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**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN THE UNITED STATES**

-- 2011 --

*This report is submitted by the United States to the Competition Committee FOR INFORMATION in the framework of its meeting held on 13-14 June 2012.*

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## 1. Introduction

1. This report describes federal antitrust developments in the United States for the period of October 1, 2010 through September 30, 2011 (“FY 2011”). It summarizes the competition enforcement and policy activities of both the Antitrust Division (“Division”) of the U.S. Department of Justice (“Department” or “DOJ”) and the Federal Trade Commission (“Commission” or “FTC”). The two agencies are collectively referred to throughout this report as the “Antitrust Agencies” or “Agencies.” For additional information on the Agencies’ activities during FY 2011, see the *FTC in 2011* annual report, available at <http://www.ftc.gov/os/2011/04/2011ChairmansReport.pdf>, and the DOJ 2011 Newsletter, available at <http://www.justice.gov/atr/public/division-update/2011/index.html>.

### 1.1 Senior DOJ and FTC staff

2. DOJ Assistant Attorney General (“AAG”) Christine Varney resigned on August 6, 2011, and Deputy Assistant Attorney General (“DAAG”) for Civil Enforcement Sharis A. Pozen was appointed Acting AAG upon her departure. Acting AAG Pozen resigned on April 27, 2012; DAAG Joseph F. Wayland became Acting AAG on her departure. Katherine B. Forrest became DAAG for Criminal and Civil Operations in October 2010, and Fiona Scott-Morton became DAAG for Economic Analysis in May 2011. In December 2011, Leslie C. Overton was appointed DAAG for Civil Enforcement.

3. In September 2011, FTC Commissioner William Kovacic’s term expired. On March 3, 2011, President Obama announced the nomination of Chairman Jon Leibowitz for a second term as FTC Commissioner. His nomination was confirmed by the Senate on March 29, 2012. President Obama nominated Maureen Ohlhausen as Commissioner on July 19, 2011, and she was confirmed by the Senate on March 29, 2012. Ohlhausen was sworn in by FTC Chairman Leibowitz on April 4, 2012.

4. On November 4, 2010, Chairman Leibowitz appointed Edward W. Felten as the FTC’s first Chief Technologist, and on February 8, 2011 he announced the appointment of Timothy L. Wu as Senior Policy Advisor for the Office of Policy and Planning. On February 14, 2011, Chairman Leibowitz appointed Edward D. Hassi Chief Litigation Counsel of the FTC’s Bureau of Competition, and on June 22, 2011, Alison Oldale was named Deputy Director for Antitrust in the FTC’s Bureau of Economics.

## 2. Changes in law or policies

### 2.1 Changes in Antitrust Rules, Policies, or Guidelines

5. On August 12, 2011, the FTC announced changes to several sections of the Commission’s Rules of Practice to streamline its adjudicative review process. The Part 3 Rules govern how competition and consumer protection cases are tried before an Administrative Law Judge (“ALJ”). The changes illustrate the agency’s ongoing commitment to reviewing the Rules to ensure that the agency hearing process is as efficient as possible. The changes relate to discovery, the labeling and admissibility of certain evidence, and deadlines for oral arguments. More specifically, the changes: clarify that discovery commences upon the ALJ’s issuance of a scheduling order; explain that third parties are protected against burdensome discovery requests; clarify the scope of confidentiality and make changes to the standard protective order form; detail the limitations on certain expert discovery; clarify admissibility of expert reports and prior testimony; specify how confidential documents should be labeled; and state when oral arguments must be held. More information about the changes can be found at <http://www.ftc.gov/os/fedreg/2011/08/110812part3frn.pdf>.

6. On July 7, 2011, following a public comment period, the Agencies promulgated the most extensive changes to the Hart-Scott-Rodino (“HSR”) premerger notification form (“HSR Form”) since its

creation in 1976 (see <http://www.ftc.gov/os/fedreg/2011/07/110707hsrfrm.pdf>). The revised HSR Form provides the Agencies with some additional information useful in making an initial evaluation of whether a transaction may raise competitive issues warranting investigation, while at the same time eliminating the need to provide certain information that the agencies found was not as useful as originally anticipated. The changes are part of ongoing efforts by the Commission and the Division to review the HSR Rules to ensure that they are up-to-date and to eliminate unnecessary or potentially overly burdensome reporting requirements for businesses. The changes make the HSR Form easier to complete, reduce the burden for most filers, and make the HSR Form more useful for the Agencies.

7. On June 17, 2011, the Division released an updated version of its Policy Guide to Merger Remedies. The Policy Guide, a tool for Division staff in analyzing proposed merger remedies, provides transparency to the business community, antitrust bar, and broader public. The Policy Guide continues to reflect the overriding goal of merger enforcement: to provide an effective remedy to eliminate the anticompetitive effects of a proposed transaction. The updated guide highlights the role of the Division's new Office of the General Counsel, which is principally responsible for enforcing consent decrees. Reflecting lessons learned since the issuance of the original guide in 2004, the updated Guide states that effective merger remedies typically include structural or conduct provisions, or a combination of the two. In horizontal merger matters, the Division continues to rely predominantly on structural remedies, sometimes in combination with conduct remedies. However, the Division has found that in many vertical transactions, tailored conduct relief can prevent competitive harm while allowing the merger's efficiencies to be realized. In all cases, the key is finding a remedy that works, thereby effectively preserving competition in order to promote innovation and consumer welfare.

## ***2.2. Proposals to Change Antitrust Laws, Related Legislation or Policies***

8. On December 7, 2011, FTC Chairman Jon Leibowitz testified before Congress, supporting legislation to end pay-for-delay settlements, *i.e.*, settlements between brand-name pharmaceutical companies and generic competitors that delay the entry of lower-priced generic drugs into the market. See <http://www.ftc.gov/opa/2011/12/antitrust.shtm>.

## **3. Enforcement of antitrust law and policies: actions against anticompetitive practices**

### ***3.1 Staffing and Enforcement Statistics***

#### ***3.1.1 FTC***

9. During FY 2011, the FTC employed approximately 522 staff and spent approximately \$118 million in furtherance of its Maintaining Competition mission.

10. During FY 2011, 1,414 proposed mergers and acquisitions were reported for review under the Hart-Scott-Rodino Antitrust Improvement Act ("HSR"), a 24 percent increase from the number of HSR transactions reported during FY 2010. Commission staff issued requests for additional information ("second requests") in 24 transactions. The Commission challenged 18 mergers, 9 of which were settled with consent orders. Five mergers were abandoned after the Commission informed the parties of its concerns about the proposed transaction. The Commission also challenged three mergers in federal court; in one case, the Commission was successful in blocking the merger, while in another case the parties ultimately were permitted to go forward. In the third matter, the Solicitor General of the United States has filed, on behalf of the Commission, a petition for review by the United States Supreme Court of an appellate ruling denying the Commission's merger challenge, and the Supreme Court granted the request for *certiorari*. See para. 47.

11. During FY 2011, the FTC staff opened 23 non-merger initial phase investigations. The Commission brought one non-merger enforcement action, which was resolved by consent order. The challenged practice involved price fixing by a physician's association.

12. The Commission filed *amicus curiae* briefs in two cases (one before the U.S. Court of Appeals for the Third Circuit and one before the U.S. District Court for the Northern District of Ohio). The FTC provided one advisory letter and submitted 16 advocacy filings.

### 3.1.2 DOJ

13. At the end of FY 2011, the Division employed 729 persons: 344 attorneys, 52 economists, 152 paralegals, and 181 other professional staff. For FY 2011, the Division received an appropriation of \$162.8 million.

14. During FY 2011, the Division opened 142 investigations and filed 108 civil and criminal cases in federal district court. In FY 2011, the Division was party to three antitrust cases decided by the federal courts of appeals.

15. During FY 2011, the Division filed 90 criminal cases, in which it charged a total of 27 corporations and 82 individuals. Eleven corporate defendants and 25 individuals were assessed fines totaling \$382 million and 21 individuals were sentenced to a total of 10,544 days of incarceration; another 12 individuals were sentenced to spend a total of 2,075 days in some form of alternative confinement.

16. The Division investigated 90 mergers and challenged 13 of them in court; seven transactions were restructured or abandoned prior to the filing of a complaint as a result of an announcement by the Division that it would otherwise challenge the transaction. In addition, the Division screened a total of 428 bank mergers. The Division opened 107 civil investigations (merger and non-merger), and issued 476 civil investigative demands (a form of compulsory process). The Division filed five non-merger civil complaints. Also during FY 2011, the Division issued one business review letter.

## 3.2 Antitrust Cases in the Courts

### 3.2.1 United States Supreme Court

17. The Supreme Court did not decide any antitrust cases during FY 2011.

### 3.2.2 U.S. Court of Appeals Cases

18. On April 6, 2011 the U.S. Court of Appeals for the Sixth Circuit upheld the FTC's ruling in the RealComp II matter. In November 2009, the FTC issued an opinion finding that RealComp, a Michigan-based realtors' group, violated Section 5 of the FTC Act by restricting the ability of member real estate agents to offer consumers lower-priced alternatives to traditional real estate services. RealComp refused to transmit discount real estate listings to its own and other publicly-available websites and excluded such listings from the default searches within its own database. The FTC found that these policies restricted access to these listings and harmed competition. RealComp filed a petition for appellate review of an FTC order on December 31, 2011. The appellate court upheld the Commission's ruling. See <http://www.ca6.uscourts.gov/opinions.pdf/11a0084p-06.pdf>.

19. In *In re Grand Jury Subpoenas Served on White & Case, LLP*, 627 F.3d 1143 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 3061 (2011), the United States successfully appealed a district court order quashing grand jury subpoenas. The subpoenas sought pre-existing, non-privileged corporate documents that had originated outside the United States but had come into the possession of law firms in the United States.

The law firms moved to quash the subpoenas on the ground that the documents were subject to a protective order in a private case. The court of appeals held that the subpoenas should be enforced. The established rule, the court explained, is that “a grand jury subpoena takes precedence over a civil protective order.” This case was somewhat unusual in that “[b]y a chance of litigation, the documents have been moved from outside the grasp of the grand jury to within its grasp.” Nonetheless, “[n]o authority forbids the government from closing its grip on what lies within the jurisdiction of the grand jury.”

20. In other court of appeals cases, the United States defended convictions and sentences based on established principles of criminal antitrust law, procedure, and evidence.

### **3.3 *Statistics on Private and Government Cases Filed***

21. According to the 2011 Annual Report of the Director of the Administrative Office of the U.S. Courts, 475 new civil antitrust actions, both government and private, were filed in the federal district courts in FY 2011. See page 126 of the report, available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf>.

### **3.4 *Significant Enforcement Actions***

#### **3.4.1 *DOJ Criminal Enforcement***

22. The Division filed 90 criminal cases in FY 2011, more than it has filed in nearly 25 years. The Division brought cases in a range of important industries, including auto parts, municipal bonds, real estate foreclosures, and freight forwarding. The criminal program for the fifth consecutive year exceeded \$500 million for criminal fines obtained. Prior to 1994, the largest corporate fine ever imposed for a single Sherman Act count was \$6 million. As of March 2012, Sherman Act violations have yielded over 90 criminal fines of \$10 million or more, including 19 fines of \$100 million or more. Over the last decade, the criminal program has obtained an average of \$411 million in criminal fines each fiscal year.

23. In FY 2011, the criminal program also exceeded 10,000 jail days for imposed jail terms. The Division’s long-standing view is that holding culpable individuals accountable by seeking jail sentences is the most effective way to deter and punish cartel activity. Individuals prosecuted by the Division are being sent to jail with increasing frequency and for longer periods of time. In FY 2011, the average prison sentence for defendants sentenced in Division matters was nearly 17 months, more than double the average of eight months in the 1990s.

24. In FY 2011, the Division placed a strong emphasis on the pursuit and development of antitrust cases in markets critical to the nation’s economic recovery, including the financial services and real estate markets. The Division will continue to prioritize those efforts throughout FY 2012 in support of the Department’s comprehensive battle against financial fraud. In addition, the Division continues to demonstrate its commitment to maintaining strong relationships with its law enforcement partners in the United States and abroad. This commitment was illustrated in FY 2011 in the resolutions reached by the Division and multiple state and federal enforcement agencies with large financial institutions implicated in the municipal bonds investigation. It was also evidenced by the Division’s close coordination with non-U.S. cartel authorities in the auto parts investigation.

25. **Financial Fraud.** The Division is an active member of the Financial Fraud Enforcement Task Force, established by President Obama to wage an aggressive, coordinated, and proactive effort to investigate and prosecute financial crimes. The Division’s municipal bonds and real estate foreclosure auction investigations are examples of efforts to investigate and prosecute financial crimes and vigorously prosecute those who seek to subvert competition in financial markets. In addition to its criminal enforcement efforts, the Division has continued to commit resources to assist federal, state and local

agencies in protecting American Recovery and Reinvestment Act (“ARRA”) funds from fraudulent activity. In its role as co-chair of the Task Force’s Recovery Act, Procurement and Grant Fraud Working Group, the Division has conducted training on antitrust awareness and collusion detection for more than 25,000 individuals in 20 federal agencies, 36 states and two U.S. territories receiving ARRA funds.

26. **Auto Parts.** The auto parts investigation is the largest criminal investigation the Division has ever pursued, in terms of both its scope and the potential volume of commerce affected by the alleged illegal conduct. As of March 2012, the ongoing cartel investigation of price fixing and bid rigging in the automobile parts industry has yielded charges against three companies and seven individuals and nearly \$750 million in criminal fines. Two of the executives charged have agreed to serve two years in prison – the longest prison term imposed on a non-U.S. national voluntarily submitting to U.S. jurisdiction for an antitrust violation.

27. The following corporate fines have been obtained in the auto parts investigation since the beginning of FY 2011:

- Furukawa Electric Company Ltd., \$200 million (<http://www.justice.gov/atr/cases/furukawa.html>)
- Yazaki Corporation, \$470 million -- the second largest criminal fine ever for an antitrust violation (<http://www.justice.gov/atr/cases/yazaki.html>)
- DENSO Corporation, \$78 million (<http://www.justice.gov/atr/cases/denso.html>)

28. **Municipal Bonds.** The ongoing investigation into bid rigging in the municipal bonds derivatives market involved substantial cooperation with other federal and state agencies. As of March 2012, the wide-ranging investigation has resulted in 13 guilty pleas and pending charges against six individuals. The municipal bonds investigation has also produced resolutions with large financial institutions implicated in the conspiracies that have agreed to pay a total of nearly \$745 million in restitution, penalties, and disgorgement to state and federal agencies as follows:

- UBS AG, \$160 million ([http://www.justice.gov/atr/public/press\\_releases/2011/270720a.htm](http://www.justice.gov/atr/public/press_releases/2011/270720a.htm))
- Wachovia Bank, N.A., \$148 million ([http://www.justice.gov/atr/public/press\\_releases/2011/278076a.pdf](http://www.justice.gov/atr/public/press_releases/2011/278076a.pdf))
- JP Morgan Chase & Col, \$228 million ([http://www.justice.gov/atr/public/press\\_releases/2011/272815a.pdf](http://www.justice.gov/atr/public/press_releases/2011/272815a.pdf))
- GE Funding Capital Market Service Inc., \$70 million ([http://www.justice.gov/atr/public/press\\_releases/2011/278581a.pdf](http://www.justice.gov/atr/public/press_releases/2011/278581a.pdf))
- Bank of America, \$137 million ([http://www.justice.gov/atr/public/press\\_releases/2010/264827.htm](http://www.justice.gov/atr/public/press_releases/2010/264827.htm))

29. **Real Estate Foreclosure.** The Division’s ongoing efforts to investigate bid rigging and fraud at real estate auctions nationwide have resulted in charges against 38 individuals and one company. The Division has identified a pattern of collusive schemes among real estate speculators aimed at eliminating competition at real estate foreclosure auctions around the country. Instead of competitively bidding at public auctions for foreclosed properties, groups of real estate speculators work together to keep prices at public foreclosure auctions artificially low by paying each other to refrain from bidding or holding unofficial “knockoff” auctions among themselves. During a period of unprecedented home foreclosure

rates, the collusion taking place at public auctions at courthouses and municipal buildings in the U.S. is artificially driving down foreclosed home prices and enriching the colluding real estate speculators at the expense of homeowners, municipalities, and lending institutions. The impact of these collusive schemes is far-reaching because they negatively affect home prices in the neighborhoods where the foreclosed properties are located. Similar collusive conduct has been detected among bidders for public tax liens. See [http://www.justice.gov/atr/public/press\\_releases/2012/280487.htm](http://www.justice.gov/atr/public/press_releases/2012/280487.htm).

30. **Freight Forwarding.** Freight forwarders manage the domestic and international delivery of cargo for customers by receiving, packaging, preparing, and warehousing cargo freight, arranging for cargo shipment through transportation providers such as air carriers, preparing shipment documentation, and providing related ancillary services. The Division's investigation into the freight forwarding industry uncovered multiple conspiracies to fix and impose certain freight forwarding service fees, including fuel surcharges and various security fees, charged to customers for services provided in connection with freight forwarding shipments of cargo by air. As of March 2012, criminal fines of nearly \$100 million have been obtained and 13 companies have been charged in the Division's investigation of price-fixing conspiracies in the freight forwarding industry. The following corporate fines were imposed during FY 2011:

- Vantec Corporation, \$3.3 million
- Nissin Corporation, \$2.6 million
- Nishi-Nippon Railroad Co. Ltd., \$4.7 million
- Nippon Express Co. Ltd., \$21.1 million
- Kintetsu World Express Inc., \$10.5 million
- Hankyu Hanshin Express Co. Ltd., \$4.5 million
- MOL Logistics (Japan) Co. Ltd., \$1.8 million

31. ***U.S. v. AU Optronics Corporation, et al.*** On March 13, 2012, following an eight-week trial, a federal jury in the Northern District of California returned guilty verdicts against AU Optronics ("AUO"), a Taiwan manufacturer of thin film transistor liquid crystal display ("TFT-LCD") panels, its American subsidiary, AU Optronics America, and the former president and former vice president of AUO. The companies and executives were convicted of participating in a conspiracy to fix the price of TFT-LCD panels. TFT-LCD panels are used in computer monitors and notebooks, televisions, mobile phones, and other electronic devices manufactured by the largest computer manufacturers in the world, including Apple, Dell, and Hewlett Packard. The jury was unable to return a verdict as to one of the subordinates charged and it returned not guilty verdicts against two other subordinates. The guilty verdicts were a first for the Division in that the jury determined the Division proved beyond a reasonable doubt that the gain derived by the conspirators for sales into the United States was at least \$500 million, meaning that the maximum fine faced by each convicted company increased from \$100 million to \$1 billion under a statutory provision allowing fines up to twice the gain or harm from the offense (18 U.S.C. §3571(d)). In addition to these trial convictions, seven companies have pleaded guilty as of March 2012 to charges arising out of the Department's ongoing TFT-LCD panels investigation and have been sentenced to pay criminal fines totaling more than \$890 million. In addition to the individuals convicted at trial, 17 other corporate executives from other firms have been charged; ten of these executives have pleaded guilty and have been sentenced to serve a combined total of 2,681 days in prison. See <http://www.justice.gov/atr/cases/auopt.htm>.



### 3.4.2. DOJ Civil Non-Merger Enforcement

32. **United Regional Health Care System.** In *U.S. et al. v. United Regional Health Care System*, the Division challenged the use of exclusionary contracts by United Regional Health Care System of Wichita Falls, Texas (“United Regional”), alleging that United Regional used these contracts to maintain its monopoly in the provision of hospital services. The Division, along with the Texas attorney general, filed a civil antitrust lawsuit on February 25, 2011. According to the complaint, United Regional was by far the largest hospital in Wichita Falls, with approximately a 90 percent market share for inpatient hospital services sold to commercial health insurers in the Wichita Falls region. It was also the region’s only provider of certain essential services, such as cardiac surgery, obstetrics, and high-level trauma care. The complaint alleged that in direct response to a competitive threat from other local health-care providers, United Regional required most health insurers to enter into contracts that effectively prohibited them from contracting with its competitors. In particular, these contracts required insurers to pay significantly higher prices if they contracted with a nearby competing facility. As a result, almost all health insurers serving Wichita Falls entered into exclusionary contracts with United Regional. To resolve these competitive concerns, the Division simultaneously filed a proposed settlement. The settlement prohibits United Regional from using agreements that improperly inhibit insurers from contracting with its competitors. In particular, United Regional is prohibited from conditioning its prices on whether insurers contract with other health-care providers. United Regional is also prohibited from taking any retaliatory actions against an insurer that enters into an agreement with a rival provider. The court approved the settlement on September 29, 2011. See [http://www.justice.gov/atr/public/press\\_releases/2011/267648.htm](http://www.justice.gov/atr/public/press_releases/2011/267648.htm).

33. **Lucasfilm.** In *U.S. v. Lucasfilm Ltd.*, the Division challenged an agreement between Lucasfilm Ltd. and Pixar Animation Studios (“Pixar”) that prohibited the companies from “cold calling” each other’s employees and required a notification when one made an offer of employment to an employee of the other. In addition, the agreement proscribed a company from making a counteroffer with compensation above its own initial offer. According to the complaint, filed on December 21, 2010, the companies’ actions reduced their ability to compete for digital animation workers and interfered with the proper functioning of the price-setting mechanism that otherwise would have prevailed in competition for employees. To resolve these competitive concerns, the Division filed a proposed settlement simultaneously with the complaint. Under the settlement, the companies cannot enter, maintain, or enforce any agreement that inhibits soliciting, cold calling, recruiting, or otherwise competing for the other’s employees except in specified situations where that agreement is ancillary to another collaboration between the firms. The companies must also implement compliance measures tailored to these practices. The court approved the settlement on June 3, 2011. Pixar was not a named defendant in this suit because the relief the Division obtained in a previous settlement with Pixar and other firms was deemed sufficient to prevent it from entering into these types of agreements in the future. See [http://www.justice.gov/atr/public/press\\_releases/2010/265387.htm](http://www.justice.gov/atr/public/press_releases/2010/265387.htm).

34. **Blue Cross Blue Shield of Michigan.** In *U.S. et al. v. Blue Cross Blue Shield of Michigan*, the Division challenged the agreements Blue Cross Blue Shield of Michigan (“BCBSM”) maintained with Michigan hospitals. According to the complaint, filed on October 18, 2010, BCBSM raised the price of healthcare services, discouraged discounts, and prevented other insurers from entering the market by including most favored nation (“MFN”) pricing provisions in its agreements. The MFN pricing provisions required hospitals to charge BCBSM’s competitors at least as much as they charged BCBSM or charge the competitors more than they charged BCBSM, sometimes between 10 and 40 percent more. The complaint alleged this conduct likely reduced competition in the sale of health insurance by raising hospital costs to BCBSM’s competitors. It also discouraged other insurers from entering into or expanding within markets throughout Michigan. The case is currently pending. See [http://www.justice.gov/atr/public/press\\_releases/2010/263227.htm](http://www.justice.gov/atr/public/press_releases/2010/263227.htm).

35. **Visa/Mastercard/Amex.** In *U.S. et al v. American Express Company, et al.*, the Division challenged the rules that American Express, Mastercard, and Visa had in place that prevent merchants from offering consumer discounts, rewards, and information about card costs. According to the complaint, filed on October 4, 2010, this practice prohibits merchants from encouraging consumers to use lower-cost payment methods, resulting in an increase in the merchants' cost of doing business, and ultimately forcing consumers to pay more for their purchases. The Division filed a proposed settlement simultaneously with its complaint requiring Mastercard and Visa to allow their merchants to offer consumers a discount for using a particular card network, express a preference and promote the use of a particular card network, and communicate to consumers the cost incurred by the merchant when a consumer uses a particular card network. The court approved that settlement on July 20, 2011. Litigation with American Express is ongoing. See [http://www.justice.gov/atr/public/press\\_releases/2010/265387.htm](http://www.justice.gov/atr/public/press_releases/2010/265387.htm).

#### 3.4.3. *FTC Non-Merger Enforcement Actions*

36. **Southwest Health Alliances, Inc.** The FTC alleged that since 2000, Southwest Health Alliances, an association representing 900 physicians in Amarillo, Texas, violated the antitrust law by fixing the prices its member doctors would charge insurers. The FTC's order settling the charges prohibits Southwest Health from jointly negotiating the prices it charges insurance providers and from similar conduct in the future. For more information on the settlement see <http://www.ftc.gov/opa/2011/07/competition.shtm>.

#### 3.4.4. *FTC Order Violations*

37. **Toys "R" Us, Inc.** On March 29, 2011, Toys "R" Us, Inc. agreed to pay a \$1.3 million civil penalty to settle FTC charges that it violated a 1998 FTC order governing the firm's dealings with its suppliers. In 1998, the FTC found that Toys "R" Us had used its dominant position as a toy distributor to extract agreements from and among toy manufacturers to stop selling the same toys to warehouse clubs. The 1998 order prohibited Toys "R" Us from engaging in practices such as urging any supplier to limit supply of products or refuse to sell to discounters. The FTC's complaint alleged that between 1999 and 2010, Toys "R" Us complained to several of its suppliers about the discounts other retailers were providing to consumers, requested information from several of the companies about how they were supplying products to discounters, and failed to keep records of communications with its suppliers in violation of the 1998 order. For more information on the settlement see <http://www.ftc.gov/opa/2011/03/toysrus.shtm>.

### 3.5 *Advisory letters from the FTC*

38. Under its Rules, the Commission or its staff may offer industry guidance in the form of advisory opinions regarding proposed conduct in matters of significant public interest. These competition advisory opinions inform the public about the Commission's analysis in novel or important areas of antitrust law. In FY 2011, the FTC issued one advisory opinion on online behavioral advertising. For more information on the Commission's advisory letters see <http://www.ftc.gov/ftc/opinions.shtm>.

39. **Council of Better Business Bureaus, Inc.** On August 15, 2011, the FTC issued an advisory opinion letter stating that it has no present intention to challenge the Council of Better Business Bureau's ("CBBB") proposed "accountability program," which would hold companies engaged in online behavioral advertising accountable for compliance with "Self-Regulatory Principles for Online Behavioral Advertising." The FTC found no competitive harm associated with the program, and although companies agree to conform their online behavioral advertising practices to a specific standard under the CBBB program, the FTC concluded that conformity likely will enhance consumer autonomy without limiting choice of competitively offered goods and services. See <http://www.ftc.gov/opa/2011/08/cbbb.shtm>.

### 3.6 *Business Reviews Conducted by the DOJ*

40. Under the Department's business review procedure, an organization may submit a proposed action to the Department and receive a statement as to whether the Department would likely challenge the action under the antitrust laws. The Department issued one business review letter in FY 2011. The business review letter can be found at <http://www.usdoj.gov/atr/public/busreview/letters.htm>.

41. On August 26, 2011, the Division announced it would not challenge a proposal by the Producers Guild of America ("Guild") to use a voluntary certification system for film producers. The system distinguishes those who performed the full range of producer duties, as defined by the Guild, from financiers and others in the entertainment industry who may have bargained for a generic producer credit in return for their services. Those who meet the Guild's certification requirements would be eligible to have "p.g.a." appear after their name in the film's credits. Based on representations by the Guild, the Division concluded that the system would not likely harm competition in the provision of producer services. In addition, the certification program would not restrain in any way the ability of studios to hire producers without the proposed certification. The main procompetitive benefit of the program is to provide additional information and clarity to the public.

## 4. **Enforcement of antitrust laws and policies: mergers and concentrations**

### 4.1 *Enforcement of Pre-merger Notification Rules*

42. On August 15, 2011, the Division announced that Nautilus Hyosung Holdings Inc. ("NHH") had agreed to plead guilty and pay a \$200,000 criminal fine for obstruction of justice in connection with a pre-merger filing and investigation by the Division. NHH, an ATM manufacturer and wholly-owned U.S. subsidiary of a Korean firm, submitted false documents that had been altered to minimize the competitive impact of NHH's proposed acquisition of a competing U.S. manufacturer of ATM systems. That transaction was abandoned before the Division reached a decision whether to challenge it. NHH was charged with obstruction of justice, which carries a maximum criminal fine of \$500,000 per count; its agreed-upon fine of \$100,000 for each of two counts took into account the nature and extent of the company's disclosure of wrongdoing and its cooperation in the investigation.

### 4.2 *Significant Merger Cases*

#### 4.2.1 *FTC Merger Challenges and Cases*

43. **DaVita / DSI Renal.** The Commission's complaint challenged DaVita, Inc.'s proposed \$689 million acquisition of DSI Renal. The complaint alleged that the acquisition would lessen competition and harm consumers in 22 geographic markets for outpatient dialysis clinics. The final Commission order settling the matter requires DaVita to sell 29 outpatient dialysis clinics in the affected markets throughout the country to resolve the alleged anticompetitive effects of the transaction. See <http://www.ftc.gov/os/caselist/1110103/index.shtm>.

44. **Perrigo / Paddock Laboratories.** The Commission reached a settlement agreement with generic drug manufacturers Perrigo Company and Paddock Laboratories, requiring the companies to sell six generic drugs to resolve charges that Perrigo's proposed \$540 million acquisition of Paddock would be anticompetitive. The FTC's complaint alleged that the transaction would reduce the number of manufacturers of four products used to treat conditions such as skin disorders, allergic reactions, and nausea, and would eliminate future competition for two other products, a generic topical steroid and a generic anti-inflammatory drug. To preserve competition in the testosterone gel market, the proposed settlement order prohibits Perrigo from accepting certain payments from Abbott Laboratories, the seller of branded testosterone gel (Androgel), which could give Perrigo incentive to slow the entry of its generic

product into the market. The proposed settlement order also prohibits Perrigo from entering into any “pay-for-delay” arrangements with Abbott. See <http://www.ftc.gov/os/caselist/1110083/index.shtm>.

45. **Cardinal Health, Inc. / BioTech Pharmacy, Inc.** The Commission required Cardinal Health, Inc. to sell nuclear pharmacies in three cities in the U.S. under a settlement order resolving the Commission’s charges that Cardinal’s purchase of nuclear pharmacies from Biotech reduced competition for low-energy radiopharmaceuticals in the three cities. Nuclear pharmacies provide radiopharmaceuticals to hospitals and cardiology clinics, and can only serve local areas given that the radioisotopes used in radiopharmaceuticals have short half-lives and decay rapidly. According to the FTC’s complaint, Cardinal’s acquisition of Biotech’s nuclear pharmacies would substantially lessen competition for the production, sale, and distribution of low-energy radiopharmaceuticals in the three cities by eliminating direct competition between Cardinal and Biotech, reducing Cardinal’s incentive to improve customer service, and allowing Cardinal to increase prices. See <http://www.ftc.gov/os/caselist/0910136/index.shtm>.

46. **Grifols / Talecris.** The Commission reached a settlement with Grifols, S.A., a manufacturer of plasma-derived drugs, that protects consumers from the potential anticompetitive effects of Grifols’ acquisition of rival Talecris Biotherapeutics Holding Corp. To settle FTC charges that the acquisition would have resulted in higher prices for consumers, Grifols agreed to sell a Talecris fractionation facility and two of Grifols’ plasma collection centers to a third company, Kedrion. The order also requires Grifols to manufacture three plasma-derived products for Kedrion for several years under a manufacturing agreement. See <http://www.ftc.gov/os/caselist/1010153/index.shtm>.

47. **Irving / Exxon Mobil.** To remedy potential anticompetitive effects resulting from Irving’s proposed acquisition of certain petroleum products storage and transportation assets located in Maine from ExxonMobil Oil Corp., the Commission required Irving to relinquish the rights to certain terminal and pipeline assets in Maine. The proposed settlement resolves the FTC’s charges that the acquisition would raise competitive concerns in certain gasoline and distillates terminaling services in Maine, resulting in higher gasoline and diesel prices for consumers. See <http://www.ftc.gov/os/caselist/1010021/index.shtm>.

48. **Hikma Pharmaceuticals / Baxter International.** The Commission’s complaint challenged Hikma Pharmaceuticals’ proposed \$11.5 million acquisition of Baxter International. The FTC complaint alleged that Hikma’s acquisition of Baxter’s generic injectable pharmaceutical business would lessen competition. Specifically, the complaint alleged that the transaction as proposed likely would have resulted in reduced competition and higher prices for two generic injectable drugs. The settlement agreement required Hikma to divest two generic injectable pharmaceuticals. See <http://www.ftc.gov/os/caselist/1110051/index.shtm>.

49. **Phoebe Putney / Palmyra.** The FTC challenged Phoebe Putney’s proposed acquisition of rival Palmyra Park Hospital, in Albany, Georgia. On April 20, 2011, the FTC filed a complaint in federal district court alleging that the deal would reduce competition substantially and allow the combined Phoebe/Palmyra to raise prices for general acute-care hospital services charged to commercial health plans, substantially harming patients and local employers and employees. On June 27, 2011, the U.S. District Court for the Middle District of Georgia dismissed the FTC’s complaint and denied its motion for a preliminary injunction to stop the deal from going forward. The FTC then appealed the district court decision to the U.S. Court of Appeals for the 11<sup>th</sup> Circuit, which affirmed the judgment of the district court on December 9, 2011. At the heart of the case is the “state action” doctrine, a narrow exception to antitrust laws for anticompetitive conduct if it is an act of government. The FTC alleges that Phoebe structured the deal in a way that uses the local hospital authority in an attempt to shield the anticompetitive acquisition from federal antitrust scrutiny. Acting at the request of the FTC, the Solicitor General of the United States petitioned the U.S. Supreme Court on March 23, 2012 to review the federal appeals court ruling

concerning the acquisition. The Supreme Court granted the request for *certiorari* on June 25, 2012. See <http://www.ftc.gov/os/adjpro/d9348/index.shtm>.

50. **ProMedica / St. Luke's Hospital.** The FTC challenged ProMedica's consummated acquisition of rival St. Luke's Hospital in the Toledo, Ohio area. The FTC's administrative complaint alleged that the deal would reduce competition and allow ProMedica to raise prices for general acute-care and inpatient obstetrical services, which would significantly harm patients and employers and employees in the Toledo area. FTC staff also filed a separate complaint in federal district court seeking an order requiring ProMedica to preserve St. Luke's as a separate, independent competitor during the FTC's administrative proceeding and any subsequent appeals. The action in federal district court was brought jointly with the Attorney General of the State of Ohio. On March 29, 2011 the District Court granted the request for a preliminary injunction. In an Initial Decision issued December 5, 2011, the FTC's administrative law judge ("ALJ") found that ProMedica's acquisition of St. Luke's eliminated competition between the two firms and reduced the number of competing hospitals from four to three. Accordingly, the ALJ ordered ProMedica to divest St. Luke's to an FTC-approved buyer. In its March 2012 Opinion, the Commission affirmed the ALJ's decision on liability, but defined the market somewhat differently. The Commission concluded that the combination of the two hospital providers would be likely to substantially lessen competition in a separate market consisting of inpatient obstetrical services sold to commercial health plans. ProMedica has appealed the Commission's decision to the 6<sup>th</sup> Circuit Court of Appeals where the case is pending. For more information see <http://www.ftc.gov/os/adjpro/d9346/index.shtm>.

51. **Keystone / Compagnie de Saint-Gobain.** To preserve competition in the North American market for alumina wear tile, the FTC imposed conditions on Keystone's planned acquisition of Compagnie de Saint-Gobain's advanced ceramics business. According to the FTC's complaint, the deal as originally structured would have reduced competition in the relevant markets by eliminating direct competition between CoorsTek, Keystone's subsidiary tile manufacturer, and Saint-Gobain. The Commission alleged that the original deal would have increased CoorsTek's market share substantially, eliminated CoorsTek's most significant alumina wear tile competitor in North America, allowed the combined company to raise prices for alumina wear tile, and increased the likelihood that the remaining firms could act together to raise consumer prices for alumina wear tile. The settlement order ensures that Saint-Gobain's North American alumina tile business will remain in place and continue to compete in the market, including by allowing Saint-Gobain to retain its facility that manufactures most of the alumina wear tile sold by Saint-Gobain in the United States, and requiring the parties to provide advance written notice to, and in some cases obtain prior approval from, the Commission, concerning the sale and/or closure of Saint-Gobain's North American alumina wear tile assets. See <http://www.ftc.gov/os/caselist/1010175/index.shtm>.

52. **LabCorp / Westcliff Medical Laboratories.** The FTC challenged LabCorp's \$57.5 million acquisition of rival clinical laboratory testing company Westcliff Medical Laboratories, alleging that the proposed acquisition would lead to higher prices and lower quality in the Southern California market for the sale of clinical laboratory testing services to physician groups. The FTC filed an action in federal court to prevent LabCorp from integrating the Westcliff assets. The court rejected the FTC challenge, finding that (i) the FTC's market definition was too narrow and (ii) the private interests at stake, *i.e.*, the harm to the parties from enjoining the merger outweigh the public interest in enjoining it. The FTC appealed the district court decision to the U.S. Court of Appeals for the 9<sup>th</sup> Circuit, which denied the Commission's appeal. On April 22, 2011 the Commission issued an order dismissing its complaint and closing the Commission's investigation. See <http://www.ftc.gov/os/adjpro/d9345/index.shtm>.

53. **Universal Health Services / Psychiatric Solutions.** The Commission's complaint challenged Universal Health Services, Inc.'s proposed \$3.1 billion acquisition of Psychiatric Solutions, Inc. The complaint alleged that the acquisition would reduce competition in the provision of acute inpatient

psychiatric services in three local markets in the U.S. The FTC order settling the matter required Universal Health to divest 15 psychiatric facilities to address the Commission's concern. See <http://www.ftc.gov/os/caselist/1010142/index.shtm>.

54. **Simon Property Group / Prime Outlets.** Simon Property Group, Inc. settled Commission charges that its proposed acquisition of Prime Outlets Acquisition Company LLC would lessen competition in retail space at outlet centers. As part of its order settling the matter, the Commission required Simon Property to divest property and modify tenant leases to preserve outlet center competition in parts of the country. In addition, Simon agreed to remove territorial restrictions for tenants with stores in its outlet malls serving the Chicago and Orlando markets. See <http://www.ftc.gov/os/caselist/1010061/index.shtm>.

#### 4.2.2 DOJ Merger Challenges and Cases

55. **Unilever / Alberto Culver.** In *U.S. v. Unilever N.V., et al.*, the Division challenged the acquisition of Alberto-Culver Company by Unilever N.V., Unilever PLC, and Conopco, Inc. The complaint alleged that the transaction as originally proposed was likely to lessen competition in three product markets—value shampoo, value conditioner, and hairspray. As products typically sold for less than two dollars per bottle, value shampoos and conditioners are the lowest priced shampoos and conditioners available in retail stores. According to the complaint, filed on May 6, 2011, the acquisition would reduce the number of significant competitors in the value shampoo and conditioner markets from three to two, likely resulting in a price increase. The Division filed a proposed settlement simultaneously with the complaint requiring divestiture of two hair-care brands, in addition to their associated assets. The court approved the settlement on July 19, 2011. During the investigation, the Division cooperated closely with the United Kingdom's Office of Fair Trading, Mexico's Federal Competition Commission, and South Africa's Competition Commission. See [http://www.justice.gov/atr/public/press\\_releases/2011/270854.htm](http://www.justice.gov/atr/public/press_releases/2011/270854.htm).

56. **GrafTech / Seadrift.** In *U.S. v. GrafTech International Ltd.*, the Division challenged the acquisition of Seadrift Coke L.P. by GrafTech International Ltd. ("GrafTech"). According to the complaint, filed on November 29, 2010, maintaining GrafTech's current supply agreement with ConocoPhillips Co. ("Conoco") post-acquisition would encourage the exchange of pricing and output information between Conoco and Seadrift, two competitors in the production of a critical petroleum product. Moreover, since the agreement included provisions such as most favored nation ("MFN") pricing and mutual audit rights, it could incentivize the exchange of contemporaneous, customer specific pricing information. To resolve these competitive concerns, the Division filed a proposed settlement simultaneously with its complaint. The settlement required GrafTech to remove the audit rights and MFN pricing provisions and agree not to include similar provisions in future agreements for a 10-year period. During that time, GrafTech must also provide the Division with copies of all supply agreements with Conoco, as well as copies of business documents relating to production capacity and sales. The settlement also established firewalls that protect confidential and valuable competitor data. The court approved the settlement on March 24, 2011. See [http://www.justice.gov/atr/public/press\\_releases/2010/264566.htm](http://www.justice.gov/atr/public/press_releases/2010/264566.htm).

57. **NBC / Comcast.** In *U.S. et al. v. Comcast Corp., et al.*, the Division, joined by state attorneys general from California, Florida, Missouri, Texas, and Washington, filed a civil antitrust lawsuit on January 18, 2011, to block the formation of a joint venture between Comcast Corp. ("Comcast") and General Electric Co.'s subsidiary NBC Universal Inc. ("NBCU"). According to the complaint, the transaction would allow Comcast to limit competition from its cable, satellite, telephone, and online competitors. As a result, the market would experience lower levels of investment, less experimentation with new models of delivering content, and less diversity in the range of products offered. The joint venture would also have less incentive to distribute NBCU programming to Comcast's video distribution

rivals than a stand-alone NBCU. To resolve these competitive concerns, the Division filed a proposed settlement simultaneously with the complaint that allows the joint venture to proceed conditioned on the parties' agreement to license programming of Comcast's cable television services to online competitors, to subject themselves to anti-retaliation provisions, and to adhere to Open Internet requirements. The Division and Federal Communications Commission cooperated closely on this matter. See [http://www.justice.gov/atr/public/press\\_releases/2011/266149.htm](http://www.justice.gov/atr/public/press_releases/2011/266149.htm).

58. **Dean Foods.** In April 2009, Dean Foods Co. ("Dean Foods") acquired the Consumer Products Division of Foremost Farms USA Cooperative ("Foremost Farms"), which included its dairy processing plants in Waukesha and De Pere, Wisconsin. After investigating this acquisition, the Division and state attorneys general from Illinois, Michigan, and Wisconsin filed a lawsuit on January 22, 2010, alleging that Dean Foods' acquisition would eliminate substantial competition between the two companies in the sale of milk to schools, grocery stores, convenience stores, and other retailers. The Division filed a proposed settlement on March 29, 2011, requiring Dean Foods to divest a significant milk processing plant in Waukesha and related assets. The proposed settlement also required that Dean Foods notify the Division before it makes any future acquisition of milk processing plants when the purchase price is more than \$3 million. Given Dean Foods' size, location, and distribution network, the Division determined that the divestiture of the Waukesha dairy plant addressed its competitive concerns. The court approved the settlement on November 21, 2011. See [http://www.justice.gov/atr/public/press\\_releases/2011/269072.htm](http://www.justice.gov/atr/public/press_releases/2011/269072.htm).

59. **CPTN / Novell.** CPTN Holdings LLC ("CPTN"), a holding company owned in equal measure by Microsoft Inc., Oracle Corp., Apple Inc. and EMC Corp., sought to acquire approximately 882 patents and patent applications in a two-stage transaction in conjunction with Novell Inc.'s ("Novell") planned merger with Attachmate Corporation. In the first phase, CPTN would acquire certain patents and applications from Novell. In the second phase, the patents would be allocated and distributed to each of the four owners through a serpentine draft. On April 20, 2011, the Division announced that while it had concluded that the proposed deal would potentially jeopardize competition, especially the ability of open source software such as Linux to continue to innovate and compete in various product categories, revisions by CPTN and its owners to their formation agreements, including Microsoft's decision to sell any patents it acquired from Novell back to Attachmate, EMC's agreement to not acquire certain specified patents, and all the acquirers' willingness to take the patents subject to GPLv.2, an open source license, were deemed to alleviate that concern. Although the Division allowed the first phase of the transaction to proceed, it continued to investigate the subsequent distribution of the Novell patents to the CPTN owners. During the course of its investigation, the Division cooperated closely with Germany's Federal Cartel Office, aided by waivers from the parties. See [http://www.justice.gov/atr/public/press\\_releases/2011/270086.htm](http://www.justice.gov/atr/public/press_releases/2011/270086.htm).

60. **Google / ITA.** In *U.S. v. Google, et al.*, the Division challenged the proposed acquisition of ITA Software Inc. ("ITA") by Google Inc. ("Google"). The complaint, filed on April 8, 2011, alleged that the acquisition, as originally proposed, would have substantially lessened competition among providers of comparative flight search websites in the United States, resulting in reduced choice and less innovation for consumers. To resolve these competitive concerns, the Division filed a proposed settlement simultaneously with the complaint. Under the proposed settlement, Google is required to continue licensing ITA's QPX software to airfare websites on commercially reasonable terms. Google is also required to continue to fund research of the QPX software at least at similar levels to what ITA has invested in recent years, and to further develop and offer ITA's next generation InstaSearch product to travel websites. To prevent abuse of commercially sensitive information, Google must also implement firewall restrictions within the company that prevent unauthorized use of competitively sensitive information and data gathered from ITA's customers. Finally, the proposed settlement provides for a formal reporting mechanism for complainants if Google acts in an unfair manner. The court approved the settlement on October 5, 2011. See [http://www.justice.gov/atr/public/press\\_releases/2011/269589.htm](http://www.justice.gov/atr/public/press_releases/2011/269589.htm).

61. **Verifone / Hypercom.** In *U.S. v. Verifone Systems Inc., et al.*, the Division challenged the acquisition of Hypercom Corp. (“Hypercom”) by Verifone Systems Inc. (“Verifone”). The complaint, filed on May 12, 2011, alleged that the proposed transaction would eliminate important competition in the sale of point-of-sale (“POS”) terminals. According to the complaint, the parties’ proposed divestiture to the only other significant provider of POS terminals, Ingenico, would not remedy competitive concerns since VeriFone and Hypercom control more than 60 percent of the U.S. market for POS terminals. As a result, on May 20, 2011, VeriFone and Hypercom abandoned the proposed divestiture to Ingenico and entered into settlement negotiations with the Division to find an alternative buyer. The Division filed a proposed settlement on August 4, 2011. The settlement required Verifone to divest Hypercom’s U.S. POS terminals business to an entity sponsored by Gores Group LLC (“Gores”), a private equity fund. This divestiture would include physical assets, personnel, intellectual property rights, transitional support, and all other assets necessary for Gores to become a viable competitor in the industry. See [http://www.justice.gov/atr/public/press\\_releases/2011/273602.htm](http://www.justice.gov/atr/public/press_releases/2011/273602.htm).

62. **H&R Block / TaxAct.** In *U.S. v. H&R Block, Inc.*, the Division challenged the acquisition of TaxACT by H&R Block Inc. According to the complaint, filed on May 23, 2011, the proposed transaction would likely have substantially lessened competition in the growing U.S. market for digital do-it-yourself tax preparation products, leading to increased prices and reduced innovation and quality. At the time, three companies accounted for 90 percent of all sales of digital do-it-yourself tax preparation products, and the proposed acquisition would have combined H&R Block and TaxACT, respectively the second- and third-largest providers of these products. As the first company to offer all taxpayers the ability to prepare and electronically file their federal individual tax returns for free directly from its website, TaxACT has been an aggressive competitor in the market. Over the years, it has consistently offered high quality products to U.S. taxpayers at low prices. As a result, the Division wanted to preserve TaxACT’s status as a significant aggressive competitor in the industry. At trial, the Division’s challenge of the merger was successful. On October 31, 2011, the U.S. District Court for the District of Columbia enjoined the transaction because it was likely to substantially lessen competition in the market for digital do-it-yourself tax preparation products. See <http://www.justice.gov/atr/cases/f277200/277287.pdf>.

63. **AT&T / T-Mobile.** In *U.S. et al v. AT&T Inc., et al.*, the Division challenged AT&T Inc.’s (“AT&T”) acquisition of T-Mobile USA Inc. (“T-Mobile”) from its parent company, Deutsche Telekom AG. State attorneys general from California, Illinois, Massachusetts, New York, Ohio, Pennsylvania, Puerto Rico, and Washington joined the Division as co-plaintiffs. In addition, the Division coordinated its review of the proposed transaction with the Federal Communications Commission (“FCC”). The complaint, filed on August 31, 2011, alleged that the proposed transaction combining two of the only four wireless carriers with nationwide networks would substantially lessen competition for mobile wireless telecommunications services across the United States. According to the complaint, AT&T and T-Mobile compete head to head nationwide and, specifically, in 97 of the nation’s largest 100 cellular marketing areas. In addition, T-Mobile has been responsible for a number of significant firsts in the U.S. mobile wireless industry, such as the first handset using the Android operating system, Blackberry wireless email, the Sidekick, national Wi-Fi “hotspot” access, and a variety of unlimited service plans. Thus, the complaint alleged, T-Mobile has played a critical role in the market and its elimination would result in higher prices, poorer quality, fewer choices, and less innovation. In light of these efforts by the Division, the FCC, and the state attorneys general, AT&T abandoned its proposed acquisition of T-Mobile on December 19, 2011. See [http://www.justice.gov/atr/public/press\\_releases/2011/274615.htm](http://www.justice.gov/atr/public/press_releases/2011/274615.htm).

64. **Deutsche Börse / NYSE Euronext.** The Division announced on December 22, 2011 that it would require Deutsche Börse AG to direct a subsidiary to sell its 31.5 percent stake in Direct Edge Holdings LLC and agree to other restrictions in order for Deutsche Börse to proceed with its planned \$9 billion merger with NYSE Euronext, one of the two largest and most prestigious stock exchange operators in the U.S. Direct Edge is the fourth largest stock exchange operator in the country. The Division said that



the transaction, as originally proposed, would have substantially lessened competition for displayed equities trading services, listing services for exchange-traded products, including exchange-traded funds, and real-time proprietary equity data products in the U.S. The Division cooperated closely with the EC on their respective investigations of the transaction. In February 2012, the EC prohibited the merger; the differing conclusions of the two agencies resulted from differences in the markets in the respective jurisdictions. See [http://www.justice.gov/atr/public/press\\_releases/2011/278537.htm](http://www.justice.gov/atr/public/press_releases/2011/278537.htm).

65. **NASDAQ / IntercontinentalExchange Inc.** On May 16, 2011, the Division announced that the NASDAQ OMX Group Inc. and IntercontinentalExchange Inc. had abandoned their joint bid to acquire NYSE Euronext after the Department of Justice informed the companies that it would file an antitrust lawsuit to block the deal. The Division said that the acquisition would have substantially eliminated competition for corporate stock listing services, opening and closing stock auction services, off-exchange stock trade reporting services and real-time proprietary equity data products. See [http://www.justice.gov/atr/public/press\\_releases/2011/271214.htm](http://www.justice.gov/atr/public/press_releases/2011/271214.htm).

## **5. International antitrust cooperation and outreach**

### **5.1 International Antitrust Cooperation Developments**

66. The Antitrust Agencies continued to play a lead role in promoting cooperation and convergence towards sound competition policies internationally, through both building strong bilateral ties with their major enforcement partners and their participation in multilateral bodies such as the International Competition Network (“ICN”), the Competition Committee of the Organization for Economic Cooperation and Development (“OECD”), the United Nations Conference on Trade and Development (“UNCTAD”), and the Asia-Pacific Economic Cooperation (“APEC”).

67. On July 27, 2011, the Agencies signed an antitrust Memorandum of Understanding (“MOU”) with China’s three antimonopoly agencies to promote communication and cooperation among the agencies in the two countries. The MOU provides for periodic high-level consultations among all five agencies as well as separate communications between individual agencies. It also lists several specific avenues for cooperation, including: exchanges of information and advice about competition law enforcement and policy developments; training programs, workshops and other means to enhance agency effectiveness; providing comments on proposed laws, regulations and guidelines; and cooperation on specific cases or investigations, when in the investigating agencies’ common interest, subject to confidentiality protections. See <http://www.ftc.gov/os/2011/07/110726mou-english.pdf>.

68. On March 31, 2011, the Agencies signed an antitrust cooperation agreement with Chile’s Office of the National Economic Prosecutor. The agreement contains provisions for antitrust enforcement cooperation and coordination, consultations with respect to enforcement actions, and technical cooperation, and is subject to confidentiality protections. The agreement also includes mutual acknowledgment of the importance of antitrust cooperation, including information sharing and coordination of enforcement actions. See <http://www.ftc.gov/os/2011/03/110331us-chile-agree.pdf>.

69. During FY 2011, the Agencies cooperated on merger reviews with many competition agencies around the world, including those of Australia, Brazil, Canada, China, Colombia, the European Union, France, Germany, Japan, Korea, Mexico, Spain, South Africa, Turkey, and the United Kingdom. In some instances, cooperation with these authorities was particularly extensive.

70. The Commission had over 40 substantive contacts in merger and non-merger cases and cooperated on 20 merger matters of which 12 were completed within FY 2011. Commission staff cooperation with non-U.S. counterparts included extensive coordination on a number of non-public matters

in which the Commission ultimately closed its investigation without taking enforcement action or that resulted in abandonment of the transaction by the parties, some after second requests were issued. Even in matters in which different jurisdictional effects or procedural requirements result in different outcomes, Commission staff often cooperate extensively with their international counterparts, as, for example, in *Intel/McAfee*, where Commission staff closely cooperated with the European Commission (“EC”)’s Directorate-General for Competition (“DG Comp”) in reaching its decision to allow the transaction to proceed.

71. In FY 2011, the Division consulted with international counterparts on approximately 17 merger investigations, of which seven were completed in FY 2011. Among the Division’s most notable instances of international cooperation were its *CPTN/Novell* and *Unilever/Alberto-Culver* matters. With waivers from the parties, the Division worked closely with the German Federal Cartel Office on an investigation into the acquisition of certain patent applications from Novell by CPTN, marking the Division’s first significant merger enforcement cooperation with Germany in 20 years. And, leading up to the Division’s complaint and consent decree involving Unilever and Alberto-Culver Co., also with party waivers, the Division participated in discussions with counterparts in Mexico, South Africa, and the United Kingdom about product markets and competitive issues that varied among the different jurisdictions affected by the merger, facilitating the crafting of remedies appropriate to the respective jurisdictions. The Division also cooperated closely with the EC in its investigation of the *Deutsche Börse/NYSE Euronext* merger, with frequent contact between the investigative staffs and the leaderships of the two agencies, aided by waivers from the merging parties. While the Division reached a settlement with the parties (see section 3.2.2 above) and the EC prohibited the merger, the different outcomes reflected differences in the markets in the respective jurisdictions, and there was no conflict. In FY 2011, the Division also coordinated/cooperated with competition agencies in non-U.S. jurisdictions in the vast majority of dozens of ongoing international cartel investigations.

72. In October 2011, the Agencies and the EC issued revised Best Practices in Merger Investigations. The Best Practices provide an updated advisory framework for interagency cooperation when one of the Agencies and the EC’s DG Comp are reviewing the same merger. The Best Practices were the fruit of a series of discussions among the three agencies reviewing experience since the first set of best practices were adopted in 2002. The main purposes for issuing the revised Best Practices were to (1) increase transparency about the Agencies’ cooperation – including when and what they communicate with one another; (2) suggest how merging parties and third parties can facilitate coordination and resolution of those reviews; and (3) place greater emphasis on coordination among the agencies at key stages of their investigations, including the final stage in which agencies consider potential remedies to preserve competition. The revised Best Practices seek to: promote fully-informed decision-making by facilitating the exchange of information between the agencies; minimize the risk of divergent outcomes; enhance the efficiency of investigations; reduce burdens on merging parties and third parties; and increase the overall transparency of the merger review process. See <http://www.ftc.gov/opa/2011/10/eumerger.shtm>; <http://www.justice.gov/atr/public/international/docs/276276.pdf>.

73. In FY 2011, the FTC and DOJ continued to play a lead role in the ICN. Both the FTC and DOJ continued to serve as ICN Steering Group members and FTC Commissioner Kovacic served as vice chair for outreach. In March 2011, the Agencies organized an ICN roundtable on enforcement cooperation in Washington, DC. The FTC, as co-chair of the Unilateral Conduct Working Group (“UCWG”), led the preparation of the first chapter of the Unilateral Conduct Workbook, on assessing dominance. The Working Group also held its second workshop and programs on price-cost tests in unilateral conduct cases, price discrimination, and unilateral conduct in the pharmaceutical industry. Randolph Tritell, Director of the FTC Office of International Affairs, led the ICN Curriculum Project, which developed training materials as part of a virtual university on competition law and practice for competition agency officials. The Curriculum project produced its first modules in 2011 on the

origins, aims, and major characteristics of competition policy, market definition, and market power (see <http://www.internationalcompetitionnetwork.org/working-groups/vicechair/outreach/icncurriculum.aspx>). As chair of the Merger Working Group's Notification and Procedures subgroup, the Commission led projects such as a program on promoting implementation of its Recommended Practices on merger notification and review procedures.

74. DOJ, as co-chair of the Merger Working Group (MWG) with the Irish and Italian Competition Authorities, led a series of teleseminars on the role of economics in competition investigations, in preparation for work in FY 2012 on revising economics chapters of the ICN Investigative Techniques Handbook. As co-chair (with the Brazilian authorities) of Subgroup 1 of the Cartel Working Group, the Division led a series of teleseminars on a wide range of cartel enforcement topics, including leniency programs. DOJ also began preliminary work, with the Turkish Competition Authority, on preparing an ICN-wide project on international enforcement cooperation, which would be initiated in FY 2012. This project will proceed in parallel with the long-term cooperation project undertaken by the OECD's Competition Committee, and will begin with a joint survey submitted to members of both organizations.

## **5.2 Outreach**

75. In FY 2011, the Agencies continued to provide technical assistance on competition law and policy matters to their international counterparts. The FTC's international technical assistance antitrust program conducted 25 foreign technical missions in 20 countries. As part of U.S. efforts to assist China in implementing its antitrust law, senior FTC and DOJ officials and staff held discussions with the Chinese antitrust agencies in the United States and China. The Agencies' staffs, together with U.S. judges, also led a workshop on antitrust litigation issues for more than 15 judges from China's Supreme People's Court and lower courts. The Agencies are also working with India's Competition Commission as it begins to implement its 2002 Competition Act and new merger regime. The Agencies' training missions included programs in Colombia, Dominican Republic, Egypt, El Salvador, Hungary, Kenya, Morocco, Singapore, Tanzania, Thailand, Turkey, and Vietnam.

76. As part of its ongoing effort to build effective relationships, the FTC provides opportunities for staff from foreign agencies to spend several months working directly with FTC staff on investigations, subject to appropriate confidentiality protections. The FTC's International Fellows and SAFE WEB Interns program is based on a statute that also enables the FTC to send staff members to work in foreign competition agencies. In FY 2011, the FTC hosted 11 International Fellows and Interns from countries such as Australia, Brazil, Canada, China, India, Mexico, Turkey, the UK, and Vietnam. These included the chief economist of the U.K. Competition Commission, who spent a one-year fellowship to serve as Deputy Director of the FTC's Bureau of Economics. It also included short-term SAFE WEB Internships for two senior managers of the Competition Commission of India. In FY 2011, the FTC also sent staff on months-long details to work in foreign competition agencies in Canada and Mexico. These assignments provide valuable opportunities for participants to obtain a deep understanding of their international partners' laws and challenges. This knowledge provides critical support for coordinated enforcement and promotes convergence toward sound policy.

77. One of the Division's senior career officials spent two weeks visiting the EC's DG Comp in November 2011, and the Division hosted a DG Comp manager in Washington, D.C., in December 2011. The exchange was the first in the Division's new Visiting International Enforcers Program ("VIEP"). Participants in the VIEP are exposed to all aspects of the Division's work, consistent with the Division's confidentiality obligations, and receive training from senior Division officials regarding the Division's civil and criminal enforcement programs. Participants also have the opportunity to participate in meetings with Division decision-makers, parties, and third parties, and are invited to provide training to the Division on a topic of their choice related to their jurisdiction's antitrust law.

## 6. Regulatory and Trade Policy Matters

### 6.1 Regulatory Policies

#### 6.1.1 DOJ Activities: Federal and State Regulatory Matters

78. On May 18, 2011, the Division responded to a letter from a State Representative in Tennessee, and urged the Tennessee legislature to adopt a proposed amendment that would repeal the state's antitrust exemption for public hospitals. A 2005 opinion of the U.S. Court of Appeals for the Sixth Circuit held that the exemption covered a wide range of potentially anticompetitive actions, including exclusive contracts with health insurers. The Division's letter concluded that repealing the state action exemption would likely promote competition and benefit consumers. See <http://www.justice.gov/atr/public/comments/271584.htm>.

79. On December 28, 2010, the Division filed comments with the Securities and Exchange Commission and with the Commodity Futures Trading Commission on conflict of interest rules those agencies had proposed for the derivatives industry. The Division applauded proposed ownership and governance limits intended to prevent the emergence of a dominant trading platform controlled by major dealers to the detriment of other market participants, but suggested that in addition to limits on the voting equity or voting power of any single participant or member, the proposed rule should also place a limit on the aggregate voting equity or voting power that the major derivatives dealers may control. The Division analogized its concerns to those raised by an over-inclusive joint venture, with more competitors than necessary to achieve the joint venture's efficiencies. See <http://www.justice.gov/atr/public/comments/265620.htm> and <http://www.justice.gov/atr/public/comments/265618.htm>.

#### 6.1.2 FTC Staff Activities: Federal and State Regulatory Matters

80. **Health Care.** On September 28, 2011, FTC staff, in response to a request from Tennessee State Representative Gary Odom, stated that there may be reduced access to pain management services in the state, as well as higher costs for those services, under a bill proposed in the Tennessee legislature that would require on-site physician supervision of pain management services in some facilities. Tennessee House Bill 1896 would require physician supervision of pain management services administered by advanced practice nurses ("APNs"), as well as certified registered nurse anesthetists ("CRNAs"), who are APNs with specialized training in anesthesia and pain management. The Bill also would limit which physicians may supervise or provide such services. The FTC staff noted that access to pain management services in Tennessee is likely to be compromised by unnecessary limits on the abilities of APNs, CRNAs, doctors, and other health care professionals to provide those services, with no demonstrable safety benefits, and affirmed that it is not clear that the restrictions proposed in the Bill are necessary to protect patients. The FTC staff concluded that absent findings that its provisions are likely to ameliorate identifiable safety concerns, the Bill should be rejected. See <http://www.ftc.gov/opa/2011/10/nurses Tennessee.shtm>.

81. **Health Care, Pharmaceuticals.** On August 8, 2011, in response to a request for comment from New York State Senator James L. Seward, FTC staff filed a comment stating that consumers are likely to be harmed by proposed state legislation that would limit a health plan's ability to steer beneficiaries to a lower cost mail order provider of prescription drugs. The FTC staff expressed concern that New York Assembly Bill 5502-B, if enacted, would reduce competition between retail and mail order pharmacies, leading to higher costs and, potentially, reduced access to prescription drugs for New York consumers. The legislation would limit a health plan's ability to require or encourage the use of any particular mail order pharmacy by placing restrictions on all health insurance policies and insurers that provide prescription drug coverage. The FTC staff noted that these restrictions would undercut mail order pharmacies' incentives to bid aggressively for a share of a health plan's business and would likely lead to higher mail order prices. The staff concluded that, although the measure may seek to enhance consumers'

ability to fill prescriptions at pharmacies of their choice, it would impede a fundamental element of consumer choice: healthy competition between retail and mail order pharmacies, which constrains costs and maximizes access to prescription drugs. See <http://www.ftc.gov/opa/2011/08/prescriptiondrug.shtm>.

82. **Health Care.** On June 8, 2011, in response to a request from Connecticut state legislators Eric D. Coleman, John A. Kissel, Gerald Fox III, and John W. Hetherington, FTC staff filed a comment stating that the state's health care consumers are likely to be harmed by a state legislative proposal that would exempt health care providers in state-certified "cooperative arrangements" from state and federal antitrust laws. The FTC staff expressed concern that Connecticut House Bill 6343, if enacted, would very likely lead to dramatically increased health care costs and decreased access to care for Connecticut consumers. H.B. 6343 would allow health care providers to establish cooperative arrangements that will immunize the cooperative's activities from state and federal antitrust laws. The FTC staff stated that the proposed legislation is unnecessary because antitrust law already permits collaborations by health care providers that benefit consumers. The staff concluded that the antitrust immunity provisions in the proposal would allow groups of private health care providers to engage in anticompetitive conduct. See <http://www.ftc.gov/opa/2011/06/chc.shtm>.

83. **Utilities, Electricity.** On June 1, 2011, FTC staff submitted a comment to the U.S. Federal Energy Regulatory Commission ("FERC") providing views on how energy regulators should apply the revised Horizontal Merger Guidelines. The Guidelines outline how the Agencies evaluate the likely competitive impact of mergers and whether those mergers comply with U.S. antitrust law. The FTC staff comment responds to a Notice of Inquiry issued by FERC, seeking to determine the extent to which its approach should reflect the revised Guidelines. The FTC staff encouraged FERC to go beyond simple market concentration thresholds and to endeavor to adopt the approach set out in the 2010 Guidelines. According to FTC staff, excessive or inappropriate reliance on market concentration thresholds, especially in electricity markets, could lead to conclusions that could be either too lenient or too restrictive. The staff urged FERC to conduct reviews that account for all relevant competitive effects of a merger or acquisition, so as to avoid approving transactions that could lessen competition and harm consumers. See <http://www.ftc.gov/opa/2011/06/ferc.shtm>.

84. **Health Care.** On May 18, 2011, in response to a request from Texas State Representative Elliott Naishtat, FTC staff filed a comment stating that Texas health care consumers are likely to be harmed by a proposal in the Texas State Legislature that would exempt state-certified health care collaboratives, which are organizations composed of hospitals, physicians, and other health care providers, from state and federal antitrust laws. FTC staff expressed concern that Texas Senate Bill 8, if enacted, would likely lead to dramatically increased costs and decreased access to health care for Texas patients. The FTC staff noted that because antitrust laws already allow procompetitive collaborations among competitors, an antitrust exemption is unnecessary to achieve cost savings or promote improved quality and access to health care. Exempting the coordinated activities of health care providers, especially when the collaboration of these organizations involves negotiating reimbursement contracts with insurance companies, would eliminate price competition. The comment concluded that the exemption would likely lead to increased costs and decreased access to health care that may not be prevented by the review provisions in the Bill. See <http://www.ftc.gov/opa/2011/05/texashealth.shtm>.

85. **Alcohol, Distribution.** On May 16, 2011, FTC staff submitted a comment to Massachusetts State Representative Alice Peisch, advising against passage of Massachusetts House Bill 1871, which would impose new administrative requirements on the acquirer of a malt beverage brewer if it subsequently wants to terminate a wholesale distribution agreement that existed between that brewer and its wholesale distributor. The FTC staff explained that, if adopted, the measure "would further impede competition in the distribution of malt beverages, and thereby harm competition and consumers." For example, it would increase distribution costs by adding new administrative procedures and requiring the

new wholesaler to buy the distribution rights from the former wholesaler unless the acquiring firm can prove that it has good cause under Massachusetts law for terminating the existing wholesale agreement. The FTC staff concluded that the Bill appears to provide no countervailing consumer benefits that might justify such competitive restrictions, and urged that the Massachusetts legislature not pass the Bill. See <http://www.ftc.gov/opa/2011/05/maltbeverages.shtm>.

86. **Health Care, Health Professions.** On May 11, 2011, in response to a request from Texas State Senators Rodney Ellis and Royce West, FTC staff submitted a comment stating that Texas health care consumers would benefit from proposals in the Texas State Legislature that would allow Advanced Practice Registered Nurses (“APRNs”) to practice to the full extent of their education and training. The FTC staff noted that Texas Senate Bills would eliminate unnecessary physician supervision and delegation requirements imposed on APRNs, allowing them to make diagnoses and to prescribe and order prescription drugs and medical devices. This likely would result in lower health care costs, greater access to care, and more choice among settings where health care is provided. Available evidence suggests APRNs are safe providers of health care services when consistent with the scope of their training. FTC staff concluded that the Bills’ elimination of supervision and delegation requirements appears to be a procompetitive improvement in the law that likely will benefit Texas health care consumers, because the current laws seem to unduly restrict patient care by APRNs. See <http://www.ftc.gov/opa/2011/05/texasnurses.shtm>.

87. **Health Care, Health Professions.** On March 22, 2011, FTC staff submitted comments on Florida House Bill 4103 and the regulation of Advanced Registered Nurse Practitioners (“ARNPs”). The Bill would remove some of the constraints on physician-ARNP supervision arrangements that the Florida legislature adopted in 2006. The Bill seeks to replace some of the current constraints on ARNPs’ scope of practice with the less-restrictive supervision requirements that existed in Florida before the 2006 legislation took effect. The FTC staff affirmed that the Bill appears to represent a procompetitive improvement in the law, one that is likely to benefit Florida health care consumers. The staff noted that reducing current supervision requirements would allow more access to healthcare and urged the legislature to consider carefully the impact of the 2006 requirements and to avoid maintaining provisions that would limit ARNP provision of health care services more strictly than patient protection requires. The FTC comments concluded that absent evidence that the heightened restrictions were, and still are, necessary to protect the public, it appears that H.B. 4103 would benefit Florida consumers by facilitating the provision of lower cost and more accessible health care services. See <http://www.ftc.gov/os/2011/03/V110004campbell-florida.pdf>.

88. **Health Care, Pharmacy Benefit Managers.** On March 22, 2011, FTC staff sent comments to State Representative Mark Formby of the Mississippi House of Representatives stating that proposed legislation that would subject pharmacy benefits managers (“PBMs”) to regulation by the state’s Board of Pharmacy, give the board access to PBM financial and business information, and impose restrictions on out-of-state, mail-order pharmacies may increase prescription drug prices and reduce competition within the state. PBMs contract with health plans to manage the cost and quality of the plans’ drug benefits. The FTC staff stated that the bill likely would undermine PBMs’ ability to negotiate lower prices for prescription drugs and could facilitate collusion through the production of financial and other business information to third parties, in turn raising those prices for both insurers and consumers covered by health insurance. The bill would also change current law to require pharmacies outside the state that deliver prescription drugs to Mississippi residents to have a state-licensed pharmacist-in-charge. The FTC staff recommended that the Mississippi legislature seriously consider whether there are benefits to consumers from the additional, more restrictive regulations in the bill that would outweigh the competitive harm and consumer costs. See <http://www.ftc.gov/opa/2011/03/pbm.shtm>.

89. **Utilities, Electricity.** On March 1, 2011, FTC staff submitted a comment as part of a Federal Energy Regulatory Commission (“FERC”) rulemaking on the integration of alternative sources of energy –

such as wind farms, solar cells, and solar thermal installations – into the nation’s electric power grid. The FTC staff suggested ways to integrate such alternative sources into the grid more efficiently, to improve the reliability of electric service, and to foster innovation that can lower the costs of meeting environmental policy goals. The FTC staff urged FERC to explain more thoroughly how alternative energy sources can supply generation reserves on their own, arguing that such a discussion will support competition in the supply of those reserves. FTC staff urged FERC to protect against proposals that would discriminate against alternative energy providers when allocating regulation service costs. Such discriminatory allocations, the comment stated, could raise rivals’ costs and lessen competition in the industry. See <http://www.ftc.gov/opa/2011/03/ferc.shtm>.

90. **Optometry.** On January 13, 2011, FTC staff sent comments to the North Carolina Board of Opticians explaining that the Board’s proposal to restrict the sale of contact lenses, eyeglasses, and other optical goods in the state is likely to raise costs to consumers unnecessarily. The comments also state that the proposal appears to conflict with the federal Fairness to Contact Lens Consumers Act and the FTC’s Contact Lens and Eyeglass Rules, both of which protect consumers’ ability to promptly access their prescriptions at no charge to encourage comparison shopping for eyeglasses or contact lenses. The staff noted that several provisions of the proposed rule raised competitive concerns, including sections that would redefine prescriptions so that opticians would not have to give consumers the measurements needed to fill their prescriptions and impose new requirements on Internet but not brick-and-mortar sellers and on out-of-state but not in-state sellers. FTC staff found that the provisions were likely to restrict competition among optical goods providers in North Carolina, leading to likely increased prices and decreased consumer access to these products. The FTC staff suggested that the Board consider whether there are consumer benefits that outweigh the costs likely to be imposed by the new, more restrictive regulations. See <http://www.ftc.gov/opa/2011/01/ncopticians.shtm>.

91. **Dentistry.** On December 30, 2010, FTC staff provided comments to the Professional Licensing Boards Division of the Georgia Secretary of State concerning proposed amendments to restrict services by dental hygienists. The FTC staff urged the Georgia Board of Dentistry to reject a proposal that would prohibit dental hygienists from providing basic preventive dental services in approved public health settings except under the indirect supervision of a dentist. The FTC staff explained that, while there is no evidence that such supervision is necessary to prevent harm to dental patients, the proposed amendments likely would raise the cost of dental services in Georgia and reduce the number of consumers receiving dental care. See <http://www.ftc.gov/opa/2011/01/dentists.shtm>.

92. **Health Care.** On November 3, 2010, FTC staff submitted comments to the Alabama State Board of Medical Examiners concerning the proposed regulation of interventional pain management services. The Proposed Rule restricts the interventional treatment of pain to qualified, licensed medical doctors and doctors of osteopathy who may not delegate to non-physician personnel the authority to utilize such procedures to diagnose, manage, or treat chronic pain patients. The rule appears to prohibit certified registered nurse anesthetists (“CRNAs”) from performing, under the supervision of a physician, pain management procedures that the Board of Nursing considers within the scope of CRNA practice. The FTC staff noted that, absent evidence that the proposed restrictions are necessary to protect the public, there appears to be no reason to sacrifice the benefits of CRNA pain management services as currently available under Alabama law. Unnecessary restrictions on the ability of physicians to provide pain management services in collaboration with CRNAs are likely to reduce the availability, and raise the prices, of pain management services in Alabama. The FTC staff urged the Board to consider carefully the impact of the Proposed Rule and to avoid adopting provisions that would limit the role of CRNAs in pain management more strictly than patient protection requires. See <http://www.ftc.gov/opa/2010/11/alabamarule.shtm>.

93. **Utilities, Electricity.** On October 13, 2010, FTC staff submitted a comment concerning the Federal Energy Regulatory Commission’s (“FERC”) Supplemental Notice of Proposed Rulemaking and

Notice of Technical Conference regarding demand response compensation in organized wholesale energy markets. The comment highlighted that there is no need for a proposed FERC net benefits test so long as FERC utilizes efficient prices in compensating demand response providers, because efficient prices will elicit efficient levels of demand response. The FTC noted that efficient price signals also will encourage efficient investments in demand response technologies. The FTC staff affirmed that the proposal to implement a net benefits test as a screen arises as a policy issue only if FERC sets inefficiently high compensation levels for demand response. Additionally, the FTC comment encouraged FERC to adopt efficient pricing for demand response compensation, explaining that if FERC does so, it can avoid the need to devise administrative means to trim excess demand response. See <http://www.ftc.gov/opa/2010/10/ferc2.shtm>.

### 6.1.3 *DOJ and FTC Trade Policy Activities*

94. Both the Division and the FTC are involved in interagency discussions and decision-making with respect to the formulation and implementation of U.S. international trade and investment policy as concerns competition policy. The Agencies participate in interagency trade policy discussions chaired by the Office of the U.S. Trade Representative, and provide antitrust and other legal advice to U.S. trade agencies. The Division also works with other Department components (including the Civil, Criminal, and Environment and Natural Resources Divisions) on international trade and investment issues that affect those components or the Department as a whole.

95. Both the FTC and Division participate in bilateral and multilateral discussions and projects to improve cooperation in the enforcement of competition laws. The Agencies also participate in negotiations and working groups related to regional and bilateral trade agreements. The Division and the FTC participate in competition policy discussions associated with APEC and the Trans-Pacific Partnership (“TPP”). The Agencies are active participants in the annual UNCTAD Intergovernmental Group of Experts on competition law and policy, and they have also followed the competition and intellectual property component of the World Intellectual Property Organization’s (“WIPO”) Committee on Development and Intellectual Property.

## 7. **New Studies Related to Antitrust Policy**

### 7.1 *FTC Conferences, Reports, and Economic Working Papers*

#### 7.1.1 *Conferences and Workshops*

96. **Patents and Standard-Setting: Tools to Prevent “Hold-up.”** On June 21, 2011, the FTC held a public workshop on patents and standard-setting. The workshop examined the legal and policy issues surrounding the competition problem of “hold-up” when patented technologies are included in collaborative standards. The FTC workshop examined three ways to try to prevent hold-up: 1) patent disclosure rules of standard-setting organizations; 2) commitments given by patent holders that they will license users of the standard on reasonable and non-discriminatory (“RAND”) terms; and 3) disclosure of licensing terms by patent holders before the standard is adopted. More information about the workshop is available at <http://www.ftc.gov/opp/workshops/standards/index.shtml>.

97. **Workshops regarding Accountable Care Organizations (“ACOs”) and Antitrust.** On October 5, 2010 the FTC held a workshop on issues associated with ACOs, including antitrust, physician self-referral, anti-kickback and civil monetary penalty laws. On May 9, 2011, the FTC held another workshop on ACOs that sought input on the Proposed Statement of Antitrust Enforcement Policy, which discusses how the Agencies will enforce U.S. antitrust laws when competing health care providers create new ACOs under the Affordable Care Act of 2010. The workshop featured a moderated discussion with a



variety of industry stakeholders, including health care providers and insurers, as well as academics, health policy, and economic experts, and representatives of the Agencies. More information on these workshops is available at <http://www.ftc.gov/opp/workshops/aco/index.shtml> and <http://www.ftc.gov/opp/workshops/aco2/index.shtml>.

### 7.1.2 *Studies and Reports*

98. **Gasoline Price Changes and the Petroleum Industry: An Update.** In September 2011, the FTC's Bureau of Economics issued a staff report that examined trends in the petroleum industry and how they affected gasoline prices between 2005 and early 2011. The report concludes that although a broad range of factors influence the price of gasoline, worldwide crude oil prices continue to be the main driver of what consumers pay for gas. The report updates FTC work on gasoline price factors and on mergers, structural changes, and antitrust enforcement in the petroleum industry. It also reviews and comments on research regarding the rate at which gasoline prices adjust to price changes further up the petroleum supply chain, as well as evidence regarding regional variations in the patterns of these adjustments. See <http://www.ftc.gov/opa/2011/09/gasprices.shtm>.

99. **Authorized Generic Drugs: Short-Term Effects and Long-Term Impact.** In August 2011, the FTC issued a report that examined how authorized generics affect the pharmaceutical market. The report finds that brand-name firms use leverage of authorized generic entry to delay competition. The report notes that when pharmaceutical companies introduce an authorized generic version of their brand-name drug, it can reduce both retail and wholesale drug prices. The report also found that authorized generics have a substantial effect on the revenues of competing generic firms. Over the longer term, by lowering expected profits for generic competitors, the introduction of an authorized generic could affect a generic drug company's decision to challenge patents on branded drug products with low sales. However, the report concluded that in spite of this, patent challenges by generic competitors remain robust. Finally, the report found that some branded drug companies may have used agreements not to launch an authorized generic as a way to compensate would-be generic competitors for delaying entry into the market. The report is available at <http://www.ftc.gov/os/2011/08/2011genericdrugreport.pdf>.

100. **The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition. In March 2011, FTC staff issued a report with recommendations** to improve two areas of patent law: policies affecting how well a patent gives notice to the public of what technology is protected, and remedies for patent infringement. The report continues the Commission's policy engagement with the patent system that began with its 2003 report, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* (available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>) and continued with the 2007 joint FTC-DOJ report on *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* (available at <http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf>). The 2011 report is based on a series of hearings, public comments, and selected panels of a May 26, 2010 workshop and recognizes that patents play a critical role in encouraging innovation. At the same time, it observes that some strategies by patent holders risk distorting competition and deterring innovation. The report suggests mechanisms to improve the public's ability to identify relevant patents, to understand the scope of patent claims, and to predict the breadth of claims that are likely to emerge from patent applications. The report also makes recommendations to courts that would ground damages calculations and injunction analysis in economic principles that recognize competition among patented technologies. The report is available at <http://www.ftc.gov/os/2011/03/110307patentreport.pdf>.

7.1.3 *Bureau of Economics Working Papers*

101. The FTC's Bureau of Economics issued the following working papers during FY 2011. The papers are available at <http://www.ftc.gov/be/econwork.shtm>.

- Dan Hanner, Daniel Hosken, Luke Olson, Loren Smith, *Dynamics in a Mature Industry: Entry, Exit, and Growth of Big-Box Grocery Retailers*, September 2011
- David J. Balan, Patrick S. Romano, *A Retrospective Analysis of the Clinical Quality Effects of the Acquisition of Highland Park Hospital by Evanston Northwestern Healthcare*, November 2010
- Patrick DeGraba, *Naked Exclusion by a Dominant Supplier: Exclusive Contracting and Loyalty Discounts*, November 2010

7.2 **DOJ Conferences, Reports, and Economic Working Papers**

7.2.1 *Department of Justice Economic Analysis Group Discussion Papers*

102. The DOJ Economic Analysis Group issued the following papers during FY 2011. The papers are available at [http://www.usdoj.gov/atr/public/eag/discussion\\_papers.htm](http://www.usdoj.gov/atr/public/eag/discussion_papers.htm).

- Russell Pittman, *Blame the Switchman? Russian Railways Restructuring After Ten Years*, February 2011
- Thomas D. Jeitschko and Byung-Cheol Kim, *Signaling, Learning and Screening Prior to Trial: Informational Implications of Preliminary Injunctions*, February 2011
- William Gillespie and Oliver M. Richard, *Antitrust Immunity and International Airline Alliances*, February 2011

## APPENDICES

Department of Justice: Fiscal Year 2011 FTE<sup>1</sup> and Actual Resources by Enforcement Activity

	FTE	Amount (\$ in thousands)
Criminal Enforcement	304	\$66,632
Civil Enforcement	456	\$99,948
Total	760	\$166,580

Federal Trade Commission: Fiscal Year 2011 Competition Mission  
FTE and Dollars by Program by Bureau/Office

	FTE	Amount (\$ in thousands)
Total Maintain Competition	521.8	\$117,734.3
<b>Mission</b>		
<i>Bureau of Competition</i>	283.3	48,866.2
<i>Bureau of Economics</i>	75.2	12,458.8
<i>Regional Offices</i>	24.4	4,394.5
<i>Mission Support</i>	138.9	52,014.8
<b>Premerger Notification</b>	31.5	4,885.7
<i>Bureau of Competition</i>	31.2	4,837.4
<i>Bureau of Economics</i>	0.0	0.0
<i>Regional Offices</i>	0.3	48.3
<b>Merger &amp; Joint Venture Enforcement</b>	181.9	31,912.0
<i>Bureau of Competition</i>	130.6	23,481.5
<i>Bureau of Economics</i>	39.2	6,373.5
<i>Regional Offices</i>	12.1	2,057.0
<b>Merger &amp; Joint Venture Compliance</b>	3.1	481.2
<i>Bureau of Competition</i>	3.0	465.1
<i>Bureau of Economics</i>	0.0	0.0
<i>Regional Offices</i>	0.1	16.1
<b>Nonmerger Enforcement</b>	137.6	22,527.5
<i>Bureau of Competition</i>	104.8	16,870.5
<i>Bureau of Economics</i>	21.8	3,625.5
<i>Regional Offices</i>	11.0	2,031.5
<b>Nonmerger Compliance</b>	0.8	124.0
<i>Bureau of Competition</i>	0.8	124.0
<i>Bureau of Economics</i>	0.0	0.0
<i>Regional Offices</i>	---	---
<b>Antitrust Policy Analysis</b>	8.9	1,449.9
<i>Bureau of Competition</i>	---	---
<i>Bureau of Economics</i>	8.9	1,449.9
<i>Regional Offices</i>	---	---
<b>Other Direct</b>	19.1	4,339.2
<i>Bureau of Competition</i>	12.9	3,087.7
<i>Bureau of Economics</i>	5.3	1,009.9
<i>Regional Offices</i>	0.9	241.6
<b>Support</b>	138.9	\$52,014.8

<sup>1</sup> An "FTE" or "full time equivalent" amounts to one employee working full time for a full year. Because the number of employees fluctuates throughout the year through hiring, attrition, and varying schedules, an agency typically has more employees than FTEs (e.g., two employees working 20 hours per week for one full year equals one FTE).