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Closing Fireside Chat with the Assistant Attorney General for the U.S. Department of Justice Antitrust Division

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CLOSING FIRESIDE CHAT WITH THE ASSISTANT ATTORNEY GENERAL FOR THE U.S. DEPARTMENT OF JUSTICE ANTITRUST DIVISION

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WEISER: All right, this is a great pleasure to bring the conversation home with Bill Baer, who really does have an extraordinary background to set him up for his current job. He has worked in the antitrust world for—how long?

BAER: Well, since the '70s.

WEISER: I was going to say coming on 40 years, and you also had the benefit of taking antitrust law from Bill Baxter and having Bob Pitofsky as your mentor. So not only does he have the extraordinary background, but has also been trained by the very best. So we'll have the chance for a discussion, we'll get some folks involved in the end. I want to start with an important point I adverted to earlier, which is that competition policy is not necessarily limited to antitrust law as enforced by the courts. Could you explain a little bit your thoughts on that topic?

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* At the time this conference was held, William J. Baer was Assistant Attorney General for Antitrust in the United States Department of Justice. On April 17, 2016, President Obama asked Mr. Baer to become Acting Associate Attorney General of the United States. Press Release, DOJ, Attorney General Loretta E. Lynch Announces Bill Baer to Serve as Acting Associate Attorney General (Apr. 11, 2016), https://www.justice.gov/opa/pr/attorney-general-loretta-e-lynch-announces-bill-baer-serve-acting-associate-attorney-general [https://perma.cc/LM95-VN72]. Assistant Attorney General Baer participated in this interview at the 16th annual Silicon Flatirons Center Digital Broadband Migration Conference on February 1, 2016. Video of this interview is available at https://www.youtube.com/watch?v=C351xEX0h4g [https://perma.cc/3HH7-3DP4].

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BAER: Sure, but let me first thank you for the invitation to join you today. It has been quite an experience. As Phil mentioned, and as I said to him last night at dinner, it is an honor to be here. The manner in which people debate at this conference, the respect everyone has for differing points of view, and the constructive dialogue that occurs here, are all exceptional. It is an extraordinarily well-organized conference, and the way in which your team—the students—have worked to deal with the challenges presented by the snowstorm is just impressive.

What we do at the Justice Department's Antitrust Division—at least my view of it—is, first and foremost, law enforcement. We go after cartels, we go after civil violations, and we take a slightly different, forward-looking view when it comes to mergers and acquisitions. That is core to what we do, and it's also the core of what the FTC does. But, we need to think about where we fit in time and in space. And that really is, I think, the issue you're raising. How do we think about the right role of antitrust enforcement? We are not pressing a view of antitrust enforcement *über alles*, which was discussed at the last panel yesterday.[1] We have markets where there may be shortages, where there may be monopolies that have been created by regulation, by scarce inputs, and we need to think about how we enforce the law in those markets.

We also need to think about ways in which we can communicate to people about how to make the market work best even though there's a regulatory overlay to it. For an example of this, you can look to our advocacy at the state level about the medical industry, in particular regarding certificate-of-need requirements.[2] The DOJ and FTC agree that these mechanisms are outdated and likely inhibit competition. You can think about some other occupational licensing requirements, that many states

1 The January 31, 2016, antitrust panel discussed the necessity of net neutrality rules, and whether or not antitrust law alone was sufficient to preserve competition. Silicon Flatirons, *2016 DBM: Antitrust*, YOUTUBE (Feb. 4, 2016), https://youtu.be/HATXZohzzDo [https://perma.cc/4V4Z-EZV8].

2 State "certificate-of-need" laws typically require, in some form, that hospitals and other health care providers obtain state approval before expanding, establishing new facilities or services, or making certain large capital expenditures. The Antitrust Division, working jointly with the Federal Trade Commission has on several occasions advocated that states repeal or limit the operation of these laws. *See* Press Release, DOJ, Department of Justice and Federal Trade Commission Support Reform of South Carolina Laws that Curb Competition, Limit Consumer Choice and Stifle Innovation for Health Care Services (Jan. 11, 2016), https://www.justice.gov/opa/pr/department-justice-and-federal-trade-commission-support-reform-south-carolina-laws-curb [https://perma.cc/3VL7-JXBU]; Press Release, DOJ, Department of Justice and Federal Trade Commission Support Reform of Virginia Laws that Curb Competition, Limit Consumer Choice, and Stifle Innovation for Health Care Services (Oct. 26, 2015), https://www.justice.gov/opa/pr/department-justice-and-federal-trade-commission-support-reform-virginia-laws-curb-competition [https://perma.cc/4VLH-SWSA].

have, that arguably do more to protect the professionals involved in that occupation than necessarily to provide meaningful competition that benefits consumers. We can think about the policy work we do with colleagues at the FCC on telecommunications, with the DOT and the FAA on transportation—a subject I think you mentioned yesterday[3]—and with the USPTO and others on intellectual property. That is to say, we are thinking about ways in which we can use our expertise to suggest how, in a regulated environment, part of the answer might be adjusting regulation so that competition can make that market deliver goods and services at the highest quality and lowest price to U.S. consumers.

WEISER: One area that's very much in the weeds of this discussion is spectrum, and how the market for spectrum is structured and developed by FCC decisions. The FCC, recently, for their incentive auction, has limited the ability of certain larger firms to buy more spectrum licenses. How does the DOJ work on those sorts of matters and collaborate with the FCC?

BAER: That's a great example of an FCC regulatory mandate to allocate newly available spectrum that broadcasters are giving up, and to structure the process of allocating it to benefit the public interest. It's a great opportunity for us to weigh in on competitive effects. We've got a history in wireless telecommunications where a few incumbents have actually obtained a significant chunk of spectrum (in particular, the low-frequency, high-value spectrum that can more easily penetrate buildings).[4] The current market dynamic is that there are two really big players (Verizon and AT&T) and a third and fourth (Sprint and T-Mobile) that have less opportunity to build out. If you put this new chunk of spectrum out there for auction[5], especially in areas where a particular firm has a high percentage of the already existing spectrum, the big players likely will have every incentive to pay the most because it increases their market

3 *See* Silicon Flatirons, *2016 DBM: Technological Change and Industry Structure*, YOUTUBE (Feb. 3, 2016), https://youtu.be/iib9V_JQGxw [https://perma.cc/K386-LFY9].

4 In 2014, the FCC reported that the two leading carriers had 73% of low-frequency spectrum. *Policies Regarding Mobile Spectrum Holdings Expanding the Econ. and Innovation Opportunities of Spectrum Through Incentive Auctions,* WT Dkt. Nos. 12-268, 12-269, Report & Order, 29 FCC Rec. 6133, 6162 para. 58 (2014).

5 The FCC's broadcast incentive auction is a process by which the FCC seeks to free up low-band spectrum for wireless use. The initial reverse auction stage consists of the FCC setting a target amount of spectrum to free, and then paying broadcasters to go off air or move to meet that target. The second "forward auction" stage consists of the FCC putting the cleared spectrum up for auction, with the amount owed to broadcasters acting as a reserve price. If the reserve price is not met, then the Commission lowers the target, and the process repeats until the reserve is met. *How It Works: The Incentive Auction Explained*, FCC, https://www.fcc.gov/about-fcc/fcc-initiatives/incentive-auctions/how-it-works [https://perma.cc/7MJ4-NKZ4] (last updated Jan. 8, 2016).

power—it gives them more opportunity to exclude opportunities for rivals. We have been an active participant (I think we filed three comments)[6] in that rulemaking process, taking the position that there should be a market power screen to prevent the most powerful players from increasing their power through buying more spectrum. And ultimately, the Commission under Tom Wheeler's chairmanship adopted such a screen.

WEISER: So, I've got a few different questions in the area of merger review that I would like to walk through with you. The first is a tricky one that doesn't get litigated that much, so it rests a lot on the prosecutorial discretion of the Antitrust Division. In particular, how do you think about mergers where two markets are at issue and where you may have benefits in one market and there may be incremental harms in another? I'm thinking here about the DirecTV/AT&T merger where some people said there might be some incremental loss of video competition[7], because in some parts of the country it was arguably a 4–3 merger, where number three and number four (or two and four) might be merging. But there are also efficiencies that could come from the merger. How, in general, do the antitrust authorities look at such cases? And if there's anything about that specific case that you can comment on, we'd welcome that as well.

BAER: Well, first I think we need to look at claims of efficiencies—whether they're in-market or out-of-market—a little skeptically. And let me elaborate on that. As an initial matter, in merger enforcement, we are undertaking a difficult predictive exercise under Section 7 of the Clayton Act, which tells us that we should prevent the accumulation or acquisition of market power and err on the side of preventing the anticompetitive effects of mergers in their incipiency.[8] In performing this predictive

6 *See Policies Regarding Mobile Spectrum Holdings*, WT Dkt. 12-269, Ex Parte Submission of DOJ Executive Summary (filed Apr. 11, 2013), https://www.justice.gov/sites/default/files/atr/legacy/2013/04/15/295780.pdf [https://perma.cc/79PG-7WXL]; Letter from DOJ Antitrust Division, *Policies Regarding Mobile Spectrum Holdings*, WT Dkt. 12-269 (filed May 14, 2014), https://www.justice.gov/sites/default/files/atr/legacy/2014/05/15/305961.pdf [https://perma.cc/C26B-H24P]; Letter from DOJ Antitrust Division, *Policies Regarding Mobile Spectrum Holdings*, WT Dkt. 12-269 (filed June 24, 2015), https://www.justice.gov/atr/file/630891/download [https://perma.cc/J8GU-L47H].

7 *See, e.g.*, David Lazarus, *Honestly Speaking, Consumers Lose in AT&T-DirecTV Deal*, L.A. TIMES (May 19, 2014), http://www.latimes.com/business/la-fi-lazarus-20140520-column.html [https://perma.cc/GU7T-PE5K]; *Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Dkt. No. 14-90, 41, Petition to Deny of Free Press, (filed Sept. 16, 2014), https://ecfsapi.fcc.gov/file/7522820501.pdf [https://perma.cc/Q6V2-GY4W].

8 15 U.S.C. § 18, as revised, prohibits stock acquisitions or mergers "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Clayton Act, 15 U.S.C. § 18 (2012).

exercise, our key job is to take a very hard look at whether there is the potential for there to be anticompetitive consequences—such as increased market power—from a particular merger, whatever the products or services at issue. Very often people come forward and say "but you should allow this merger because there are great benefits; we will be a more efficient competitor"—which, if there is a sufficient factual basis, is an argument our merger guidelines invite.[9] Bill Baxter, whom you mentioned before, was my antitrust professor and a wonderfully thoughtful person. He thought efficiencies should count for zero. He totally bought into the longstanding Supreme Court case law that it is not the job of the antitrust agencies.[10] I had a long conversation with him years ago about it, and his bottom line was basically that because it's so easy to gin up a claim of cost savings, it's very difficult to rely on efficiencies claims. The agencies are skeptical, but not that skeptical.

In evaluating efficiencies, we take a couple steps. First, we take a look at whether or not there is likely to be a serious market power enhancement from the transaction. If we think that's pretty likely and it's a pretty significant enhancement in market power, we're going to be highly skeptical of any efficiency claims, in-market or out-of-market. Second, where there is a close call on the competitive effect, then we're going to look more deeply to differentiate between efficiencies that past history suggests can be realized and those that history suggests cannot.

In markets where there are examples of recent mergers, companies can come in and show us a trend line or show us what happened in the last deal—e.g., that they actually were able to lower overall costs and increase their competitiveness. That is just a long-winded way to say that if you can show us those sorts of evidence, and we don't have a high level of concern about anticompetitive consequences in a particular market, we will take efficiencies claims into account. The courts say we don't have to consider out-of-market efficiencies when we're litigating.[11] But frankly, if you've got a very minor risk of anticompetitive harm and demonstrably lowered costs likely to result from the consolidation, as a matter of prosecutorial discretion, a good antitrust enforcer will take a really hard look at that.

WEISER: That's helpful. Another matter that you have

9 *See* DOJ & FTC, HORIZONTAL MERGER GUIDELINES § 10 (2010).

10 *See, e.g.*, FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967) ("Possible economies cannot be used as a defense to illegality.").

11 United States v. Phila. Nat'l Bank, 374 U.S. 321, 370 (1963) ("If anticompetitive effects in one market could be justified by procompetitive consequences in another, the logical upshot would be that every firm in an industry could, without violating § 7, embark on a series of mergers that would make it in the end as large as the industry leader.").

talked about before is the significance of disruptive innovation or mavericks. One case that comes to mind is in the wireless sector where T-Mobile has undertaken a lot of interesting experiments and they've been innovative in their marketing and product development.[12] That sector is a beneficiary of merger policy that has maintained independent companies in that space. Is that a case from which we can learn something about how we see mavericks? One of the concerns people say: "Is the key aspect of the T-Mobile example just that it is an innovative leader? Or is it that they're the number four player?" How do you connect the concepts of disruptive innovation and mavericks to market structure?

BAER: Let me first use that example to go back to your prior question: One of the key defenses AT&T made in its failed effort to buy T-Mobile was a claim of efficiencies,[13] but they gave up when both the FCC and the Antitrust Division said we're going to the mat on this one. AT&T said they would not be able to build out LTE to more than 80% of American consumers unless we let this deal go through. And within months after their abandoning the deal, they were basically saying they thought they would shortly be able to build out LTE to 96% of American consumers. That's one reason why taking those efficiency claims a little bit skeptically is an important thing for us to do. But, you know, that deal gets abandoned. What happens? Well, T-Mobile has to go to plan B. And it's too bad that merger ever got proposed because the implementation of plan B was delayed for the about 18 months in which the deal was under scrutiny. And there is a cost to competition during that period when the merger is under review. Parties have a right to propose them. But it is one of the reasons why I think sellers increasingly are looking for reverse breakup fees, because they want to be compensated for that period of time when they're stuck in this limbo. I have represented companies in these situations when the employees are going nuts; they don't know what to do. And then, when it's over, there is really a diminution in the competitive significance of the seller. Usually

12 William J. Baer, Assistant Att'y Gen., Remarks at the Chatham House Annual Antitrust Conference (June 18, 2015) (transcript available at https://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-remarks-chatham-house-annual-antitrust) [https://perma.cc/5LSA-R6FQ] ("[M]ore than three years after AT&T abandoned its bid [to acquire T-Mobile], T-Mobile remains a disruptive force for change. Characterizing itself as the 'Un-Carrier,' T-Mobile declares that it is 'redefining the way consumers and business buy wireless services through leading product and service innovation.'").

13 *See Bureau Dismissal Without Prejudice of AT&T's Applications for Transfer of Control of T-Mobile USA, Inc.*, WT Dkt. No. 11-65, Bureau Staff Analysis & Findings, paras. 89–90, 210–15 (Nov. 11, 2011), https://apps.fcc.gov/edocs_public/attachmatch/DA-11-1955A2.pdf [https://perma.cc/M282-8A5V].

the buyer keeps pushing forward.

What happened when T-Mobile had to go to plan B? They basically blew up the old format of how you would go to market, and offered plans without a two-year commitment and other consumer friendly options. Now they're changing the way data is bought and paid for, and it has really disrupted that whole marketplace. You can see competitors have had to respond. We are benefiting from a degree of competition that did not exist before. And I'll say that one of the first things that happened to me when I came into the job in 2013, was (and this is all public) Sprint's owner came to me and said "all right, you wouldn't let AT&T/T-Mobile go through, but why not let the third and fourth players in this market—Sprint and T-Mobile—combine; it will create a stronger number-three?" Well, everything we do know about the market, about the positioning of Sprint and T-Mobile, suggested that, in fact, this market could sustain four, and competition would be better for it. And, with the spectrum auction coming up, T-Mobile would be potentially in a position to deal with some of its disadvantages. There was about a three-month lobbying campaign to get us to change our minds, but with the combination of a sort of steeliness at the FCC and at the Antitrust Division, they gave it up. In the meantime, though, T-Mobile was continuing down plan B, and, as I said, we've seen the benefits of that.

WEISER: One other issue that antitrust has to deal with is market definition. This is often viewed as a central foundational exercise, but it's also a difficult one in technologically dynamic markets. Take two markets that antitrust enforcement has looked at over the last 20 years here: one is MCI WorldCom looking to merge with Sprint, where the market being affected included long distance, even with eminent Bell entry. And part of that was the merger guidelines talk about harm in a relevant market within [a] two-year period, and not really looking too much beyond that. Another one is XM merging with Sirius, where the merger was allowed to go forward in part because there was a belief that wireless broadband enabled smartphones were going to compete with the merged firm, even though it seemed almost certain at the time that this development was going to be more than two years out. How do you approach this question of market definition in technologically evolving markets?

BAER: The challenge may be more apparent there, but it's not different in-kind from what we have to do in a brick-and-mortar or service-industry merger. As economic tools have evolved, we've tried to update our thinking and our horizontal

merger guidelines (which were last revised in 2010).[14] You were probably at the front end of that exercise when you were at the Antitrust Division. We try in those guidelines to make clear that merger analysis should not be seen as simply a sequential thing (e.g., you define a product and geographic market, then you look at market shares, then you look at entry—is it likely to come in a timely and significant fashion—then you look to efficiencies that they offset). The reality is you've got to look at the competing firms, the degree to which they're particularly close rivals, the degree to which a market may be so concentrated that there already is coordinated behavior going on, which was a concern we articulated in our challenge to the merger between U.S. Airways and American Airlines.[15] When you look at the reality of the competition, you look at it today, but you also make sure you aren't doing a static snapshot. You don't let yesterday predict tomorrow. You take a look at where innovation has been going.

You mentioned MCI/Sprint. I think a large part of the concern there related to the Internet backbone, which was the focus of the first cause of action in [the] complaint we filed in that action. If MCI and Sprint combined, they would have controlled about 53% of the Internet backbone, and that was the thing that concerned us most.[16] And, looking at it today, that concern was fully justified. We also identified the other issues you raised, and our predictions about long-distance competition may have been wrong, and there has been more competition as things in that market evolved. But we did our best. So in a high-tech market, this sort of convention of "we're just talking about two years" shouldn't be viewed too rigidly—and our guidelines are more flexible about that. We do really want to get it right. We want to see where market evolution is going, and focus our analysis on important competitive dynamics. The further out you look, the harder it is to predict, but it is a legitimate thing to look at in these markets with fast-paced innovation.

WEISER: One recent merger that came before the Antitrust Division is the Comcast/Time-Warner merger.[17] You have been

14 DOJ & FTC, HORIZONTAL MERGER GUIDELINES (2010).

15 Amended Complaint at 14–16, U.S. v. US Airways Grp., Inc., No. 13-cv-1236 (D.D.C. Sept. 5, 2013), https://www.justice.gov/atr/case-document/file/514521/download [https://perma.cc/B6PF-ESL4].

16 Complaint at 14, para. 32, U.S. v. WorldCom, Inc. (June 26, 2000), https://www.justice.gov/atr/case-document/file/516831/download [https://perma.cc/E8WN-2NL8].

17 Press Release, DOJ, Comcast Corporation Abandons Proposed Acquisition of Time Warner Cable After Justice Dep't and the Federal Communications Commission Informed Parties of Concerns (Apr. 24, 2015), https://www.justice.gov/opa/pr/comcast-corporation-abandons-proposed-acquisition-time-warner-cable-after-justice-department [https://perma.cc/JEP9-PL99].

quoted as saying that the concern there was that Comcast would have had too much control over, and too few competitors in, shaping the future of video competition and broadband Internet service. I believe the figure that you or others may have said is that post-merger Comcast would have served almost 60% of high-speed broadband subscribers in the U.S.[18] It looks like that concern is rooted in the merger guidelines statement—that a merger that would be likely to create a potential harm to competition, sort of an exclusionary harm, was at issue.[19] What can you say about that case? And then as you think about it, how would you weigh making type I versus type II errors as you're thinking about stopping a merger? How much do you worry about MCI WorldCom, if you would have got that one wrong versus if we didn't stop it, all the harm that could come? That is part of the real challenge in making these judgments in incipiency: How do you approach that generally, and then specifically to Comcast/Time-Warner, what can you say about it?

BAER: Well, let me start by saying that with Comcast/Time Warner, I was not actually involved in it because I was involved in a prior matter—the GE/Comcast deal—but I've learned some since then from what's been said publicly, and as a result I have talked some about it. In Comcast/Time Warner, we really were worried that having one firm responsible for delivering content, providing high-speed Internet to almost 60% of U.S. homes, had the potential to distort competition both upstream and downstream. And it's not unlike, I think, some of the issues that play out in the net neutrality debate. You have this "one pipeline" problem, where one entity controls the last mile connecting almost 60% of U.S. homes with high-speed Internet service, and it would give that one entity—Comcast—significant and disproportionate leverage in dealing with content providers that Comcast competes against in its video business.[20] We worried that this combination would distort competition and, on the other hand, there were not particularly compelling efficiencies offered. As for efficiencies, we heard the argument that this was a great opportunity for Comcast to get more eyeballs, and maybe this would lower, marginally, the cost of program acquisition. But, it was not a compelling efficiencies story, whereas we had this substantial competitive

18 William J. Baer, Assistant Att'y Gen., Keynote Address at the Future of Video Competition and Regulation Conference at Duke Law School (Oct. 9, 2015), https://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-keynote-address-future-video-competition [https://perma.cc/BN3N-7EAP] ("The combined firm [of Comcast and Time Warner] would have ended up with . . . controlled access to nearly 60% of the high-speed broadband subscribers in the U.S.").

19 DOJ & FTC, HORIZONTAL MERGER GUIDELINES 1–2 (2010) ("Enhanced market power may also make it more likely that the merged entity can profitably and effectively engage in exclusionary conduct.").

20 DOJ, *supra* note 17.

concern.

Now, going to your broader point: It's unusual, I think, that by blocking a merger where we have a plausible fact-based story of harm, you could thereby cause long-term injury to the market. I think what we did is really what the Clayton Act tells us to do—err on the side of stopping a deal that risks competitive harm, and let companies compete and come up with a better mousetrap and grow that way. The notion that we should be very deferential to shortcuts—shortcuts by acquisition—is really what we try to guard against. That's the basic framework.

WEISER: So we have a number of students here who are interested in antitrust, as you can see from the chair you're in now, and how lawyers help either oppose or defend proposed mergers. What advice do you have for the students about how to be an effective advocate for a particular position?

BAER: Good question, and I think the hard part about being an effective advocate is appreciating that you're not doing your client or yourself a service if you're only thinking about advocating your own position. You can't be subtle and effective, I think, without understanding the other side's perspective on a matter and thinking about how you would argue it. You know, that is what a moot court or debate teaches you to do—flip it, think about the other side of something. And don't be afraid to give the ground that the judge is going to see is already occupied by your adversary. It's not that you have to win everything, you really have to suggest that your story, your argument—and I use those terms interchangeably—takes into account the relevant facts and on balance gets you to a good outcome.

There is also, if you're dealing with the government, a need to appreciate that you're appealing to my—to our—prosecutorial discretion. If you come and act in a totally adversarial way, trying to persuade me to let you go your way by being two-dimensional, forceful, and not conceding anything, it is not terribly helpful. Remember that I've got a whole lot of confidential information that you don't, and I'm trying to process it all. You need to get me to want to listen to you. If you're representing a private party, you should know that we do learn a lot from our engagement with merging parties, with people involved in our conduct investigations. But when they come in guns blasting—sometimes at the staff level in particular—that shuts down that beneficial dialogue. And you want to win at the staff level, so if you're in my office trying to convince me not to approve a staff recommendation to go to court, you are already in kind of a losing position even though I might have ended up agreeing with your position. But, you want to win at the staff level, and that involves a different

kind of three-dimensional engagement than some players actually use.

WEISER: So, thinking about the staff, the Antitrust Division now has staff lawyers and staff economists. Edith Ramirez talked about the FTC developing a staff of technologists and engineers.[21] Can you see a day where the Antitrust Division, in different industries, with telecommunications being an obvious one, the information technology sector being another notable one, would start to not just retain outside experts, but maybe hire technologists to be part of the process?

BAER: Yes, I can see that day. We're not there yet, in part because the mandate of the FTC is broader.[22] If you get into privacy and consumer protection areas, they probably had an earlier need for them than we do, and in the short-term we can take care of the need for that insight by using outsiders. I had a series of meetings in the last couple of weeks about how we do our investigations—and this is where a technologist would help—where we've successfully transitioned from a hard document world to email and electronic copies; and we're also transitioning to see situations where the communications that often are most revealing of criminal intent, or anticompetitive intent, in a conduct investigation, or even in a merger, aren't retained anywhere. Mobile applications allow you to communicate and we don't know enough about it. We're figuring out how we're going to do our job in the future.[23] We do, as many of you know, a lot of price-fixing investigations (it's about 40% of what the Antitrust Division does), and we work very closely with the FBI on those matters. We've got great partners over there that help get us educated on what to do and how to do it. We may need to actually use more covert activity because we're not going to be able to get the email or cell phone data that we used to get that helps put a case together.

WEISER: So, as I said earlier, you were extremely prepared for this job. What's been the hardest part of the job for you?

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21 Silicon Flatirons, *2016 DBM: Welcome & Fireside Chat*, YOUTUBE (Feb. 1, 2016), https://www.youtube.com/watch?v=9JksN2zy10w [https://perma.cc/PU63-P4CF] (It is "a top priority [for the FTC to hire technologists]." "[Technology is] an area that [the FTC] had to make an even greater investment because . . . given the role that technology plays in today's world [the FTC] absolutely need[s] to have people who have the skill set to understand it.").

22 *See* A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority, FTC, https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority [https://perma.cc/YRG9-HQ9Y] (last updated July 2008).

23 Tonja Jacobi & Jonah Kind, *Criminal Innovation and the Warrant Requirement: Reconsidering the Rights-Police Efficiency Trade-Off*, 56 WM. & MARY L. REV. 759, 822 (2015) ("One response has been to design new technology that promotes privacy by the fleeting nature of its mode of communication—by destroying any record of communication, it becomes more difficult, though not impossible, for a third party to access the information.").

BAER: The hardest part of the job was when I came in, January of 2013, and we had been through a two-year hiring freeze.[24] We had sequestration, and my predecessor closed four of seven offices outside of DC, but with a promise that where anybody didn't transfer to a remaining office we'd be able to hire to fill those positions, so there would be no net loss in bodies. And what happened was those offices were closed, and then the hiring freeze hit and we had our normal attrition. By the time I got to the Division in January 2013, we were at about 20 to 25% under our typical staffing level. And to basically keep momentum going, once we got permission ahead of the lifting of the hiring freeze, we began hiring to get our numbers back up. But, in my experience—and those of you who have been associated with law firms know this too—when you bring in 60, 70, 80 people, the potential for people to get lost, or individuals (e.g., the partners and senior associates) not to invest because there are just too many, is overwhelming. So we've been focused on making our way intelligently through this hiring bubble, and we have hired 150 people in 18 months—not all lawyers, a lot of them legal assistants, IT specialists, and economists. But to get them integrated, to get them up and running, to make sure they feel they have a stake in what we do and understand how we do it, to get them trained, to get them mentored—that has been the biggest challenge. It's been a great challenge, and I think when I leave we will have renewed the talent pool in the Antitrust Division in an unprecedented way. But it's a hard slog and we need, as managers, to spend a lot of time dealing with these issues.

WEISER: When you came into the Division, or after you got there, and had a chance to get the lay of the land, did you develop any overall goals for your leadership? And, as you start looking back with the presidential election upon us, are there things you're feeling proud of having been a part of moving forward?

BAER: Yes, although I came in perhaps with fewer intentions of making mid-course corrections because there already had been some corrections that my predecessor, with whom you worked, Christine Varney, had started. And I talked with her. We talked about the job and what the priorities were. We discussed that there was a view out there that the Antitrust Division was reluctant to litigate, and that we needed to change that perception. If you're perceived as afraid, people will be more

24 *See* Press Release, Dep', Attorney General Holder Announces Justice Department to Lift Hiring Freeze (Feb. 10, 2014), https://www.justice.gov/opa/pr/attorney-general-holder-announces-justice-department-lift-hiring-freeze [https://perma.cc/AZT5-XN7B].

aggressive. For example, they'll try to force cheap settlements on you in a merger matter.

Your behavior responds to the perception of how talented the enforcer is, and how committed he or she is to using the tools of enforcement. And so by bringing in a bunch of experienced outside litigation talent, together with insiders who had some litigation experience and lots of antitrust knowledge, I think we successfully have shown that we're willing to go to court, that we're credible in court, and that—though we don't necessarily win all the cases—nobody has an easy fight against the Antitrust Division. That was one priority that was started before me, which I think we pushed even farther along. We are now, in an average year, in civil litigation (mergers, like Bazaarvoice;[25] and conduct matters, like the eBooks case against Apple[26]), in court about three times as much in this administration as we were during the prior administration. So that's changed, and I think it affects the way lawyers counsel about the risk of going forward with a particular course of conduct or a particular merger. That's a good thing over the long run, and I think it's very helpful.

On the criminal side, I think one of my priorities, which was a little ahead of what people call the Yates Memorandum—issued by Sally Yates, the Deputy Attorney General—was that we really want to make sure that in prosecuting financial and other white-collar crimes, we are holding corporations accountable, but also going after the most senior culpable officials.[27] And we've actually upped our emphasis on that over the last three-and-a-half years. Now, on average, for every corporation that has been found guilty of an antitrust crime (they usually plead out, though not always), we have about two-and-a-half individual guilty pleas or convictions. So we aren't letting the corporation take the hit and allowing the individuals to walk free. But you know 40 years ago an antitrust crime was a misdemeanor, and so we've had to get courts accustomed to treating antitrust crimes just like other white-collar crimes. And the average jail sentence has gone from about a year, ten years ago, to 25-26 months in the last few years. So that was another priority, and we've made good progress on that too.

WEISER: That's great. Let's get some questions, again starting from students and I'm not afraid to call folks.

Audience questions.

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25 United States v. Bazaarvoice, Inc., No. 13-CV-00133-WHO, 2014 WL 203966 (N.D. Cal. 2014).

26 United States v. Apple Inc., 952 F. Supp. 2d 638 (S.D.N.Y. 2013).

27 Memorandum from Sally Quillian Yates, Deputy Att'y Gen., to the Assistant Att'y Gen., Antitrust Div., et al. (Sept. 9, 2015), available at http://www.justice.gov/dag/file/769036/download [https://perma.cc/XQ4P-JQBJ].