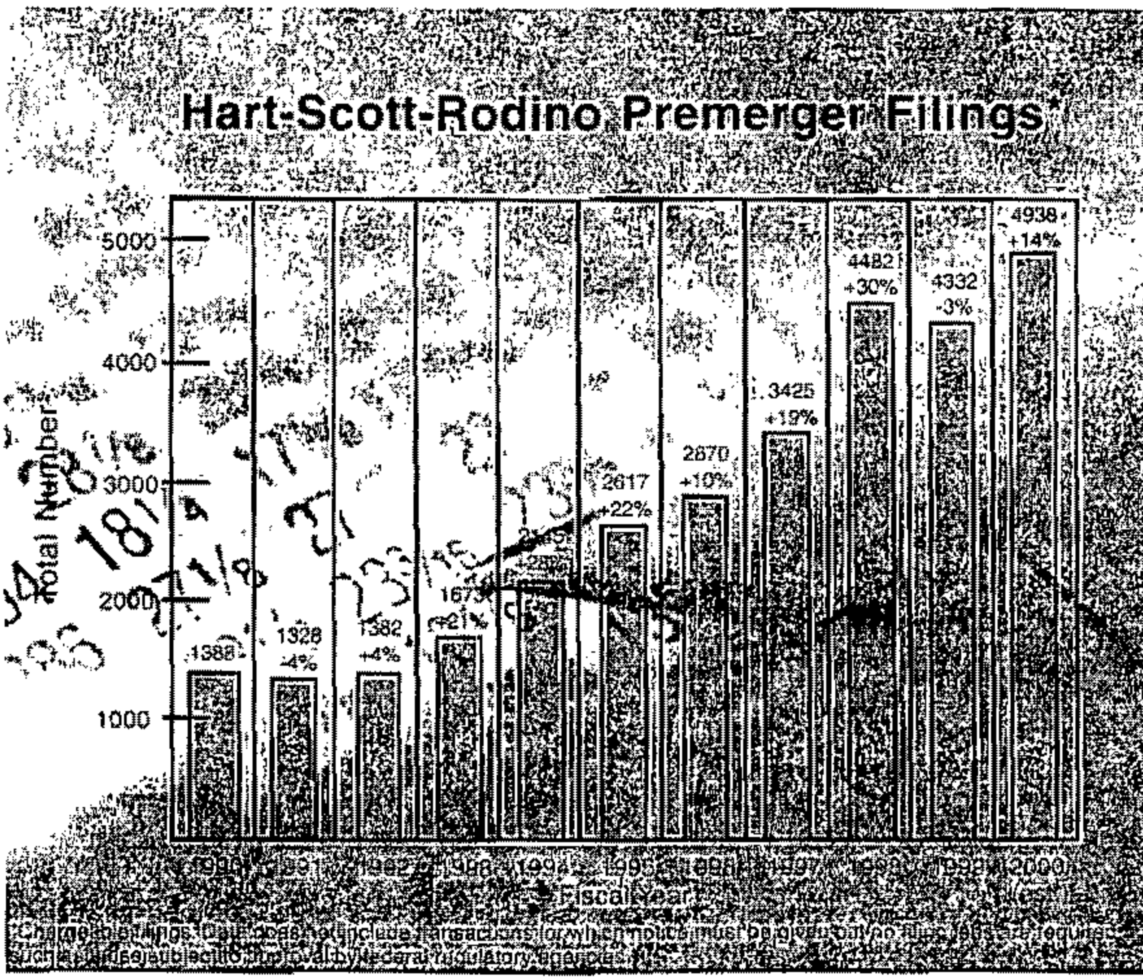
The Antitrust Division's merger enforcement program has been tested during the past two years by record numbers of transactions filed under the Hart-Scott-Rodino Act's premerger review provisions. In FY 1998 and 1999, approximately 4,500 transactions were filed each year—more than double the number filed just a few years earlier. During the past two years, 97 transactions have been abandoned or restructured in response to the competitive concerns expressed by the Antitrust Division, the highest level of merger enforcement activity in its history. These transactions encompassed many products and services that affect everyday life, including telephone, Internet, health insurance, airline, and banking services, local radio advertising, movie theaters, aluminum cans, trash hauling and disposal, voting machines, electronic benefits transfer, and our military's most sophisticated weapons. Many of these transactions have involved firms with billions of dollars in revenues, operating in numerous product and service markets.

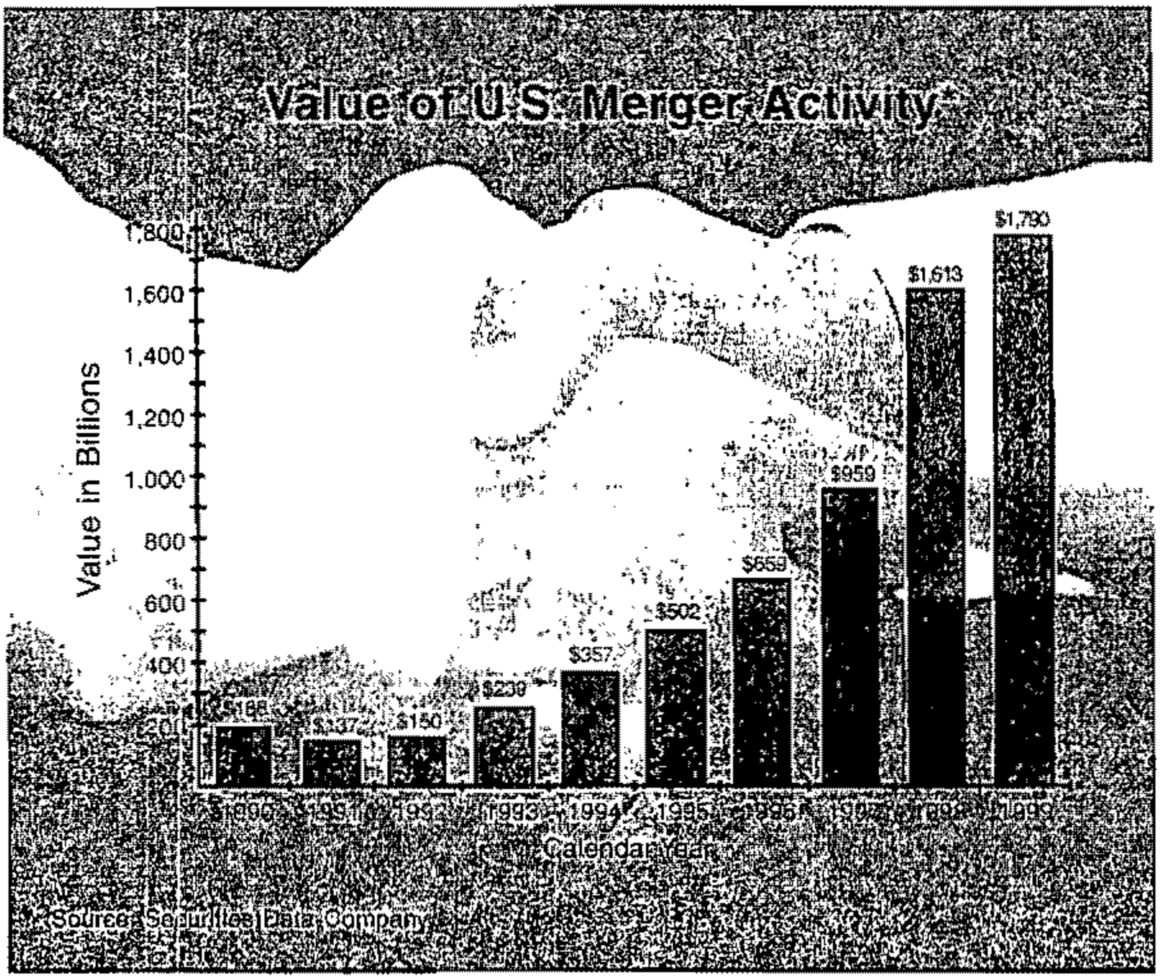
The analysis of proposed mergers has become increasingly difficult as the products and services of our economy become more complex and the pace of the development of new products increases.

The analysis of proposed mergers has become increasingly difficult as the products and services of our economy become more complex and the pace of the development of new products increases. In technologically complex or rapidly changing markets, the Antitrust Division must determine not only the extent to which the merging firms compete today but also the manner in which such rivalry is likely to be affected by foreseeable innovation from these firms and others in the same or related markets. This type of complex, fact-based analysis led to the Division's suit to block the $11.9 billion proposed merger of Lockheed Martin and Northrop Grumman, the largest merger ever challenged by the government, as well as to the divestitures ordered in connection with Raytheon's acquisitions of the defense electronics businesses of Texas Instruments and Hughes Electronics. The Division's goal in each of these transactions was to preserve for our armed services the competition necessary for development of innovative, cutting-edge weapons systems.

In *United States v. Primestar*, the Division challenged an acquisition that raised the risk that the cable industry would be able to impede competition from a new technology. Cable television companies, which for many years have dominated markets for the distribution of multichannel video programming, are beginning to face competition from firms using new technology to distribute programming through high-powered satellites. The Division sued to block an effort by five of the nation's largest cable companies, acting through their joint venture Primestar, to acquire one of only three orbital slots available to provide such high-power direct broadcast satellite service. The parties abandoned the transaction before trial.

Much of the Antitrust Division's merger enforcement work over the last few years has been concentrated in recently deregulated or rapidly consolidating industries. For example, the relaxation of radio station ownership restrictions in the Telecommunications Act of 1996 has led to rapid consolidation in the radio industry. The Division has investigated dozens of radio mergers and has challenged transactions that would have led to competitive concerns; all of those transactions were either restructured to resolve the Division's objections or abandoned. During FY 1999 alone, the Division analyzed numerous bank merger transactions, including some of the largest in history, and required divestitures of





local branches and assets in seven transactions, including the largest divestiture in bank merger history. The Division also challenged a merger between a gas and an electric company, as well as Northwest Airlines' acquisition of voting control of Continental Airlines.

In two cases last year, *United States v. Aetna* and *United States v. Cargill*, the Division demonstrated that its concerns about market power extend to circumstances involving "monopsony power," in which a transaction may create or enhance the power of buyers. In *Aetna*, the Division's complaint alleged that, in certain geographic markets, the merged firm would obtain the ability to depress artificially physicians' reimbursement rates, leading to a reduction in quantity or degradation in quality of physicians' services. In *Cargill*, the Division's complaint alleged that, in certain geographic markets, the acquisition of Continental's grain business by Cargill would allow Cargill to depress artificially the prices paid to farmers for grain and soybeans. Both cases were successfully resolved by consent decree.

The majority of the Division's merger cases are resolved by consent decrees requiring divestitures that are designed to protect competition. Full compliance with consent decrees is therefore essential to merger enforcement. During the year, the Division

The Civil Non-Merger Enforcement Program

The Antitrust Division has filed complaints challenging a wide variety of both unilateral and multilateral conduct in industries that are important to consumers, such as personal computer operating systems, credit cards, and airlines, to ensure that consumers are not denied the full benefits of competition.

The Antitrust Division's civil non-merger enforcement program has been addressing one of the most timely questions about antitrust enforcement: Are the antitrust laws adequate to protect consumers from anticompetitive harm that may arise during a period of unprecedented technological change? During this period, the Antitrust Division has filed complaints challenging a wide variety of both unilateral and multilateral conduct in industries that are important to consumers, such as personal computer operating systems, credit cards, and airlines, to ensure that consumers are not denied the full benefits of competition. The Antitrust Division has simultaneously continued its competitive advocacy efforts before Congress and federal administrative agencies to urge reliance on competition, rather than regulation, as the means to maximize consumer welfare.

Recent years have seen unprecedented technological change in many industries, particularly those involving information technology. While some people have contended that the rapid pace of change obviates the need for antitrust enforcement on the ground that new entrants can easily supplant dominant incumbents that try to exert market power, the Division believes that such a generalization is mistaken. Under certain circumstances, network externalities and first-mover advantages associated with information technology systems pose special risks that markets will "tip" very quickly in favor of a dominant incumbent. In such cases, timely and effective antitrust intervention may be even more important than is normally the case if we are to ensure that the eventual market winner prevails on the basis of competition on the merits.

Network effects, a phenomenon of various computer and communications systems, arise when the value of a product or service to a user increases with the number of other users or as products compatible with the service increase. Network effects arise directly where communication with other users is important; for example, in telecommunications or sharing of computer files. Network effects can also arise indirectly where a product's value depends heavily on complementary products (such as application programs compatible with a computer's operating system), since a larger customer base tends to attract a greater variety of such complements. Where network effects are

substantial, the market success of a competitor's product will depend not only on its inherent attributes (such as price or ease of use) but also on its ability to interface seamlessly with the dominant firm's products or with complementary products tailored for those products. Installed-base compatibility advantages can give the dominant firm a competitive edge also in related markets, as well as help defend its core market power against rivals whose offerings are otherwise superior. Antitrust concerns arise when a dominant firm's advantages derive from contrived incompatibilities (that is, not from genuine efficiencies) or other exclusionary practices against rivals that restrict efficient access.

The most significant of the Antitrust Division's enforcement efforts of this type has been its action against Microsoft. In 1998, the Antitrust Division filed a complaint charging Microsoft with violating Sections 1 and 2 of the Sherman Act in connection with its efforts to use exclusionary practices to protect its monopoly in personal computer operating systems and to extend its monopoly power into the Internet browser market. Trial on the liability issues was completed in 1999, and the District Court issued extensive findings of fact on November 5, 1999.

Concerns about innovation in services important to consumers led the Antitrust Division to file suit in another case involving collaborative conduct by competitors. In October 1998, the Antitrust Division charged Visa and MasterCard, the two dominant general-purpose credit card networks, with failing to compete against one another

In 1998, the Antitrust Division filed a complaint charging Microsoft with violating Sections 1 and 2 of the Sherman Act in connection with its efforts to use exclusionary practices to protect its monopoly in personal computer operating systems and to extend its monopoly power into the Internet browser market.

and adopting rules to prevent their member banks from dealing with other card networks, all of which retarded innovation. The case, which is scheduled to go to trial in June, will highlight the importance that the antitrust laws attach to preserving competitive incentives and opportunities for exiting and potential rivals.

During the year, the Antitrust Division also filed suit charging American Airlines with monopolizing routes emanating from its Dallas/Ft. Worth (DFW) hub in violation of Section 2 of the Sherman Act, through predatory practices designed to drive low-cost carriers out of DFW routes. The complaint charges that American added uneconomic flights and reduced fares in DFW routes served by low-cost carriers until the low-cost carriers were forced out of the market; American viewed such conduct as an "investment" to protect its ability to charge high fares on DFW routes. This is the first predation case brought against an airline by the Division since the industry was deregulated in 1979.

The Antitrust Division has also continued its long-standing policy of being an effective advocate for the cause of competition in various legislative proceedings. The Antitrust Division testifies regularly to Congress on various proposals with competitive implications. In recent years, significant segments of the American economy, subjected to economic regulation for half a century or more, have been substantially deregulated by statute. Where public restraints have been lifted, proper application of the antitrust laws ensures that the benefits of competition will not be impaired by private restraints.

Even in industries that have not been deregulated by statute, regulatory agencies often retain substantial discretion to promote competitive behavior. The Antitrust Division works closely with many federal agencies, including the Department of Transportation, the Federal Energy Regulatory Commission, the Securities and Exchange Commission, and the Federal Communications Commission, to urge that they rely in their decision making on competitive principles to the maximum extent consistent with the other statutory goals.

Thus, through antitrust enforcement actions, direct overtures to Congress for regulatory reform, and communications with federal regulatory agencies, the Antitrust Division remains the government's foremost proponent of competition.

The Telecommunications Competition Program

The promotion of competition in telecommunications has been one of the Antitrust Division's most significant accomplishments of the past three decades and will be one of its greatest continuing challenges in years to come.

Thanks in significant part to the Antitrust Division's activities, consumers today have more choices than ever before in choosing among providers for local telecommunications services, for wireless services, for video services, for Internet services, and for international telecommunications services.

For most of the twentieth century, the telecommunications industry in the United States was a regulated monopoly. In the late 1960s, the Antitrust Division participated in FCC proceedings and successfully advocated the introduction of competition into long-distance telephone service. In 1974, the Justice Department filed a monopolization case against AT&T, seeking structural relief that would permit the long-distance competition then authorized by the FCC to develop. That case was resolved through the entry of a consent decree in 1982, which involved a breakup of AT&T. The breakup was highly controversial, but subsequent experience proved its wisdom. Competition grew and flourished. By the mid-1990s, the lower prices and rapid innovation generated by competition and deregulation of long-distance telephone service and telecommunications equipment manufacturing in the United States prompted U.S. policy makers to seek to extend competition more broadly throughout the domestic telecommunications industry. This effort culminated in the passage of the Telecommunications Act of 1996, which eliminated legal restrictions on competition in local telephone service and firmly established a fundamental national policy favoring competition and deregulation in all telecommunications markets. The new competitive environment created by the Telecommunications Act presented several competition advocacy challenges for the Antitrust Division, which are reflected in its activities since 1996.

1. Opening Local Telecommunications Markets. The Telecommunications Act of 1996 created opportunities to eliminate the most important remaining monopoly in the telecommunications industry—the monopoly of local telecommunications services controlled by the Bell Operating Companies (BOCs) and other incumbent local exchange carriers. The Antitrust Division has worked to maximize those opportunities by successfully advocating principled and procompetitive interpretation and implementation of the local market opening provisions of the Act.

To that end, the Division filed extensive comments in the FCC's Local Competition rulemaking advocating

The globalization of the telecommunications industry has created new challenges for the Antitrust Division. The Division's mission in the global arena mirrors its domestic mission.

principles that the FCC adopted when it promulgated its local competition rules. The Division then worked closely with the FCC in defending those rules (and the FCC's rulemaking jurisdiction) in the Eighth Circuit and before the Supreme Court, which largely upheld the FCC's procompetitive rules. The Antitrust Division also assisted in successfully defending actions in which the constitutionality of the 1996 Act's transitional restrictions on the BOCs were challenged. Assistant Attorney General Joel Klein successfully argued in the U.S. Court of Appeals for the Fifth Circuit that the restrictions on the BOCs do not constitute a "bill of attainder" and are not otherwise unconstitutional.

The Antitrust Division has also assisted in monitoring and filing *amicus* briefs in the numerous district court and court of appeals cases under Section 252 of the Telecommunications Act, reviewing arbitrated interconnection agreements between incumbent local exchange carriers (LECs) and new entrants. These efforts have helped to produce a substantial body of precedent supporting appropriate, procompetitive interpretations of the market-opening requirements of Sections 251 and 252 of the Act.

These litigation victories have been critically important in establishing a solid legal foundation for the market-opening process contemplated by the 1966 Telecommunications Act, but litigation victories will not, by themselves, create competition. Successful competition will also require incumbent LECs and new entrants to implement the technically complex arrangements for interconnection and access to the incumbents' ubiquitous local networks.

The development of these arrangements has been the focus of a substantial portion of the Division's efforts in connection with its review of long-distance service applications by the BOCs under Section 271 of the Act. In late 1996, the Division solicited public input concerning the standard that it should use in reviewing these applications, and concluded that it would support Section 271 applications only if the applicant demonstrated that its local market was "fully and irreversibly open to competition." The FCC adopted an interpretation of the critical threshold requirements of Section 271 that followed the Division's recommendations. The agency's decision was affirmed by the D.C. Circuit Court of Appeals. The Division has explained in detail—in its formal evaluations of Section 271 applications, in speeches, and in its frequent discussions with interested parties—how it will apply that standard in evaluating many specific controversies that can be expected to arise in connection with the market-opening process. The Division has devoted substantial resources to the continuous monitoring of the BOCs' market-opening efforts, through discussions with the BOCs, competing carriers, consumer groups, state commissions, and others. As a result of this process, many of the requirements for a successful 271 application have been met by a number of BOCs, and the Division is hopeful that successful applications, demonstrating fully and irreversibly open markets, will be filed in the near future.

These efforts have led to substantial entry by competitive local exchange carriers (CLECs). Using exclusively their own facilities or a combination of their own facilities with elements of the BOCs' networks, these CLECs are providing local telecommunications services to an increasing number of customers. CLECs had installed more than 800 voice switches by the end of 1999, compared to a total of 139 voice switches in 1996. CLECs tripled the size of their local fiber transmission networks from 1996 to 1999. As of June 1999, CLECs had obtained approximately 685,000 unbundled loops from incumbents (an increase of 180 percent over the previous year) and had collocated in wire centers serving 60 percent of all lines in the country (compared to 32 percent the previous year). CLECs have achieved local market shares approximating 10 percent in some states, a remarkable achievement in markets that were virtually complete monopolies throughout most of the twentieth century.

2. Promoting Competition in the Global Telecommunications Market. The telecommunications industry is a central component of the emerging global economy. As firms in other markets have expanded the geographic scope of their operations, their need for global communications capabilities, both voice and data, have greatly increased. Improved technology and more competitive telecommunications markets throughout the world have also lowered the costs and prices of telecommunications services, further stimulating demand for international communications.

The globalization of the telecommunications industry has created new challenges for the Antitrust Division. The Division's mission in the global arena mirrors its domestic mission. First, we have worked to support the opening of markets for international telecommunications, a process that will also entail the opening of markets in other countries. These international market-opening efforts will benefit American consumers, who purchase a large share of international telecommunications services. It will also benefit American telecommunications firms, whose experience in competitive domestic markets has positioned them for success in the international arena as well. Second, we have worked closely with telecommunications and competition authorities in other countries, particularly with respect to merger enforcement, to ensure the consistent application of sound policies that will protect competition in international markets.

The transition to deregulated, competitive telecommunications markets will continue to create new challenges for the Antitrust Division in the coming years. That transition is far from complete. In many critically important telecommunications markets, incumbent providers still maintain substantial market power. But the experience in moving to competitive equipment and long-distance markets over the past two decades and more recent experience in extending competition to other markets under the Telecommunications Act has demonstrated the great benefits of competitive markets. Thanks in significant part to the Antitrust Division's activities, consumers today have more choices than ever before in choosing among providers for local telecommunications services, wireless services, video services, Internet services, and international telecommunications services. More importantly, the Division's efforts have helped to create a solid foundation for greater competition in the future and the lower prices, improved technology, and broader consumer choices that such competition provides.

International Antitrust Policy and Procedures

As a result of the increasing globalization of the world economy in recent years, it is increasingly common for business conduct in one country to have anticompetitive consequences in other countries. This trend has given rise to new challenges for the Antitrust Division. The most immediate challenge is to ensure continued, effective enforcement of the antitrust laws against unlawful conduct, wherever it occurs, that causes injury in the United States. As noted previously, the Division has actively pursued criminal enforcement against international cartels. The Division now has more than 30 ongoing grand juries—well over one-third of its criminal investigations—looking into international cartel activity.

The Division has also sought to encourage developments in competition law throughout the world that will both further the enforcement of sound, effective antitrust laws and reduce any costs imposed on United States businesses and consumers by reason of the number of, or possible inconsistencies among, different national competition laws. To those ends, the Division has taken several steps to facilitate its obtaining evidence (both documents and witnesses) located abroad in connection with its cartel enforcement activities. In April 1998, for example, the OECD ministers endorsed a Division-introduced Hard-Core Cartel Recommendation that encourages the

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29 OECD member countries to enact and enforce laws prohibiting hard-core cartels as well as to enter into mutual assistance agreements to permit the sharing of evidence with foreign antitrust authorities to the extent permitted by national laws. In April 1999, the United States signed an agreement with Australia, the first under the International Antitrust Enforcement Assistance Act of 1994, that will permit the two antitrust enforcement agencies to share confidential information on both civil and criminal matters. In March 1999, the United States signed an antitrust cooperation agreement with Israel, and similar agreements were signed in October 1999 with Japan and Brazil.

As described in detail above, the Division has been actively engaged in international merger and civil nonmerger enforcement. In many cases the business conduct involved is subject to review by two or more countries' antitrust agencies. As a result, the Division has had numerous occasions to work with the Commission of the European Communities on merger matters and has had good experiences with case-specific cooperation. One example is the WorldCom/MCI merger

During the past several years, the Division has also worked with other U.S. agencies and in multinational fora to improve the overall environment for competitive markets and sound antitrust enforcement.

involving two U.S. telecommunications firms, which resulted in the divestiture of MCI's $1.75 billion in internet assets—the largest divestiture in U.S. merger history. In that case, the parties provided written waivers of confidentiality that permitted the two agencies' staffs to work closely together in making their independent analyses of the transaction. The Division and the European Commission ultimately reached essentially the same conclusions, and before announcing its approval of the transaction in July 1998, the Commission formally requested, pursuant to the 1991 U.S.-EU antitrust cooperation agreement, the Division's cooperation and assistance in evaluating and implementing the divestiture proposal that had been proposed to both the Division and the Commission. A similar procedure was successfully followed by the Division, the European Commission, and the merging parties in the Dresser/Halliburton merger, where the antitrust concerns were resolved by a U.S. consent decree requiring a significant divestiture.

Anticipating that they will be faced with important transnational civil nonmerger matters, the United States and the European Union entered into a new positive comity agreement in June 1998. This agreement builds on the positive comity provisions of the first such agreement, which was adopted in 1991. Under the "positive comity" concept, the antitrust authority of one country preliminarily determines that there are reasonable grounds for an antitrust investigation, typically in a case where a firm based in that country appears to have been denied access to the markets of another country by anticompetitive behavior in the latter. The requesting authority refers the matter, along with its preliminary analysis, to the authority whose home markets are most directly affected by the suspect behavior. After consulting with the foreign antitrust authority and depending on that authority's conclusions and actions, the requesting authority may accept the foreign authority's conclusions or seek different results under its own laws.

While no referrals have yet been made under the 1998 agreement, in 1997 the Division made a formal referral under the 1991 agreement regarding possible anticompetitive conduct by certain European airlines that may be preventing U.S.-based computer reservations systems from competing effectively in certain European countries. In 1999, the European Commission issued a statement of objections, which opens formal proceedings, against one of the airlines pursuant to this referral.

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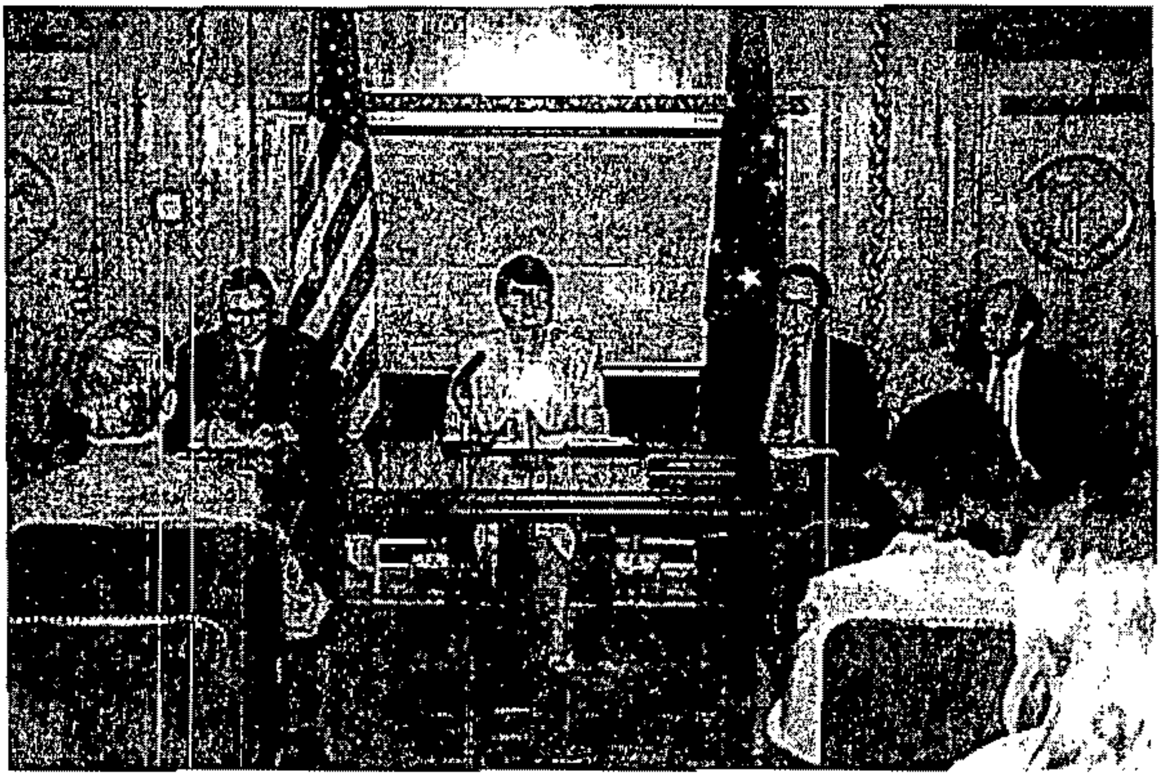

(with the Department of State) the Structural Issues Working Group of the U.S.-Japan Enhanced Initiative on Deregulation and Competition Policy; this group's joint report included commitments by the government of Japan to strengthen its antitrust enforcement program. Similarly, the Division worked with USTR and other domestic agencies on the successful conclusion of the World Trade Organization (WTO) negotiations on basic telecommunications issues, which included agreement on a Reference Paper on interconnection rules and other transitional competition-related safeguards. Although the Reference Paper does not directly affect antitrust enforcement, it does establish a minimum level of effective (non-antitrust) regulation for governments to employ in liberalizing former monopoly telecom markets.

The Division also participates in discussions in the increasing number of international fora, including the OECD, NAFTA, the Asia Pacific Economic Cooperation, and the negotiations for the Free Trade Area of the Americas (FTAA), in which antitrust and competition policy issues are discussed. In addition, the Division has participated (with other U.S. agencies) during the past three years in discussions of the WTO working group on the relationship between trade and competition policy.

In 1997, Attorney General Reno and Assistant Attorney General for Antitrust Klein established an International Competition Policy Advisory Committee (ICPAC) to examine the changing international environment from an outside-the-Division perspective. ICPAC devoted special attention to three key issues: (1) How can we build a consensus among governments for cooperation and effective prosecution of at international cartels? (2) How should we deal with the proliferation of premerger notification requirements and merger laws around the world, so as to achieve sound results for both consumers and merging firms? (3) How should we deal with the complex relationships between trade and competition? ICPAC, which was cochaired by former Assistant Attorney General Jim Rill and former U.S. International Trade Commission Chairwoman Paula Stern, met several times and held hearings in which antitrust officials from around the world as well as a wide range of U.S. witnesses participated. ICPAC's report was issued in February 2000.

DEPARTMENT OF JUSTICE

RETHINKING ANTITRUST POLICIES FOR THE NEW ECONOMY

By:

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at the

Haas/Berkeley New Economy Forum

Haas School of Business, University of California at Berkeley

Portola Valley, California

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I am very pleased to be here today. I want to thank the Haas School and Dean Tyson for inviting me to address you about a subject that I've thought and even re-thought about a great deal over the past few years: the subject of this panel, "Rethinking Antitrust Policies for the New Economy."

My conclusion is that the core principles of antitrust reflected in the Sherman Act -- like other fundamental principles embodied in venerable texts like the Constitution and the Bill of Rights -- should not be changed in this new era. All of these charters state enduring rules that can and should be applied in new situations. The Framers of the Constitution surely could never have imagined electronic eavesdropping; but the Supreme Court had no trouble ruling that this form of invasion of privacy was subject to the Fourth Amendment.

Core antitrust principles have served our Nation, our citizens, and our economy extremely well in the more than a century since the Sherman Act was passed. And I expect that they will continue to do so in the 21st Century, during this period of remarkable technological progress and expansion.

The core principles of antitrust are actually what Adam Smith wrote about more than two centuries ago: that free and competitive markets result in maximum economic development, wealth creation, and consumer welfare, but that markets will not always remain free and competitive in the absence of effective government oversight. In the end, antitrust is all about market power -- which every business understandably wants -- and the limits on how it can be obtained, preserved, and extended.

The legitimate ways of acquiring and maintaining market power are essentially the same today as they were a hundred years ago; and the illegitimate ways are fundamentally the same as well. "Skill, foresight and industry" is the term that antitrust lawyers use to summarize the permissible means of acquiring market power. But I don't have to tell this audience that that simple phrase can capture a broad range of productive and profitable business activity, activity that has contributed so much to our Nation's economic strength. And market power can legally be maintained in the same way, through innovation and competition in the marketplace.

The illegitimate means of getting and keeping market power have changed little since Senator Sherman's day as well. I will describe them in detail in just a bit. They deter innovation and restrict consumer choice, and they are as illegitimate and illegal today as they were a hundred years ago.

Two important corollaries follow from all this: First, sound antitrust policy does not believe that big is bad or that success must be punished. Quite the contrary -- where success is the result of skill, foresight and industry, consumer welfare is enhanced. To be sure, there have been times when antitrust enforcement has appeared to take a different view. For example, during the 1960's, the Division sometimes disregarded sound, market-based antitrust analysis in favor of a big-is-per se-bad philosophy. But that view fell out of fashion decades ago, and there is little prospect of its revival.

And second, since we believe that free and competitive markets maximize innovation and consumer welfare, we tend to disfavor regulation generally and certainly as a way to remedy abuses of market power. Ongoing regulation is invariably inefficient, both because it under-deters anticompetitive behavior and because it can be exploited by opportunistic rivals to hamper procompetitive conduct. Thus, where possible, we seek structural, market-based solutions to serious competitive problems, because these solutions mean that consumers, not government agencies or existing monopolists, will get to chose when longstanding monopolies yield to innovative technologies and innovative business models.

In this regard, I've been reading a lot lately about this issue of regulation versus structural solutions -- as it affects a case of some interest to me. It's a case that is well known to many of you as well, I'm sure. It involved complex and wide-ranging antitrust claims, resulting in a trial that gained lots of attention, followed by a Justice Department proposal to break-up a major American corporation.

Here's what the *Wall Street Journal* had to say about the case on its editorial page:

> "While the Justice Department can't promise any consumer benefits that might result from its suit to break up [the company], it is sure of one thing: This is the largest antitrust action ever filed. So much for the mentality of modern-day trustbusters. As long as they can tackle the biggest of all 'big businesses,' what is the difference whether the massive expenditure of federal money and effort is likely to cut anyone's . . . bills?"
>
> "Where is the problem that justifies risking possible damage to the efficiency of a vital part of the U.S. infrastructure; damage to the investments of innumerable small investors and pension fund beneficiaries; possible damage to an important research and development enterprise? If there is a problem that justifies all this we can't find it. Maybe it is because we prefer to deal in economics, rather than politics in such matters."

By now, you may have guessed that this is an editorial about the Department's monopoly maintenance case against AT&T, a 1974 editorial as a matter of fact; but if it sounds familiar, it is because the same charges have been leveled against the Department's lawsuit, and our proposed remedy, in the *Microsoft* case.

Then as now, the Department challenged illegal practices by a firm with monopoly power in a critical market, practices designed to maintain and extend the monopoly.

Then as now, the Department was criticized for challenging a technology leader and a critical part of the economic infrastructure.

Then as now, the Department sought a structural remedy because it is the most effective and efficient means of protecting and preserving competition.

And then as now, dire predictions were made that structural relief would kill the goose that laid the golden egg. One of my favorites is a *Forbes Magazine* article published the day after the AT&T divestiture took place: "For the consumer, costs will go up and service down . . . It's quite alarming, in fact, just how many top executives in the industry are predicting [this] . . . get used to it; it's going to get worse."

We now know, of course, that the divestiture in the AT&T case, far from making things worse, has unleashed unprecedented competition, innovation and consumer benefit. By separating the local telephone monopolies from other aspects of the telecommunications business, it has fostered the growth of the Internet, wireless communications, broadband services and fiber optics, and other extraordinary innovations that were unimaginable when the divestiture took place.

And it has also led to substantial competition in telephone services and significantly lower prices for consumers. Since divestiture, prices for long distance calls have fallen dramatically, while per capita use of long distance service has almost tripled -- an extraordinary output effect by any standard.

We believe that the proposed divestiture in the *Microsoft* case similarly would produce substantial innovation and competition in the software business. The district court found that Microsoft illegally maintained its operating system monopoly through a broad pattern of unlawful acts that crushed emerging threats to that monopoly posed by Netscape's browser, Sun's Java, and other cross-platform middleware technologies. We need to make sure that new technologies aren't subject to the same treatment in the future or, even worse, that innovators decide to avoid such technologies altogether for fear that they may meet the same fate if things don't change.

The central feature of our proposed remedy is splitting Microsoft into an operating systems company and an applications company. Unlike the *AT&T* case, where line-of-business restrictions remained on the local telephone companies, here the separated businesses would be entirely free to compete with each other in all lines of business. Each company would have the incentive to compete vigorously through developing and licensing products that compete with the other's core business.

For example, a separate applications company would have the incentive to develop the best possible office suite, not only for Windows, but also for other computing platforms like the Apple and Linux operating systems. Indeed, much like the browser was in 1995, before Microsoft commenced its illegal campaign, Office has the very real potential to be a cross-platform middleware threat to the dominance of the Windows monopoly.

Because Office is an enormously popular product -- with over 100 million copies in use around the world -- its availability on other operating systems would give those operating systems a real opportunity to compete against Windows. As these other computing platforms grow and proliferate, moreover, we would expect the Windows operating systems business to face real competition for the first time. And this is only one of several ways in which the proposed split is likely to facilitate competition. In toto, the result will be exciting and innovative new products, with more choices and lower prices for consumers.

Now, there are some who are suggesting that the reorganization will result in a loss of efficiency currently generated by the coexistence of the operating system business and the applications business under one roof. That argument is wrong as a matter of fact, and wrong as a matter of history as well. It is wrong as a matter of fact, since the two companies would be free to exchange technical information, as long as that information was also made available to third parties; and Microsoft has long claimed that it provided third-party applications developers all the information about its operating system that those developers could need to write their applications for Windows. If so, there should be no real loss of efficiency in the reorganization.

The argument is also wrong as a matter of history. The opponents of the AT&T remedy made the very same claim, arguing that the divestiture would imperil the efficiency of the telephone network; and that argument has surely failed the test of time.

Now, let me move away from this specific example of "the more things change, the more they stay the same" to the more general point about antitrust enforcement that I referenced at the beginning of my remarks. While technology changes, and that of course affects the particulars of our analysis, antitrust enforcement remains remarkably constant in its application of the core principles that have proven to be effective in protecting and preserving competitive markets while maximizing innovation and assuring low prices for consumers. These principles, as I noted earlier, have to do with market power and separating the legitimate, procompetitive ways it is acquired and preserved, from the illegitimate, anticompetitive ways.

Let me reiterate the fundamental point: businesses want market power -- i.e., the ability to make more than normal, competitive profits. It's good for the business, good for its employees, and good for its shareholders. And a rational, procompetitive system of antitrust laws must seek to ensure that the way business gets that market power is good for consumers as well.

To take an obvious example of a good way of acquiring and protecting market power, one from outside the antitrust arena, though by no means inconsistent with it, let's look at patent law. Here is an example where we grant statutory protections that tend to create and protect market power. That is why drugs cost so much -- absent patent protection, once a drug is created, it could be duplicated and readily sold at a small fraction of its patent-protected-price. The rationale behind patents, and the market power they establish and protect, is that, in the absence of patent protection and the returns it generates, no one would spend the money on R&D necessary to develop the drug in the first place. In short, we create a legally imposed barrier to entry -- intellectual property (or IP) protection -- in order to ensure that innovation is encouraged. One can argue, as many do, whether the period of IP protection is too long or too short to stimulate a desirable level of overall R&D, but the basic principle that, absent some IP protection, innovation would be harmed is clearly correct.

The next point I want to note here is that market power is not a unitary thing: there is market power and there is market power. Lots of businesses enjoy at least some market power, but very few enjoy monopoly power over any significant period of time. Brand loyalty or a first-mover advantage, for example, may give a business the ability to charge prices a bit above the competitive level, but in the absence of stronger barriers to entry than just brand loyalty or a simple first-mover advantage, the magnitude of these supracompetitive profits are likely to be quite modest.

This point, in turn, is key to understanding a fundamental market dynamic that animates antitrust analysis, *i.e.*, the strength of barriers to entry is ultimately what determines how much market power a business will be able to sustain and exploit. At the same time, and somewhat paradoxically, the more a business exploits such power, the more potential competitors want a piece of the action. In short, supracompetitive profits, like well-known movie stars, draw a crowd; businesses, just like the bank robber, Willie Sutton, want to be where the money is.

And, in fact, as it turns out, because of the powerful incentives of the marketplace, it's quite rare that we see strong barriers to entry enduring for long periods of time. That is especially true in the absence of illegal business practices that augment the natural barriers that exist, a point that I want to come back to in a moment because it is at the heart of what antitrust enforcement is all about. But this view about the strength of entry barriers, at least in certain critical industries, has not always been widely shared. On the contrary, there have been quite a few times in our history when entry barriers to particular markets were thought to be so strong, we concluded that the market was a so-called "natural monopoly" and that we had no choice but to regulate it.

Indeed, not so long ago, that was the case with respect to surface and air transportation, telephones, and energy (and as to the latter two, still is the case to some degree even today).

But now, with increasing confidence and conviction, we in America (and much of the world as well) have been won over to the view that, in the absence of illegal practices, technology will ultimately be able to erode almost any barrier to entry. Consequently, for several decades now, we have wisely adopted a national policy that favors deregulation and market forces instead of regulation.

This is not to suggest that market forces cannot generate strong barriers to entry. They can, especially in markets characterized by a so-called positive feed-back loop, either from scale economies or from what economists call "network effects." What this fancy jargon means is something we all tend to understand intuitively: in certain circumstances, nothing succeeds like success. A network effect occurs when the more a business sells of a particular product or service, the more people want it because its increasing adoption increases its value to the next user. A classic example, of course, is the telephone: the more people on a given network, the more value the network has to potential users, making it easier to get the next customer, and so on. Indeed, once a network gets a sufficiently large number of customers, it becomes almost impossible for a new entrant without access to the network to successfully challenge its dominance.

Two things I want to emphasize here about these kinds of positive feedback situations: first, they existed in the old economy, just as they do in the new. We had an old-economy case against AT&T, for example, where market power was derived in this fashion. And our new-economy case against Microsoft relies on this notion as well.

Like the telephone system, the Windows operating system at issue in the *Microsoft* case also benefits from a positive feedback loop. People select an operating system based largely on the number of applications available to run on that operating system, and people who develop applications want to develop them for the most popular operating system, since that is the way to sell the most applications. As a result, a dominant position in operating systems reinforces itself because the applications developers write to your operating system and then more new computer buyers want your operating system because desirable applications are available to run on it.

The second point to understand about these positive feedback loops is that there's nothing illegal or even undesirable about them: they are an outgrowth of market forces and consumer choice and, so far as the antitrust laws are concerned, businesses which have the skill and foresight to understand and take advantage of those forces are entitled to enjoy the fruits of their efforts.

In both *AT&T* and *Microsoft*, antitrust enforcement became an issue not because of the acquisition of market power but because of how that power was protected and/or expanded. This is a fundamental point to understanding the future of antitrust enforcement and so, in the time that remains, I would like to expand on it briefly.

As I have noted, we in America have chosen, wisely in my view, to reject an effort to regulate all monopolies; instead, we generally put our faith in the ingenuity of the market -- entrepreneurs and innovators -- to erode barriers to entry and protect consumer welfare. But if monopoly power, once had, can be used to protect and extend itself, our reliance on the market will be frustrated and consumers will be hurt. Unlike positive-feedback-loops, which are a natural and inevitable market phenomenon, abuse of market power is anticompetitive and harmful; it means that a monopoly position has prevented innovation and entrepreneurship that would strengthen the economy and increase consumer welfare.

What's interesting in this regard -- and this is why I say that the new economy is fundamentally no different from the old when it comes to antitrust enforcement -- is that the anticompetitive techniques used to protect and extend monopoly power in the new economy are essentially no different from those used throughout history. Put a bit differently, while technology changes, human nature, as Adam Smith taught us long ago, does not. There are, to paraphrase Paul Simon, only so many ways to illegally hurt your competitor.

In our business, there are generally about a half-dozen or so of these techniques and they are used in the new economy in much the same way that they were used in the old. Let me first mention the basic techniques and then illustrate their application by referring to cases involving the new and old economies, mentioning for illustrative purposes three that are currently in court. The basic techniques -- apart from good old fashioned collusion in which potential competitors agree not to compete -- typically involve cutting off competitors' access to important suppliers and markets, inducing rivals not to compete, using tying to force customers to purchase other products, and engaging in predatory tactics to raise rivals costs or cut their revenues without a real business justification. Basically, these are the time-tested tricks of the monopolist's trade.

Let's take a quick look at several of them. First, there are the traditional anticompetitive distribution techniques: intimidating or coercing distributors who need your monopoly product, either informally or through formal exclusionary contractual arrangements. These kinds of practices are as old as the antitrust laws themselves and rest on the sound premise that the use of market power to restrict distribution of competing products can only injure consumers. That point is at the heart of our complaint in the *Dentsply* case, a very old economy case involving false teeth and exclusive dealing contracts with dental labs. It was also a key issue in the *Microsoft* case where the judge found that Microsoft repeatedly intimidated OEMs who wanted to distribute competitors's products and used exclusionary contracts with Internet Access and Content Providers to limit their distribution of the Netscape browser.

A second common, anticompetitive distributional practice involves tying two products together -- once again, a violation as old as the antitrust laws themselves. Tying allows a firm to use its market power in one product to force consumers to take a second product and thus often makes it harder for the firm's competitors to distribute their products. To be sure, a tying case can present complex factual issues about whether there are one or two products at issue, which in turn can raise important questions about potential integrative efficiencies that might result from a "tie." But distributional efficiencies -- i.e., simply putting two products together -- are no defense to tying. That was true in the 1930s when a unanimous Supreme Court ruled that IBM's decision to tie calculating cards to its calculator was unlawful and that was also true under the District court's opinion in *Microsoft* involving the tying of Microsoft's browser to its monopoly operating system.

Since a lot of discussion has focussed on the tying issue in *Microsoft*, let me emphasize that ties in the software industry, especially where, as in our case, the tied product (e.g., browsers) could undermine the monopoly position of the tying product (e.g. operating systems) can have particularly strong anticompetitive effects. In this regard, we need look no further than the remarks of Microsoft's Chief Operating Officer of Microsoft when he was asked in 1998 how small software companies could compete on products that Microsoft plans to fold into its operating system. His reply: these smaller rivals had three possible paths -- they could fight a losing battle, they could produce a successful product and then sell to Microsoft or another large company, or they could "not go into business to begin with because, hey, if you're a betting person, you know which way it's going to go." It's hard to think of a greater deterrent to innovation.

The next set of traditional antitrust violations involve what we call predatory, as distinguished from exclusionary, practices. Here we're talking about a business incurring expenditures that would be profitable only if they will defeat a competitor and then allow the business to recoup the short-term costs of the action through the long-term preservation of monopoly profits. And here again, these practices were used in the old economy as well as the new, a point readily demonstrated by the fact that this issue is at the heart of our *American Airlines* case and was key in *Microsoft* as well.

In the *American Airlines* case, we charged that, when faced with new entrants in Dallas, American incurred great expense -- by saturating the relevant city-to-city markets where the new entrant had started service (e.g., Dallas/Wichita) and lowering prices substantially -- in order to drive the new entrant from the market. The essence of the case is our claim that American would never have engaged in these practices had it not known that it could eliminate new entrants and then recoup its short-term losses by enjoying monopoly profits in the future. As American's CEO said to his colleagues at the time, "if you're not going to get them out [of the market], then [there is] no point to diminish [our] profit."

Moving next to the new economy, the facts of the *Microsoft* case provide an especially powerful example of this predatory technique. There, the judge found that Microsoft had spent hundreds of millions of dollars to develop and distribute Internet Explorer, not just for Windows but for Internet Access Providers and even for Apple. Microsoft did this, the court further found, even though it internally described IE as a "no-revenue product" and knew that, standing on its own, Microsoft's IE business strategy made no sense. After all, it's hard to sustain a business plan by paying millions of dollars to induce others to distribute a no-revenue product, especially one that cost hundreds of millions to develop. What made this strategy even more perplexing is that, according to Microsoft's own documents, "browser market share" -- share of this no-revenue product -- was seen a "priority number 1" within the corporation.

The reason this otherwise irrational business strategy made sense, of course, is that, as the district court found, Microsoft was protecting its monopoly profits in Windows by making sure that Netscape's browser did not obtain sufficient market share to create a platform that could ultimately erode Windows' dominance -- a fear that Bill Gates highlighted at the outset of Microsoft's anticompetitive campaign by noting that, if Netscape wasn't stopped, its browser would be able to "commoditize" the operating system.

I could give other examples of anticompetitive practices in the new economy -- like withholding technical information that competitors need to compete -- which were also observed in the old economy. But by now I think you get my basic point: when it comes to antitrust enforcement, the new, new thing isn't so new after all.

So let me conclude by highlighting two points. First, the focus of antitrust enforcement tomorrow, as it was yesterday, will remain on preventing the traditional anticompetitive techniques that businesses with market power have long used to maintain and extend that power. And second, given my first point, in the new economy as in the old, businesses with market power should have little problem in ordering their affairs in a way that keeps them free from antitrust difficulties.