Interview with
R. Hewitt Pate, Acting Assistant Attorney General, Antitrust Division, U.S. Department of Justice

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R. Hewitt Pate

Editor's Note: *The Antitrust Division's leadership is in a period of transition with the departure of Charles James, William Kolasky (International Deputy), and Michael Katz (Economics Deputy). On November 15, 2002, Attorney General John Ashcroft announced that R. Hewitt Pate had been named the Acting Assistant Attorney General for Antitrust. In this interview,* The Antitrust Source *discusses Acting AAG Pate's goals for the Division during this transition period and his views on issues of current interest to the antitrust practitioner, including the merger clearance process, the role of economic analysis, gun jumping, remedies, and the* Goldwasser *decision.*

Preceding his appointment as Acting AAG, Mr. Pate served as a Deputy to Charles James, overseeing transportation, airline, energy, and regulatory matters. Prior to joining the Antitrust Division in 2001, Mr. Pate was a partner at Hunton & Williams, where he litigated cases involving antitrust, patent, trade secrets, false advertising, and other business tort issues. In 1999, he was Ewald Distinguished Visiting Professor of Law at the University of Virginia School of Law, where he taught Unfair Competition.

Mr. Pate graduated first in his class from the University of Virginia School of Law, where he was a member of Order of the Coif and the Executive Editor of the Law Review. After law school he clerked for Supreme Court Justice Anthony Kennedy (1989–1990), former Supreme Court Justice Lewis F. Powell, Jr. (1988–1989), and Judge Harvie Wilkinson III, U.S. Court of Appeals for the Fourth Circuit.

ANTITRUST SOURCE: Everybody is interested in knowing how things have changed as a result of your appointment as Acting Assistant Attorney General. Can you tell us a little bit about how responsibilities have been reshuffled?

R. HEWITT PATE: Debbie Majoras and I are trying to use this interim period to make sure that the Division and its enforcement work stay on track, that we follow through on a number of initiatives that Charles James started, and that we keep the Division running well and doing high quality work. Debbie is now the Principal Deputy at the Division. That means that she is responsible for a very broad range of matters, and all six of the civil sections now report directly to Debbie. On the international front, Ed Hand (who is the Foreign Commerce chief) is serving as the Acting International Deputy for the present time. We are also heading towards a transition at EAG with Michael Katz departing as the Economics Deputy. So we have a lot of change going on at the Division. Sometime in March, David Sibley will succeed Michael Katz as the Economics Deputy. We hope to add an additional Legal Deputy soon. If we can get an additional Legal Deputy on board while I am here as the Acting AAG, international matters probably will be a primary part of that Deputy's focus.

ANTITRUST SOURCE: During this current period before an AAG is nominated and confirmed, what do you expect the priorities within the Division to be?

PATE: I am not sure I can add much more to what I just discussed. I do not think that in the Acting position it is incumbent upon me to announce any broad policy initiatives or directives. I think Charles's primary message was that we want to do good law enforcement, to continue to focus on criminal enforcement, to run the merger program well, and likewise to bring the appropriate civil non-merger cases when and where we find them. Particularly during this interim period, the key thing is to make sure that the Division operates well. So, for example, training, litigation management, and things like that, are going to be a focus for us. We are having a retreat and management meeting, combined with the Antitrust Institute, a training session for our new attorneys and economists later this month. Connie Robinson, the Director of Civil Enforcement, has been working very hard on these events. This sort of nuts and bolts work is where we need to keep our focus for the next few months.

ANTITRUST SOURCE: Does the Division intend to initiate any Section 2 cases?

PATE: At any given time we have many investigations ongoing, and if we find an appropriate Section 2 case we certainly will bring it. But I do not have for you today a pre-announcement of any sort of case.

ANTITRUST SOURCE: Would Section 2 rank high or low on your list of priorities?

PATE: I really would not characterize it that way. Section 2 ranks co-equally as an important part of the Sherman Act, which is one of the key statutes we enforce. I do not have a rank order of priorities in mind. Criminal enforcement is an extremely important part of what we do, as are the merger program and the civil non-merger program. We have to do a good job in all areas.

ANTITRUST SOURCE: The Division disbanded its Health Care Task Force last year, and in the merger allocation agreement conceded most of the health care area to the FTC. However, the DOJ recently entered into a consent agreement with Mountain Healthcare,[1] which raises the question whether the Division intends to play an active role in antitrust health care enforcement. Can you comment?

PATE: Let me start out with respect to what you referred to as the "merger allocation agreement"—that being the initiative that FTC Chairman Tim Muris and Charles James undertook to more clearly set forth for the bar and other interested parties how the FTC and the DOJ were going to go about sharing their antitrust enforcement jurisdiction. As it turned out, while I think the effort that was made on the clearance agreement was worthwhile, it did not result in the announced allocation agreement that the Agencies had initially advocated. It is true that in the health care area, in the energy area, in the media area, and in other areas, the clearance agreement would have made

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[1] Press Release, U.S. Department of Justice, Justice Department Requires Mountain Health Care to Disband (Dec. 13, 2002), *available at* http://www.usdoj.gov/atr/public/press_releases/2002/200552.htm.

some of the allocations crisper and clearer. That clearance agreement did not remain in force, however, and it is not being enforced now, so there has not been any de facto attempt to follow the clearance agreement. We have tried to continue in place what some of the congressional and other commenters on the clearance process suggested, which was to work hard on trying to make the clearance process that we had under the existing agreement work well. And I think while the level of merger activity has not been high, we have made some improvements in trying to avoid unnecessary delay or contention between the FTC and the Division on clearance matters.

But, with all that wind-up, you wanted to ask about health care. We did have a temporary Health Care Task Force. By definition it was a task force—it was not a full fledged section. As part of Charles's reorganization last year, he put health care, which is a very important area of the economy, on a footing with other industries and assigned health care to lawyers in the existing sections. The Division is going to continue to be active in health care. The Asheville case you mentioned does not really represent any sort of a change in what we have seen following the demise of the clearance agreement. We are going to continue to be fully engaged in health care antitrust enforcement. We may have some different emphases than the FTC; for example, Charles often mentioned the insurance side, which had been expressly reserved for the Division under the clearance agreement. That may be a focus for us, whereas Tim Muris, for example, has announced that he is interested in looking at consummated hospital mergers.

The long and short of it is that we continue to be, and expect to be, an active player on the health care front. I was recused from the *Mountain Health Care* case so I do not want to get too much into the details of that particular matter. I can talk about what was publicly reported when the matter was resolved—I think it is a traditional provider-side case of the type the Division has been involved in and the announcement we made about the case speaks for itself.

ANTITRUST SOURCE: How will the Division and the FTC allocate responsibility for health care mergers going forward?

PATE: We are going to apply the clearance agreement that we have. I do not have in mind any sort of a formal allocation. We are going to continue to be active in the health care area, and I know that Tim Muris is very interested in it. So far I would say that we work together well and I do not see any clearance problems on the horizon. I hope we will not have any.

ANTITRUST SOURCE: There are two significant projects underway at the Division: a review of how the Division evaluates coordinated effects in merger cases, and the antitrust remedies study. What is the status of those efforts?

PATE: Let me start with the Coordinated Effects project and describe it together with the Remedies project that Charles James initiated, because I think my answer is going to be roughly the same for both, which is that these were important initiatives that Charles got underway, and one of the things I hope to do while I am here as Acting AAG is to keep them moving forward. On the coordinated effects side, Andrew Dick and others at EAG have been doing a great amount of work in collecting economic literature, case law, past Division practices, and analyzing them in order to provide resources for doing our jobs better. I am not sure what form it will take, but I am sure that some of the fruits of our efforts will be shared with the bar and other interested persons through speeches as the year progresses. I think the same is probably a fair description of the status of the Remedies project. On the merger side, we have had some staff taking a look at past lessons

we have learned and hopefully what future best practices we can develop. In terms of how our work might be shared with the bar and other interested persons, it is probably going to be through Division employees' participation in ABA panels, Conference Board panels, and other sorts of CLE programs.

ANTITRUST SOURCE: When can we expect announcement of the results of these studies?

PATE: I do not know if there will be any formal "announcement," but I think you will start to see some of the benefits of these initiatives beginning in the spring and throughout the rest of 2003. I would say the timetable is roughly the same for both.

ANTITRUST SOURCE: Telecommunications has been a focus area of yours, at least prior to taking your current position as Acting AAG. The Division has recently recommended the approval of many of the Regional Bell Operating Companies' Section 271 requests to provide regional long-distance services after a history of generally refusing to go along with those proposals. Does that reflect a change in the Division's policy or does the Division believe that the competitive landscape has changed?

PATE: No, I do not think it reflects any change in policy. From my perspective, I look at the Division's 271 work as having developed in three stages. The first stage took place when Joel Klein was AAG and Marius Schwartz and others worked to develop the standards for evaluating 271 applications. During this time the Division reviewed several initial applications. I do not think it is surprising that many of the initial applications did not meet with success. At that time this was all a very new enterprise; incumbents were just coming to grips with some of their responsibilities, and the Department was coming to grips with the standards to apply. Then, in the second stage of the 271 work, there were a larger number of applications that represented an attempt to work through the process of trying to get, for example, OSS up to the standard that would support competitive entry which, as you know, was an issue in a number of those applications. In a number of cases, two or three applications were required in order to iron out some of those problems. I think now we are in a third stage in which it is pretty clear what standards the Division is going to apply. A number of the incumbents operate their systems on a regional or system-wide basis, and so, as almost all of them have generally moved through the process of getting at least some applications successfully completed, it is not very surprising that follow-on applications will be more likely to meet with success. So I think we are coming to a phase where the remaining applications are likely to go through in a more predictable and smoother fashion. That does not mean we are changing what we are doing. We have a number of talented people in the Telecommunications and Media section who are very carefully going through applications to make sure that the incumbents are meeting the obligations they have to meet in order to get a 271 application approved. I do not know whether there has been a change in the competitive landscape. There have been some recent media reports suggesting such a change—I think in particular of a recent *Wall Street Journal* article that suggested that there has been an uptick in competitive entry in regional telephone service. On the other hand, our standards for evaluating 271 applications have never focused on a particular threshold of entry as the standard. Rather, they are focused on whether the systems or practices of the incumbent are open to competition so that entry could take place. So, while I think there are some hopeful signs in terms of competitive entry, that is not really the focus of our 271 work as a test for decision.

ANTITRUST SOURCE: The FCC is reportedly planning to end the requirement that the Regional Bell Operating Companies offer their networks to competitors at wholesale rates. Has the Division been involved in that or been consulted about it? What's your view of it?

PATE: On 271 matters, for example, we work closely with the FCC. In terms of the rulemaking that is ongoing, no, I would not say that we have been participating directly in that. And as to the media reports, I think you must be referring to a report I saw today that indicated the FCC had in draft some proposal to change the TELRIC principles or the wholesale rates at which it requires RBOCs to offer service. I do not think it would be appropriate to comment on something that, as far as I know, is just a single media report that I saw for the first time this morning.

ANTITRUST SOURCE: A follow-up question on the Division's view of the *Goldwasser*[2] case in the Seventh Circuit. Reading the amicus briefs filed in the *Covad*[3] matter in the Eleventh Circuit and recently in the *Trinko*[4] case (which has a petition for certiorari pending), the *Covad* brief seems critical of *Goldwasser*, but the *Trinko* brief seems to take the Second Circuit to task for not following *Goldwasser*. Is there any tension in the positions taken in those two amicus briefs, and does the Division still stand behind the brief it filed in the Eleventh Circuit in the *Covad* case?

PATE: I do not think there is any tension in those positions. The Division, as far as I know, stands behind every brief that we have filed in the so-called *Goldwasser* area, whether it be the *Intermedia*[5] brief, the Eleventh Circuit *Covad* brief, the *Trinko* amicus brief in support of cert that we recently filed, or the *Covad*[6] D.C. Circuit brief that we recently filed. While different people have read Judge Wood's decision in *Goldwasser* in different ways, we think it is very important that that case not stand for the proposition that there is any sort of implied repeal of or implied immunity from the antitrust laws in areas that also happen to be covered by the obligations of the 1996 Act. I think you will notice in *Trinko*, which did not primarily address that issue, we reiterated our position. On the other side of the coin, we think it is important for courts to understand that the obligations of assistance imposed by the 1996 Act, which include very detailed duties of assistance at rates that are determined through processes put in place by and under standards promulgated pursuant to the 1996 Act, do not, by virtue of the 1996 Act, become part of the generally applicable Section 2 standards of antitrust law. I think we have been consistent in putting out both sides of that message in all the briefs that you mentioned.

ANTITRUST SOURCE: Is a failure to comply with the '96 Act requirements irrelevant in your view to the determination of whether or not there has been an antitrust violation?

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[2] Goldwasser v. Ameritech Corp., 222 F.3d 390 (7th Cir. 2000), *available at* http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=7th&navby=case&no=981439.

[3] Brief of Amici Curiae, Covad Communications Co. v. BellSouth Corp., No. 01-16064-C (11th Cir. Dec. 17, 2001), *available at* http://www.usdoj.gov/atr/cases/f9700/9708.htm.

[4] Brief of Amici Curiae, Verizon Communications, Inc. v. Law offices of Curtis V. Trinko, No. 02-682 (2d Cir. Dec. 2002), *available at* http://www.usdoj.gov/atr/cases/f200500/200558.htm.

[5] Brief of Amici Curiae, Intermedia Communications, Inc. v. BellSouth Telecommunications Inc., No. 01-10224-JJ (11th Cir. Mar. 28, 2001), *available at* http://www.usdoj.gov/atr/cases/f7700/7777.htm.

[6] Brief of Amici Curiae, Covad Communications Co. v. Bell Atlantic Corp., No. 02-7057 (D.C. Cir. Dec. 17, 2002), *available at* http://www.usdoj.gov/atr/cases/f200500/200567.htm.

PATE: I am not sure that I know exactly what you mean by the question. Is it possible that conduct that could violate an obligation of the '96 Act might also violate the antitrust laws? I think we have been clear in saying that the answer is yes, that the fact that conduct is covered by or in the same area as, or to use the term that the *Goldwasser* court did, "linked with" conduct covered by the '96 Act does not mean that the antitrust laws are displaced. On the other hand, I think it is very clear that simply to assert any violation of the standards of the '96 Act or even a series of violations of the '96 Act does not necessarily amount to an antitrust violation. I think most courts have been pretty consistent on that point, and our briefs certainly have been.

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ANTITRUST SOURCE: With regard to the wireless industry, there's been a lot of talk in the press about potential consolidation. How would the Division look at mergers between significant players in the wireless industry?

PATE: Ever since I started working at the Division eighteen months ago, I have been told that any day we would be seeing either a major transaction or a series of transactions in the wireless industry, so your guess is as good as mine as to whether or when that might happen. Over the past few years and in these past eighteen months, we certainly have seen a move toward a situation where we have six national players, and different numbers of players in various markets across the country. We would look at a wireless merger in the same way and use the same tools to review any other merger in the telecom area or otherwise. I think these transactions will raise some interesting issues that we have not seen posed in recent transactions, and we will have to take a careful look at the market in each case. By that I mean we must consider issues such as the possible substitution of wireless service for landline service. Certainly the U.S. is not in the same position as Europe on that front, but there is no question there has been some substitution of that type, so market definition issues will be interesting when and if those transactions occur. Another interesting issue may arise if one of these transactions is announced, and it is followed closely by a string of others. The Division may find itself in one of those situations where a number of transactions are pending. But the bottom line is that we will use the traditional tools and methods that we always use in looking at any mergers that come up.

ANTITRUST SOURCE: In the wireless setting, is there an argument that consolidations would be procompetitive because of the efficiencies in generating improvements in existing services and deployment of new so-called 3G services?

PATE: On that point, I would be very surprised to see a merger come to the Division where the parties did not make the argument that consolidation would lead to greater efficiencies that could be enjoyed faster if the merger were allowed to go through. In the context of 3G development, or otherwise, that might be one of the features that is held out as a beneficial part of the merger; it might depend on which of the carriers was seeking to combine with which other carrier. So, I do not know without being able to get into the details of it what we would do if an actual transaction came up.

ANTITRUST SOURCE: Let's turn to international competition issues. Can you describe for us the recent work that members of the Division have been involved in for the International Competition Network?

PATE: We have put a lot of effort into the ICN. It is an organization that is particularly valuable for the enforcement community because it is composed of government officials who are actually involved in doing enforcement work, as opposed to some of the broader bar and other groups that sponsor most of the educational and policy programs in the antitrust area. It has the benefit of being a virtual organization without a bureaucracy. While he was International Deputy, Bill Kolasky chaired the ICN merger working group. Since Bill has departed, Debbie Majoras has taken over that task, at least for the present time. In terms of programs, Connie Robinson, our Director of Civil Enforcement, and some of her staff put a tremendous effort into a recent conference that we held on investigative techniques. There were approximately 40 countries represented at this meeting in Washington. We had almost 100 lawyers and economists at the conference, and the Israeli Competition Authority took a significant part in developing the program, as did others. We will continue to have a variety of programs at which enforcers from various countries come together and discuss their experiences, discuss how their different approaches work, and hopefully learn from one another.

ANTITRUST SOURCE: What is the Division doing or planning to do with the information gathered at the joint DOJ-FTC Intellectual Property hearings?

PATE: As the year unfolds, I think that we will be working toward the development of a joint report with the FTC. I am not exactly sure what format the report will take, but we expect to work closely with the FTC and to arrive at a joint product that will be useful to the bar and to others in this area. We certainly conducted extensive hearings, received a lot of written material from a lot of very smart people with a lot of experience in this area, including academics, lawyers, corporate witnesses, and others. I am not sure about the timeframe, but it is something that Susan DeSanti over at the FTC and Frances Marshall, who is our Senior Counsel for Intellectual Property at the Division, are going to be giving their primary attention for 2003.

ANTITRUST SOURCE: Do you expect the report to issue this year?

PATE: That would be my hope.

ANTITRUST SOURCE: Is there any possibility that it will issue in conjunction with or lead to the issuance of new Intellectual Property guidelines?

PATE: I do not have in mind any revision of the IP guidelines right now. That is not the goal with which the hearings were undertaken. I would not rule out that at some point it might make sense to revise the IP guidelines, but I think it is more likely that what you will be seeing is a joint report of the type I have mentioned.

ANTITRUST SOURCE: Another initiative that Charles James mentioned last year was that the Division would be providing guidance to the bar and business community on gun jumping under the HSR Act. Is that initiative still in process?

PATE: Yes. The form that guidance is likely to take is going to be speeches and appearances by Division staff at various events. I talked about gun-jumping at a recent antitrust panel. More importantly, the way the Division makes clear its position on the law and on enforcement is to

undertake investigations and bring cases. On that front we may see some developments this year in terms of gun-jumping cases. It is something that we take very seriously.

More broadly than the gun-jumping area, one of the things we want to focus on in the Division is making sure that the rules that govern the HSR process are respected and that the Division's requests for information are respected, and so that sort of enforcement of process is going to be an important focus for us.

ANTITRUST SOURCE: Can you give us a status report on how the Merger Review Process Initiative is working out?

PATE: We think it has been a tremendous success so far. We think it can be even more useful than it already has been as counsel begin to understand the opportunities that exist to make the process work better. As you know, under the Merger Review Process Initiative, we held out the possibility that where appropriate, counsel can agree to undertakings with respect to a schedule for decision and a schedule of meetings with officials at various levels of the Department, so that we can attempt to focus investigations in a way that will lead to a quicker and better resolution. While I cannot go into the details of specific cases, I have in mind several situations where that has been done and where, by getting cooperation with the parties up front in terms of access to information, we have been able to focus on potentially dispositive issues and to bring an investigation forward. At the same time, this has both minimized the burdens of the process, and, more importantly, allowed us to obtain the information that will help us make an appropriate decision about whether to challenge a merger and make us better prepared to challenge it if necessary. It takes two in order for this process to work, though. Counsel need to understand that the Merger Review Process Initiative is not a one-way street in which we expect them to come and demand things from us. If parties want the process to work better, that means they are going to need to be forthcoming and responsive in their dealings with us during an investigation. But I think the answer is, so far so good. We think it has been a tremendous success. While the level of merger activity has not been anywhere near what it was during the '98–'99 merger boom period, we think that efficiencies of the process will be even more important in periods where we return to higher levels of merger activity, which history would show is likely to happen at some point.

On that front we may see some developments this year in terms of gun-jumping cases. It is something that we take very seriously.

ANTITRUST SOURCE: Has here been any attempt to quantify the increased efficiencies associated with the Merger Review Process Initiative?

PATE: I do not have any quantification in mind right now. I think it may be too early to say that I can demonstrate in a quantifiable way efficiencies from the Merger Review Process Initiative.

ANTITRUST SOURCE: What is the Division's current thinking on challenging mergers that have already been consummated?

PATE: It is certainly the case that we can always challenge a consummated transaction if we find a violation, and we would be ready and willing to do so if circumstances warrant it. I think it is obvious, however, that challenging a transaction after it has closed, particularly if it closed a long time ago, is a much more difficult undertaking than stopping a transaction that should not have gone forward in the first place. So my answer would be that we would not rule it out, but we recognize that it would be a difficult undertaking.

ANTITRUST SOURCE: The FTC has expressed an affirmative interest in attacking health care mergers after they have been consummated. Has the Division's appetite for post-consummation merger enforcement increased?

PATE: No, I think the considerations that I mentioned have historically guided us and will continue to guide us in the future. I do not think there is any pronounced change of appetite. If it is appropriate, we will do it, but there are difficulties involved in post-consummation challenges.

ANTITRUST SOURCE: Is there anything going on at the Division with respect to analyzing the role of efficiencies in merger analysis? And are there any plans in the works for new merger guidelines?

Factual investigation is critical. It cannot be replaced by running simulation-based exercises. Rather, econometrics and other techniques can supplement and be an important tool in merger investigations.

PATE: There are not any plans afoot for any new merger guidelines. You may recall that Charles James said that he would be perfectly pleased if he were able to complete his tenure as AAG without the promulgation of guidelines. That being the case, I have not inherited any such project, and I certainly do not have any intentions to start a project like that now. As to efficiencies, I think you can always expect to hear more from the Division on efficiencies because it is such a perennial topic of antitrust programs. We think they are an important part of doing good merger analysis.

ANTITRUST SOURCE: What are the Division's current views on the use of econometrics in merger investigations?

PATE: Econometrics can be an important tool in merger investigations. Our economists stay up to date on econometrics and are very comfortable with it. As with all economic evidence, I would say that econometrics and other simulation-based work can be important and helpful. On the other hand, we cannot lose sight of the fact that we need to develop the actual facts that relate to the competitive situations we are addressing. Factual investigation is critical. It cannot be replaced by running simulation-based exercises. Rather, econometrics and other techniques can supplement and be an important tool in merger investigations.

ANTITRUST SOURCE: How does that comment relate, if at all, to the decision to challenge the Echo Star Direct/TV merger[7]?

PATE: My comment was not directed toward the Echostar/DirectTV merger, but I will say that based on the facts that we developed in our investigation of the merger and based on the economic work that a number of our good economists at EAG undertook, we thought it was quite clear that the merger needed to be challenged. We did that, and we are pleased that the merger did not go forward, because that's going to preserve competition in all areas of the country. In more populated and urban areas, it's going to ensure at least three providers for satellite or for MVPD services. In more rural areas, the merger would have had many attributes of a two-to-one transaction and left many of viewers without any choice at all as to their MVPD provider.

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[7] United States v. Echostar Communications, Corp., Civil No. 1:02CV02138 (D.D.C. Oct. 31, 2002), *available at* http://www.usdoj.gov/atr/cases/f200400/200409.htm.

ANTITRUST SOURCE: Was there any way that that transaction could have been fixed?

PATE: I am not going to speculate on that. Our job is to take the transactions as proposed and try to evaluate whether or not they comply with the law. There was a lot of speculation in the press about what might, could, or should have happened with that deal that involved a lot of parties. That is for those private parties to deal with, and not for me to speculate about.

ANTITRUST SOURCE: You have noted a decline in the amount of the number of mergers brought to the Division for analysis. Has that resulted in a reallocation of resources to non-merger activity?

PATE: It has not resulted in any reallocation. Certainly we have had more time to put into policy initiatives, such as reviewing coordinated effects, remedies, and merger process. It has been easier, for example, to find time to devote to training activities that are designed to enhance our litigation capabilities. We always try to make a good use of attorneys' and economists' time, no matter what is the level of merger activity. I think we are doing that, but we have not reallocated anyone's functions on the basis of merger activity levels. ●