

Unclassified

DAF/COMP/AR(2014)24

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

17-Jun-2014

English - Or. English

Directorate for Financial and Enterprise Affairs
COMPETITION COMMITTEE

DAF/COMP/AR(2014)24
Unclassified

ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN THE UNITED STATES

-- 2013 --

18-19 June 2014

This report is submitted by the United States to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 18-19 June 2014.

JT03359512

Complete document available on OLIS in its original format

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

English - Or. English

TABLE OF CONTENTS

1. Introduction.....	3
1.1 Senior Leadership Update.....	3
2. Changes in law or policies	3
2.1 Changes in Antitrust Rules, Policies, or Guidelines	3
2.2 Proposals to Change Antitrust Laws, Related Legislation or Policies.....	4
3. Enforcement of antitrust law and policies: actions against anticompetitive practices	4
3.1 Staffing and Enforcement Statistics.....	4
3.1.1 FTC	4
3.1.2 DOJ	5
3.2 Antitrust Cases in the Courts	5
3.2.1 United States Supreme Court.....	5
3.2.2 U.S. Court of Appeals Cases.....	6
3.3 Statistics on Private and Government Cases Filed.....	7
3.4 Significant Enforcement Actions.....	7
3.4.1 DOJ Criminal Enforcement	7
3.4.2 DOJ Civil Non-Merger Enforcement.....	10
3.4.3 FTC Non-Merger Enforcement Actions	11
3.5 Advisory Letters from the FTC	12
3.6 Business Reviews Conducted by the DOJ	13
4. Enforcement of antitrust laws and policies; mergers and concentrations	13
4.1 Enforcement of Pre-merger Notification Rules	13
4.2 Select Significant Merger Matters	14
4.2.1 FTC Public Merger Investigations and Challenges	14
4.2.2 DOJ Public Merger Investigations and Challenges	17
5. International antitrust cooperation and outreach.....	19
5.1 International Antitrust Cooperation Developments	19
5.2 Outreach.....	21
6. Regulatory and Trade Policy Matters	22
6.1 Regulatory Policies	22
6.1.1 DOJ Activities: Federal and State Regulatory Matters	22
6.1.2 FTC Staff Activities: Federal and State Regulatory Matters	23
6.1.3 DOJ and FTC Trade Policy Activities	25
7. New Studies Related to Antitrust Policy.....	25
7.1 Joint Conferences and Reports.....	25
7.2 FTC Conferences, Reports, and Economic Working Papers	25
7.2.1 Conferences and Workshops.....	25
7.2.2 Bureau of Economics Working Papers	26
7.3 DOJ Economic Working Papers	26
7.3.1 DOJ Economic Analysis Group Discussion Papers.....	26
APPENDICES.....	27

1. Introduction

1. This report describes federal antitrust developments in the United States for the period of October 1, 2012 through September 30, 2013 (“FY 2013”).¹ 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 2013, see the FTC’s Annual Highlights 2013, available at <http://www.ftc.gov/reports/annual-highlights-2013>, and the DOJ’s Spring 2014 Division Update, available at <http://www.justice.gov/atr/public/division-update/2014/index.html>.

1.1 Senior Leadership Update

2. On January 3, 2013, William J. Baer was sworn in as Assistant Attorney General (“AAG”) for the Division, following confirmation by the U.S. Senate. Prior to his arrival, Deputy Assistant Attorney General (“DAAG”) for Criminal and Civil Operations Renata B. Hesse served as Acting AAG after the November 16, 2012 resignation of Acting AAG Joseph F. Wayland. DAAG Leslie C. Overton began supervising the Division’s international program in April 2013, upon the departure of Rachel Brandenburger, the Special Advisor for International Matters; also at this time, Patricia A. Brink, Director of Civil Enforcement, took on the role of coordinating civil case cooperation. Aviv Nevo became DAAG for Economic Analysis on March 31, 2013. David I. Gelfand became DAAG for Litigation on August 26, 2013, and Brent Snyder became DAAG for Criminal Enforcement on November 26, 2013.

3. President Obama designated FTC Commissioner Edith Ramirez to serve as Chairwoman, effective March 4, 2013. FTC Chairman Jon Leibowitz resigned in February 2013. On January 11, 2013, after confirmation by the U.S. Senate, Joshua Wright was sworn in as Commissioner. On April 9, 2014, the U.S. Senate confirmed President Obama’s nomination of Terrell McSweeney as Commissioner.

4. On June 17, 2013, Chairwoman Ramirez appointed Deborah L. Feinstein as Director of the FTC’s Bureau of Competition, Jessica Rich as Director of the Bureau of Consumer Protection, and Jonathan E. Nuechterlein as General Counsel. On September 9, 2013, Chairwoman Ramirez appointed Martin S. Gaynor as Director of the Bureau of Economics.

2. Changes in law or policies

2.1 Changes in Antitrust Rules, Policies, or Guidelines

5. **Changes to Premerger Notification Rules.** On November 6, 2013, the FTC, after public comment and with the concurrence of the Division, issued changes to the premerger notification rules that require companies in the pharmaceutical industry to report certain proposed acquisitions of exclusive patent rights to the FTC and DOJ for antitrust review. The revised rules provide a framework for determining when a transfer of exclusive rights to a patent or part of a patent in the pharmaceutical industry results in a potentially reportable asset acquisition under the Hart-Scott-Rodino Act. See <http://www.ftc.gov/news-events/press-releases/2013/11/ftc-finalizes-amendments-premerger-notification-rules-related>.

6. **Changes to Carve-out Practice Regarding Corporate Plea Agreements.** On April 12, 2013, AAG Baer issued a statement on changes to the Division’s carve-out practice regarding corporate plea

¹ In some sections of the Report, e.g., the following section on Senior Leadership Update, more recent information is provided.

agreements in criminal cases. Previously, in appropriate cases, corporate plea agreements included a provision offering non-prosecution protection to those employees who cooperated with the investigation and whose conduct did not warrant prosecution. The Division excluded, or carved out, employees who were believed to be culpable. In certain circumstances, it also carved out employees who refused to cooperate with the Division's investigation, employees against whom the Division was still developing evidence, and employees with potentially relevant information who could not be located. The names of all carved-out employees were included in the corporate plea agreements, which were publicly filed in the district courts where the charges were brought. As a result of the announced changes, the Division no longer carves out employees for reasons unrelated to culpability, and the Division will not include the names of carved-out employees in the plea agreement itself. Those names will instead be listed in an appendix to be filed with the court under seal. See http://www.justice.gov/atr/public/press_releases/2013/295747.htm.

2.2 Proposals to Change Antitrust Laws, Related Legislation or Policies

7. On July 23, 2013, FTC Chairwoman Ramirez testified before Congress, expressing concern about anticompetitive "pay-for-delay" agreements in the pharmaceutical industry. Chairwoman Ramirez stated that following the Supreme Court decision in *FTC v. Actavis, Inc.*, which held that pay-for-delay agreements are subject to a rule of reason analysis (see Section 3.2.1 below), the FTC will continue to challenge anticompetitive "pay-for-delay" agreements in court, and continue to support legislation that would make these agreements presumptively illegal to enhance clarity, create a stronger deterrent effect, and help the FTC move more quickly to stop these harmful agreements. See <http://www.ftc.gov/public-statements/2013/07/prepared-statement-federal-trade-commission-pay-delay-deals-limiting>.

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

3.1 Staffing and Enforcement Statistics

3.1.1 FTC

8. During FY 2013, the FTC employed approximately 538 staff and spent approximately \$113.4 million in furtherance of its Maintaining Competition mission.

9. During FY 2013, 1,286 proposed mergers and acquisitions were reported for review under the HSR Act, a 10.0 percent decrease from the number of HSR transactions reported during FY 2012. The Commission staff issued requests for additional information ("second requests") in 25 transactions. The Commission challenged 23 mergers, 16 of which were settled with consent orders, two in which the transaction was abandoned or restructured as a result of antitrust concerns raised during the investigation, four in which the Commission initiated administrative litigation, and one in which the Commission filed a complaint in federal court seeking permanently to enjoin the merger.

10. During FY 2013, the FTC staff opened 23 non-merger initial phase investigations. The Commission brought four non-merger enforcement actions, each of which was resolved by a consent order.

11. The Commission filed *amicus curiae* briefs in 11 cases (one before the Supreme Court and ten before federal appeals and district courts). The Commission provided three advisory opinions (see Section 3.5 below) and submitted 14 advocacy filings (see <http://www.ftc.gov/policy/advocacy>).

3.1.2 DOJ

12. At the end of FY 2013, the Division had 611 employees: 310 attorneys, 45 economists, 115 paralegals, and 141 other professional staff. For FY 2013, the Division received an appropriation of \$159 million.

13. During FY 2013, the Division opened 92 investigations and filed 62 civil and criminal cases in federal district court.

14. During FY 2013, the Division filed 50 criminal cases, in which it charged a total of 21 corporations and 34 individuals with federal crimes. The Division obtained just over \$1 billion in criminal fines against 24 corporate defendants and 29 individuals. Twenty-eight individuals were sentenced to a total of 20,999 days of incarceration; the courts imposed an average sentence of just over two years per defendant.

15. During FY 2013, the Division investigated 65 mergers and challenged seven of them in court; 8 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 511 bank mergers. The Division opened 75 civil investigations (merger and non-merger), and issued 338 civil investigative demands (a form of compulsory process). The Division filed five non-merger civil complaints. Also during FY 2013, the Division issued four business review letters.

3.2 Antitrust Cases in the Courts

3.2.1 United States Supreme Court

16. On June 17, 2013, the U.S. Supreme Court decided *FTC v. Actavis*, a “pay-for-delay” case concerning the testosterone-replacement drug AndroGel. On February 2, 2009, the FTC filed a complaint in federal district court challenging agreements in which Solvay Pharmaceuticals, Inc. paid generic drug makers Watson Pharmaceuticals, Inc., Paddock Laboratories, Inc., and Par Pharmaceutical Companies, Inc. to delay generic competition to Solvay’s branded testosterone-replacement drug AndroGel, a prescription pharmaceutical with annual sales of more than \$400 million. The complaint alleged that the companies violated the antitrust laws when Solvay paid the generic firms millions of dollars annually in exchange for their agreements to abandon their patent challenges to Solvay’s drug and to refrain from marketing a generic version of AndroGel until 2015. The District Court dismissed the complaint, and the Eleventh Circuit Court of Appeals affirmed.

17. The Supreme Court reversed the decision of the Court of Appeals. Ruling in favor of the FTC, the Court held that an agreement to settle patent-related litigation was not immune from antitrust attack just because the anticompetitive effects of the agreement fell within the exclusionary scope of the patent. Instead, the Court ruled that antitrust challenges to such agreements should be decided by assessing their competitive effects and evaluating whether the claimed justifications are legitimate, using a “rule of reason” analysis.

18. On June 30, 2013, the Supreme Court decided *American Express Co. v. Italian Colors Restaurant*, in which it enforced an arbitration provision incorporating a class-action waiver to bar a class action antitrust suit. The plaintiffs were merchants who alleged that American Express had used its monopoly over charge cards to force them to pay 30 percent more so they could accept its credit cards, and that this was an unlawful tying arrangement. American Express’s agreement with the merchants included a requirement that any disputes over it be arbitrated and barred class arbitration. The Court held that the bar on class arbitration was enforceable under the Federal Arbitration Act, rejecting the plaintiffs’ argument that the maximum any one of them could expect to recover was less than \$40,000 after trebling.

The Court acknowledged that the provision effectively precluded individual – and thus any – claims, but thought that the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim.

19. On March 27, 2013, the Supreme Court decided *Comcast Corp. v. Behrend*, reversing the certification of a class action in an antitrust suit. The district court had certified the class, and the court of appeals affirmed. The suit alleged that Comcast’s practice of “clustering” its cable systems, by which it acquired additional systems adjacent to its existing systems in a metropolitan area, was an antitrust violation. To pursue a case on a class basis, however, the district court must find that “the questions of law or fact common to class members predominate over any questions affecting only individual members.” It found that was true of only one of the four theories of anticompetitive effect asserted, that the clustering deterred “overbuilding” by competing cable operators. The lower courts rejected Comcast’s argument that the econometric study that plaintiffs had submitted to show damages was not capable of measuring damages for the class injured under that theory, holding that such an argument went to the merits of the case and was not suitable for decision at the class certification stage. The Supreme Court held that the plaintiffs must show that damages can be measured on a classwide basis; their evidence here fell short, and the court must consider that in certifying the class, even if the issue overlaps the merits.

20. On February 19, 2013, in *FTC v. Phoebe Putney Health System, Inc.*, the Supreme Court unanimously ruled that the state action immunity doctrine did not immunize Phoebe Putney Health System, Inc.’s acquisition of Palmyra Park Hospital, Inc. from the federal antitrust laws. The FTC filed suit on April 20, 2011, seeking to block the proposed combination of the only two hospitals in Albany, Georgia. The Commission alleged that the deal would reduce competition significantly and allow the combined Phoebe/Palmyra to raise prices for general acute-care hospital services charged to the commercial health plans harming patients and local employers and employees.

21. Under the state action doctrine, when a local governmental entity acts pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, it is exempt from scrutiny under the federal antitrust laws. The Supreme Court held that Georgia law, which creates special-purpose public entities called hospital authorities and gives those entities general corporate powers, including the power to acquire hospitals, did not clearly articulate and affirmatively express a state policy to permit acquisitions that substantially lessen competition. The Court, unanimously upholding the FTC’s position and reversing the lower court, reasoned that, because Georgia’s grant of general corporate powers to hospital authorities does not include permission to use those powers anticompetitively, the clear-articulation test is not satisfied and state action immunity does not apply. See www.ftc.gov/opa/2013/02/phoebe.shtm.

3.2.2 U.S. Court of Appeals Cases

22. On May 31, 2013, the U.S. Court of Appeals for the Fourth Circuit decided *North Carolina State Board of Dental Examiners v. FTC*, 717 F.3d 359 (4th Cir. 2013), upholding the FTC’s administrative adjudicatory order concluding that a state dental board had unlawfully attempted to restrict competition for tooth whitening services by issuing cease-and-desist orders, without judicial authorization, against non-dentist providers of those services. The Court ruled that the dental board was not exempt from antitrust liability because it was composed almost entirely of industry representatives (dentists) and was not actively supervised by the state government. The Court affirmed the FTC’s conclusions that the dentists had acted collusively and that their actions were “inherently suspect” due to their clear tendency to suppress competition. The Supreme Court recently granted the dental board’s request to review the Fourth Circuit’s ruling.

23. On January 4, 2013, the U.S. Court of Appeals for the Tenth Circuit decided *Auraria Student Housing at the Regency, LLC v. Campus Village Apartments, LLC*, 703 F.3d 1147, an interlocutory appeal from a district court order denying a motion to dismiss in which the defendant had pleaded state action immunity from an antitrust suit. The defendant contended that state action immunity was like the sovereign immunity of a state, which is a right not to be sued by a private party without its consent. It further argued that an erroneous order forcing a state to go to trial would defeat the purpose of the doctrine, so an order denying a motion to dismiss should be immediately appealable under the collateral order doctrine. However, the Court held that the state action “immunity” provides a private party with only a defense on the merits that can be vindicated by an appeal from a final judgment after trial, so the court did not have jurisdiction over the interlocutory appeal.

24. On November 20, 2012, the U.S. Court of Appeals for the Federal Circuit decided *Ritz Camera & Image, LLC, v. SanDisk Corp.*, 700 F.3d 503. Ritz, a purchaser of NAND flash memory products, sued SanDisk under the antitrust laws for monopolizing the market for NAND products, alleging that SanDisk had secured a patent for the technology through deliberate fraud on the Patent Office. SanDisk moved to dismiss the claim, arguing that Ritz was not a competitor, was not threatened with liability under the patent laws, and thus had no standing to bring it. The district court denied SanDisk’s motion, but certified the issue for interlocutory review. The court of appeals affirmed, holding that standing under the patent laws was irrelevant; this was an antitrust suit, and so long as Ritz had standing as a direct purchaser under the antitrust laws, it could raise the fraudulent patent acquisition as an element of its antitrust claim.

3.3 Statistics on Private and Government Cases Filed

25. According to the 2013 Annual Report of the Director of the Administrative Office of the U.S. Courts, 817 new civil antitrust actions, both government and private, were filed in the federal district courts in FY 2013. See Table C-2A of the report, available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/C02ASep13.pdf>.

3.4 Significant Enforcement Actions

3.4.1 DOJ Criminal Enforcement

26. The Division obtained significant criminal fines and prison sentences in FY 2013, including the longest sentence ever involving a Sherman Act violation, and won jury trial victories relating to its Superfund (a federal program to clean up hazardous waste sites) fraud and real estate foreclosure auctions investigations. The FY 2013 total of \$1 billion in criminal fines total is the third time since 2009 that the Division exceeded the \$1 billion fine mark; since 2009, the Division has obtained more than \$4 billion in criminal fines. These criminal fines do not go to the Division, but rather are contributed to the Crime Victims’ Fund, helping those victimized by federal crimes throughout the U.S. The Division also established a second criminal office in Washington, D.C. Its initial focus will be investigating real estate foreclosure auction bid rigging in the southeastern United States; over time it will expand to include a full portfolio of matters.

27. In FY 2013, in connection with its coastal shipping investigation, the Division obtained a five-year prison sentence for a convicted criminal defendant, the longest ever for a Sherman Act violation. And in the Division’s investigation of kickbacks at Environmental Protection Agency Superfund sites, a defendant was sentenced to 14 years in prison for antitrust violations, fraud, and other criminal activity. During FY 2013, 68 percent of the individuals sentenced in Division cases received prison time. Nearly twice as many defendants in Division cases receive prison sentences as in the 1990s, with current defendants serving longer terms. In FY 2013, the average prison sentence was 25 months, more than three times the average of eight months in the 1990s. Ten foreign nationals were sentenced to imprisonment

during FY 2013, with an average sentence of 15 months. The Division remains committed to ensuring that culpable foreign nationals serve prison sentences for violating the U.S. antitrust laws, just as U.S. price-fixers do.

28. **Real Estate Foreclosure Auctions Cartel.** On March 11, 2014, following a four-week trial, a California federal jury convicted two real estate investors of conspiring to rig bids at public real estate foreclosure auctions in San Joaquin County, California. One of the defendants also was convicted of obstruction of justice for destroying evidence. The jury could not reach a verdict on a count of conspiracy to commit mail fraud against these two defendants. The jury found a third defendant, an auctioneer, not guilty.

29. The convicted investors and their co-conspirators agreed to suppress and restrain competition by rigging bids to obtain selected properties offered at public auctions. Evidence showed that after the conspirators' designated bidder bought a property at a public auction, they often would hold a second, private auction at which each participating conspirator would bid the amount above the public auction price he or she was willing to pay. The conspirator who bid the highest amount at the end of the private auction won the property. The difference between the price at the public auction and that at the second auction was the group's illicit profit, and it was divided among the conspirators in payoffs. This was money that otherwise would have gone to pay off mortgages and, in some cases, the defaulting homeowners. The bid-rigging conspiracy lasted from September 2008 or earlier until October 2009 or later. To date, 46 individuals either have pled guilty or agreed to plead guilty in connection with the real estate foreclosure auctions investigation in northern California. *See* http://www.justice.gov/atr/public/press_releases/2014/304304.htm.

30. **Superfund Kickback Scheme.** On September 30, 2013, following a two-week trial, a jury in New Jersey returned guilty verdicts on 10 counts charged in the indictment against a former project manager for a prime contractor, for his central role in conspiracies that spanned seven years and involved kickbacks in excess of \$1.5 million at two Environmental Protection Agency Superfund sites. The defendant was convicted of conspiring with three subcontractors at two New Jersey Superfund sites. He also was convicted of engaging in an international money laundering scheme, major fraud against the United States, accepting illegal kickbacks, committing two tax violations, and obstruction of justice. As part of the conspiracies, he and co-conspirators accepted kickbacks from subcontractors in exchange for the award of subcontracts. He also provided co-conspirators with their competitors' bid prices, which allowed them to submit higher bid prices and still be awarded the subcontracts. On March 3, 2014, the defendant was sentenced to 14 years in prison and to pay a \$50,000 fine. As of March 2014, more than \$6 million in criminal fines and restitution have been imposed in the course of this investigation, and six individuals have been sentenced to serve more than 24 years in total prison time. *See* http://www.justice.gov/atr/public/press_releases/2014/304133.htm and http://www.justice.gov/atr/public/press_releases/2013/301155.htm.

31. **Auto Parts.** The Division's ongoing automobile parts investigation has yielded very significant results. On September 26, 2013, the Division undertook the largest simultaneous enforcement action in its history, bringing charges against nine companies, which agreed to the imposition of a total of more than \$740 million in fines, and two individuals. Recently, the investigation also yielded the fourth-largest criminal antitrust fine ever imposed—a \$425 million fine against Bridgestone Corporation.

32. As of March 2014, the investigation has resulted in charges against 26 companies and 29 individuals and more than \$2 billion in criminal fines for participation in conspiracies to fix prices of and rig bids on automobile parts, including safety systems such as seat belts, air bags, steering wheels, and antilock brake systems, and critical parts such as anti-vibration rubber, instrument panel clusters, starter motors, and wire harnesses. Twenty-three of the individuals have pled guilty or agreed to plead guilty and

have agreed to serve prison sentences ranging from a year and a day to two years. The Division continues to cooperate on this investigation with its counterparts in Canada, the EC, Japan, and South Korea, among others. *See* press releases and case filings at <http://www.justice.gov/atr/public/division-update/2014/auto-parts.html#press-releases>.

33. **Financial Fraud: Real Estate Foreclosure.** As of March 2014, 90 defendants have pleaded guilty to real estate foreclosure and tax liens conspiracies across the United States that suppress and restrain competition in ways that harm financially distressed homeowners. The Division has partnered with the FBI to combat a pattern of collusive schemes among real estate speculators aimed at eliminating competition at real estate foreclosure auctions. Instead of competitively bidding at public auctions for foreclosed properties, groups of real estate speculators work together to keep public auction prices artificially low by paying each other to refrain from bidding or holding unofficial “knockoff” auctions among themselves. The Division has taken recent action against real estate investors who purchased rigged properties in four counties in California, as well as Mobile, Alabama, and Atlanta, Georgia. As described above in paras 28-29, the Division recently secured convictions at trial against two real estate investors for conspiring to rig bids at real estate foreclosure auctions in San Joaquin County, California. *See* real estate foreclosure auctions investigation press releases and case filings at <http://www.justice.gov/atr/public/division-update/2014/re-foreclosure-auctions.html#press-releases>.

34. **Financial Fraud: Tax Lien Auctions.** Similar collusive conduct also has been detected among bidders for public tax liens, and eleven individuals and three companies have pleaded guilty as part of an ongoing investigation into bid rigging and fraud related to such auctions in New Jersey. Additionally, four individuals and two entities were indicted on November 19, 2013. The Division is investigating this type of anticompetitive conduct at auctions in multiple states. *See* municipal tax lien auctions investigation press releases and case filings at <http://www.justice.gov/atr/public/division-update/2014/tax-lien-auctions.html#press-releases>.

35. **Financial Fraud: LIBOR.** In the LIBOR (London InterBank Offered Rate)/Euribor investigation, the Division, in conjunction with the Criminal Division, obtained a conviction against Rabobank, which agreed to pay \$325 million in criminal penalties. The Division also filed criminal complaints against, and obtained guilty pleas from, eight individuals for their roles in manipulating LIBOR and/or Euribor benchmark interest rates. In all, the Division has obtained \$475 million in criminal fines and penalties in this ongoing investigation, and the total global criminal and regulatory fines, penalties, and disgorgement obtained by enforcement authorities is over \$3.7 billion. The broader investigation relating to LIBOR and other benchmark rates has required, and has greatly benefited from, a wide-ranging cooperative effort among various enforcement agencies both in the United States and abroad. The FBI, Securities and Exchange Commission, Commodity Futures Trading Commission, U.K. Financial Conduct Authority and Serious Fraud Office, Japanese Ministry of Justice, Japan Financial Services Agency, Swiss Financial Market Supervisory Authority, Dutch Public Prosecution Service, and Dutch Central Bank all have played major roles in the LIBOR investigation. *See* <http://www.justice.gov/atr/public/division-update/2014/libor.html#press-releases>.

36. **Financial Fraud: Municipal Bonds.** The Division, in concert with other federal agencies, continues to obtain convictions in criminal conspiracies involving bid rigging in the municipal bond investments market. The schemes under investigation involve unlawful agreements to manipulate the bidding process on municipal investment and related contracts—financial instruments that were used to invest the proceeds of, or manage the risks associated with, bond issuances by municipalities and other public entities. The bonds these crimes affect support critical municipal infrastructure, like roads, schools, and other projects. As of March 2014, the Division’s ongoing investigation has resulted in criminal charges against 20 former executives of various financial services companies and one corporation. Seventeen of the 20 executives charged have pleaded guilty or were convicted at trial. In addition, financial institutions have

agreed to pay a combined total of nearly \$750 million in restitution, penalties, and disgorgement to federal and state agencies for their roles in the conduct. See <http://www.justice.gov/atr/public/division-update/2014/muni-bonds.html#press-releases>.

37. **Airline Charter Services.** On February 24, 2014, the Division obtained the fifth guilty plea to arise out of its ongoing investigation into fraud and anticompetitive conduct in the airline charter services industry. A former employee of Aviation Fuel International, Inc. (AFI) pleaded guilty to a felony charge. The charge against him stemmed from the investigation into kickback payments by AFI and its employees to the former vice president of ground operations for Ryan International Airlines. The defendant worked for AFI from June 2007 to March 2008, and during that time Ryan's vice president received kickback payments from AFI on aviation fuel, services, and equipment sold by AFI to Ryan. AFI's owner and operator pleaded guilty on March 6, 2014, bringing the total number of guilty pleas to six. Four of the six individuals who have pleaded guilty have been ordered to serve sentences ranging from 16 to 87 months in prison and to pay more than \$580,000 in restitution. See http://www.justice.gov/atr/public/press_releases/2013/300683.htm; http://www.justice.gov/atr/public/press_releases/2013/300000.htm; and http://www.justice.gov/atr/public/press_releases/2013/299559.htm.

38. **Ocean Shipping.** On February 27, 2014, the Division brought charges in its investigation of a conspiracy involving ocean shipping services. Compañía Sud Americana de Vapores S.A. (CSAV), a Chilean corporation, was the first company charged in the conspiracy to suppress and eliminate competition by allocating customers and routes, rigging bids, and fixing prices for the sale of international ocean shipping services for roll-on, roll-off cargo. This is non-containerized cargo that can be rolled onto and off an ocean-going vessel and includes new and used cars and trucks, as well as construction, mining, and agricultural equipment. CSAV has agreed to pay an \$8.9 million criminal fine. See http://www.justice.gov/atr/public/press_releases/2014/304053.htm.

3.4.2 DOJ Civil Non-Merger Enforcement

39. **E-Books.** On July 10, 2013, after a three-week trial, Judge Denise Cote of the Southern District of New York ruled that Apple had violated section 1 of the Sherman Act by conspiring to raise the prices of e-books and curtail e-book sellers' ability to compete on price. The court concluded that Apple had engaged in and furthered a horizontal price-fixing conspiracy among e-book publishers. The court also expressed concern with the credibility of several Apple witnesses who testified under oath. Ultimately, the court determined that Apple's illegal conduct deprived consumers of the benefits of competition on e-books and forced them to pay higher prices. The Division filed its suit against Apple and five publishers on April 11, 2012, and had previously reached settlements with the publishers.

40. On September 5, 2013, the court entered its final judgment in this case. The court's order requires that Apple modify its existing agreements with the publisher defendants to allow retail price competition on e-books and eliminate the "most-favored-nation" clauses that led to higher e-book prices. The order also prohibits Apple from serving as an information conduit among e-book publishers and from retaliating against publishers for refusing to sell e-books on agency terms. Further, the order bars Apple from entering into agreements with e-book publishers that are likely to increase, fix, or set the price at which other e-book retailers may sell content. Finally, the court ordered the appointment of an external compliance monitor to ensure that Apple's antitrust compliance policies will be sufficient to deter any future anticompetitive conduct. The monitor will work with an internal antitrust compliance officer who will be hired by and report exclusively to the outside directors on Apple's audit committee. The antitrust compliance officer will be responsible for training Apple's senior executives about the antitrust laws and ensuring that Apple abides by the final judgment. See http://www.justice.gov/atr/public/press_releases/2013/299776.htm and

http://www.justice.gov/atr/public/press_releases/2013/299273.htm. Apple's appeal of the district court's decision is pending.

41. **American Express.** The Division filed suit on October 4, 2010, challenging rules American Express, MasterCard, and Visa instituted that prevented merchants from offering consumers discounts or rewards for using competing card brands and from providing information about the costs associated with the use of their credit cards. These policies caused consumers to pay more for their purchases and raised merchant costs. The Division reached a settlement with MasterCard and Visa, which the court approved in July 2011, in which both companies agreed to eliminate the anticompetitive provisions. Litigation against American Express continues. Discovery is ongoing, and trial is scheduled to begin in July, 2014. See http://www.justice.gov/atr/public/press_releases/2010/262867.htm.

42. **eBay.** The Division's legal challenge to eBay's agreement not to recruit or hire employees from Intuit Inc. is ongoing. Division staff has worked closely in this matter with the California Attorney General's office, which filed a similar lawsuit. The Division seeks to prevent eBay from upholding its agreement with Intuit or entering into similarly anticompetitive agreements with other companies. These types of agreements eliminate competition to hire affected employees, depriving them of access to improved job and salary opportunities. This is the Division's most recent challenge to a "no-poach" agreement; earlier cases involving Adobe Systems Inc., Apple Inc., Google Inc., Intel Corp., Intuit Inc., Lucasfilm Ltd., and Pixar resulted in consent decrees. The court entered a stay in this litigation on January 22, 2014, to accommodate settlement discussions. See http://www.justice.gov/atr/public/press_releases/2012/288865.htm.

43. **Chiropractic Associates, Ltd. of South Dakota.** On April 8, 2013, the Division filed a civil antitrust lawsuit against Chiropractic Associates Ltd. of South Dakota (CASD), alleging that CASD negotiated contracts with insurers that caused consumers to pay higher fees for chiropractic services. CASD includes approximately 80 percent of all practicing chiropractors in South Dakota and its anticompetitive conduct dated to 1997. Along with this suit, the Division filed a proposed settlement, which the court approved on September 4, 2013, prohibiting CASD from jointly determining prices and negotiating contracts with insurers on behalf of competing chiropractors in South Dakota, North Dakota, Minnesota, and Iowa, and requiring CASD to terminate its current payer contracts. See http://www.justice.gov/atr/public/press_releases/2013/295564.htm.

3.4.3 *FTC Non-Merger Enforcement Actions*

44. **In the Matter of Motorola Mobility LLC and Google, Inc.** On July 24, 2013, the Commission approved a final order requiring Google to license its standard essential patents (SEPs) on fair, reasonable, and non-discriminatory (FRAND) terms. These SEPs are needed to make devices such as laptop and tablet computers, smart phones, and gaming consoles. The Commission alleged that Google had reneged on these commitments and pursued or threatened to pursue injunctions and exclusion orders against companies that need to use SEPs held by Google's subsidiary, Motorola Mobility LLC, in their devices and were willing to license these patents on FRAND terms. Throughout the investigation, the FTC staff worked closely with the European Commission. See <http://www.ftc.gov/enforcement/cases-proceedings/1210120/motorola-mobility-llc-google-inc-matter>.

45. **Bosley, Inc., Aderans America Holdings, Inc., and Aderans Co., Ltd.** On April 8, 2013, the Commission brought charges alleging that Bosley, Inc., the nation's largest manager of medical/surgical hair restoration procedures, had illegally exchanged competitively sensitive, nonpublic information about its business practices with one of its competitors, Hair Club. The information exchanged included details about future product offerings, surgical hair transplantation price floors and discounts, plans for business expansion and contraction, and current business operations and performance. On June 5, 2013, the

Commission approved a final settlement order in which Bosley agreed not to communicate such information and to institute an antitrust compliance program. See <http://www.ftc.gov/enforcement/cases-proceedings/1210184/bosley-inc-aderans-america-holdings-inc-aderans-co-ltd>.

46. **In the Matter of Práxedes E. Alvarez Santiago, M.D., et al.** On February 28, 2013, the Commission challenged eight independent nephrologists in Puerto Rico alleging that they illegally collectively bargained with insurers and refused to treat health plan patients when their price demands were rebuffed. On May 3, 2013, the FTC approved a final order settling the charges and barring the doctors from jointly negotiating prices, jointly refusing to deal with any insurer, and jointly refusing to treat patients. See <http://www.ftc.gov/enforcement/cases-proceedings/1210098/praxedes-e-alvarez-santiago-md-et-al-pr-nephrologists-matter>.

47. **In the Matter of IDEXX Laboratories, Inc.** On February 12, 2003, the Commission approved a final order settling charges that IDEXX Laboratories, Inc. – the largest U.S. supplier of diagnostic testing products used by small animal veterinarians – acted anticompetitively by engaging in exclusive dealing arrangements with three national distributors and two large regional distributors, and threatening to drop them if they carried other competing companies' products. IDEXX agreed to an order that prohibits it from entering into concurrent exclusive distribution arrangements with distributors of point-of-care diagnostic testing products. See <http://www.ftc.gov/enforcement/cases-proceedings/101-0023/idexx-laboratories-inc-matter>.

3.5 Advisory Letters from the FTC

48. 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 2013, FTC staff issued three advisory opinions, discussed below. For more information on the Commission's advisory letters, see <http://www.ftc.gov/policy/advisory-opinions>.

49. **The Money Services Round Table.** On September 4, 2013, FTC staff issued an advisory opinion concerning the Money Services Round Table's ("TMSRT") proposal to establish an information exchange database and disseminate information to licensed U.S. money transmitters regarding terminated U.S. agents. The TMSRT is a trade association comprised of licensed national money transmitters, which are non-bank entities that transfer funds from one individual or institution to another by wire, check, computer network, or other means. FTC staff opined that the TMSRT's program appeared unlikely to harm competition and that FTC staff had no intention of recommending an enforcement action challenging the proposed information exchange. FTC staff noted that one of the safeguards of the proposed information exchange was the appointment of a third-party vendor to maintain and secure the database. See http://www.ftc.gov/sites/default/files/documents/advisory_opinions/money-services-round-table/130904moneyservicesopinion.pdf

50. **Norman Physician Hospital Organization.** On February 13, 2013, FTC staff issued an advisory opinion to the Norman Physician Hospital Organization (Norman PHO) regarding Norman PHO's proposed joint contracting activities. Norman PHO is a multi-provider network joint venture that seeks to create a "clinically integrated" network and to engage in joint contracting with third party payers on behalf of its participating physicians and hospitals. In the advisory opinion, FTC staff observed that Norman PHO's clinical integration program would increase the interdependence of and cooperation among participating physicians and generate significant efficiencies in the provision of physician services. Further, Norman PHO would not be an exclusive network. If a health plan, employer, or other third party did not wish to contract with Norman PHO, it would, for example, have the ability to negotiate with the network's individual participating providers. FTC staff concluded that, as proposed, Norman PHO's

activities were unlikely to unreasonably restrain trade and, therefore, FTC staff did not intend to recommend an enforcement action against Norman PHO. See http://www.ftc.gov/sites/default/files/documents/advisory_opinions/norman-physician-hospital-organization/130213normanphoadvltr_0.pdf.

51. **The Methodist Hospital System.** The FTC staff's advisory opinion dated November 30, 2012, addressed the proposal of The Methodist Hospital System ("Methodist"), a not-for profit hospital system, to sell at cost drugs to Baytown EMS during the pendency of nationwide shortages of certain critical drugs. Baytown EMS is a division of the Baytown, Texas, city government, and serves as the exclusive 9-1-1 emergency transport service for Baytown residents by city ordinance. As an emergency transport, Baytown EMS also often administers certain pharmaceuticals en route to the hospital. The FTC staff advised that Methodist's proposal was a permissible emergency humanitarian gesture. Pursuant to the Supreme Court's precedent in *Abbott Labs. v. Portland Retail Druggists Ass'n, Inc.* regarding a hospital's role in an emergency and the Commission's similar discussion in its *St. Peter's Hospital of the City of Albany* advisory opinion, the staff opinion says Methodist may resell the needed pharmaceuticals to Baytown EMS as a humanitarian gesture during the shortages. See http://www.ftc.gov/sites/default/files/documents/advisory_opinions/methodist-hospital-system/121130advopinionltrmethodist.pdf.

3.6 **Business Reviews Conducted by the DOJ**

52. Under the Department's business review procedure, a person may submit a proposed business 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 four business review letters in FY 2013. The business review letters can be found at <http://www.justice.gov/atr/public/busreview/letters.html#page=1>.

53. On December 20, 2012, the Department announced it would not challenge a proposal by a group of seven nuclear power plant operators to procure jointly certain goods and services; each of them operates a single nuclear electric generation plant and they seek to obtain efficiencies similar to those of a nuclear fleet operator through the proposed joint procurement. On January 2, 2013, the Department announced it would not challenge a proposal by the two only providers of flight support services at an airport in Groton, Connecticut, to combine their fuel and hangar resources in a newly formed joint venture. On January 16, 2013, the Department announced it would not challenge a proposal by a trade association of New York hospitals to establish a "gainsharing" program, allowing physicians to receive a share of savings generated from reducing costs for treating commercial health-insurance and managed-care patients; an independent contractor would calculate a best practice norm for certain treatments and measure the performance of individual physicians relative to the norm. On March 26, 2013, the Department declined to state its enforcement intentions with respect to a proposed exchange for the trading of unit license rights to sets of patents, because of inherent uncertainties and potential competitive concerns associated with the novel business model.

4. **Enforcement of antitrust laws and policies; mergers and concentrations**

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

54. On July 2, 2013, corporate investor Barry Diller was charged with violating pre-merger reporting and waiting requirements when he acquired voting securities in The Coca Cola Company. Although this was the first time that Diller was charged with an HSR Act violation, he had previously made a corrective filing for what he claimed was an inadvertent failure to file before acquiring voting securities of a different company. Under the terms of a consent decree filed simultaneously with the charges, Diller was required

to pay a \$480,000 civil penalty. See <http://www.ftc.gov/news-events/press-releases/2013/07/barry-diller-pay-480000-settle-ftc-allegations-related-premerger>.

55. On June 20, 2013, the investment firm of MacAndrews & Forbes Holdings, a New York-based holding company owned by Ronald O. Perelman, was charged with violating pre-merger reporting and waiting requirements when it acquired voting securities of Scientific Games Corporation, a provider of lottery and gaming services. Although this was the first time that MacAndrews & Forbes was charged with an HSR Act violation, the firm had previously made a corrective filing in May 2011 for what it asserted was an inadvertent failure to file before acquiring voting securities of a different company. Under the terms of the consent decree filed simultaneously with the charges, MacAndrews & Forbes was required to pay a \$720,000 civil penalty. See <http://www.ftc.gov/news-events/press-releases/2013/06/investment-firm-macandrews-forbes-pay-720000-penalty-resolve-ftc>.

4.2 Select Significant Merger Matters

4.2.1 FTC Public Merger Investigations and Challenges

56. **In the Matter of Actavis, Inc. and Warner Chilcott PLC.** On September 27, 2013, the Commission challenged international drug manufacturer Actavis, Inc.'s \$8.5 billion acquisition of drug manufacturer Warner Chilcott, alleging that the transaction would reduce competition in the U.S. markets for four current and future drugs (Generic Femcon FE, Loestrin 24 FE, Lo Loestrin FE, and Atelvia). The Commission's consent order required Actavis to sell all rights and assets to the generic versions of the four drugs to Amneal Pharmaceuticals L.L.C. Actavis would also relinquish its claim to first-filer marketing exclusivity for the generic forms of Lo Loestrin FE and Atelvia. See <http://www.ftc.gov/enforcement/cases-proceedings/131-0152/actavis-inc-warner-chilcott-plc-matter>.

57. In the Matter of Mylan Inc., Agila Specialties Global Pte. Limited, Agila Specialties Private Limited, and Strides Arcolab Limited. On September 26, 2013, the Commission challenged Mylan Inc.'s ("Mylan") proposed acquisition of Agila Specialties Global Pte. Ltd and Agila Specialties Pvt. Ltd. (collectively, "Agila"). The Commission alleged that in 11 markets, Mylan and Agila are two of a limited number of current or likely future competitors as suppliers of generic pharmaceuticals. According to the Commission, a decrease in suppliers in such markets through the acquisition would decrease competition and likely lead to increased prices for injectable drugs. To address the competitive concerns, Mylan and Agila agreed to divest 11 generic injectable drugs. See <http://www.ftc.gov/enforcement/cases-proceedings/131-0112/mylan-inc-agila-specialties-global-ptelimited-agila>.

58. **In the Matter of Nielsen Holdings N.V., and Arbitron Inc.** On September 20, 2013, the FTC challenged Nielsen Holding N.V.'s ("Nielsen") proposed \$1.26 billion acquisition of Arbitron. The Commission alleged that the acquisition would eliminate future competition between the two national providers of cross-platform audience measurement services, and would likely cause advertisers, advertisement agencies, and programmers to pay more for such services. The Commission's consent required Nielsen to sell and license, for a minimum of eight years, certain assets related to Arbitron's services to an FTC-approved buyer. See <http://www.ftc.gov/enforcement/cases-proceedings/131-0058/nielsen-holdings-nv-arbitron-inc-matter>.

59. **In the Matter of Honeywell International Inc.** On September 13, 2013, the Commission challenged Honeywell International Inc.'s ("Honeywell") acquisition of rival scan engine manufacturer Intermec Inc. According to the FTC, the acquisition would reduce competition in the U.S. market for two-dimensional ("2D") bar code scan engines. 2D scan engines are used in products such as retail store scanners to translate an image (often a barcode) into a digital format that can be interpreted and analyzed by a computer. To resolve the charges, the Commission approved a consent order requiring Honeywell to

license its and Intermec's patents for 2D scan engines to Datalogic IPTECH s.r.l. for the next 12 years. *See* <http://www.ftc.gov/enforcement/cases-proceedings/131-0070/honeywell-international-inc-matter>.

60. **Solera Holdings, Inc.** On July 22, 2013, the Commission challenged Solera Holdings, Inc.'s ("Solera") consummated 2012 acquisition of Actual Systems of America, Inc. ("Actual Systems"). The Commission alleged that the acquisition harmed competition in the concentrated market for yard management systems ("YMS") used by automotive recycling yards, and would likely result in higher prices for YMS and less innovation in the market. Solera, through its wholly owned subsidiary Hollander, Inc., and Actual Systems were two of the three leading providers of YMS in the North American market at the time of the acquisition. The FTC settlement required Solera to sell the U.S. and Canadian YMS business that it acquired from Actual Systems to ASA Holdings, Inc. *See* <http://www.ftc.gov/enforcement/cases-proceedings/121-0165/solera-holdings-inc>.

61. **In the Matter of General Electric Company.** On July 19, 2013, the Commission challenged General Electric Company's ("GE") proposed \$4.3 billion acquisition of Italy's Avio S.p.A's ("Avio") aviation business. Avio currently designs a critical component – the accessory gearbox or AGB – for Pratt & Whitney's PW1100G engine. Pratt & Whitney is a rival aircraft engine manufacturer to GE, and has no viable alternatives to Avio for development of the AGB for the PW1100G engine. GE and Pratt & Whitney are the only two firms that manufacture engines used on Airbus's A320neo aircraft. The FTC alleged that GE's acquisition of Avio would put it in a position to interfere with the development of the AGB, lessening competition in the sale of engines for the Airbus A320neo aircraft, and resulting in higher prices, reduced quality, and engine delivery delays for A320neo customers. The consent order prohibits GE from interfering with Avio staffing decisions relating to its work on the AGB for the PW1100G engine and allows Pratt & Whitney to have representatives at the GE/Avio facility. If Pratt & Whitney terminates its agreement with Avio post-merger, GE must provide transitional services to help Pratt & Whitney manufacture AGBs and related parts for its PW1100G engine. The order also prevents GE from accessing Pratt & Whitney's proprietary information about the AGB. Finally, the proposed order allows the Commission to appoint a monitor to oversee GE's compliance with its obligations. Throughout the investigation, FTC staff worked closely with the European Commission. *See* <http://www.ftc.gov/enforcement/cases-proceedings/131-0069/general-electric-company-matter>.

62. **In the Matter of Tesoro Corporation and Tesoro Logistics Operations LLC.** On June 17, 2013, oil refiner Tesoro Corporation ("Tesoro") and one of its subsidiaries agreed to settle FTC charges that their \$355 million acquisition of Chevron Corporation pipeline and terminal assets would be anticompetitive. The consent order required Tesoro to sell the terminal it currently owns in Boise, Idaho, to an FTC-approved buyer within six months. Without this divestiture, the deal would have given Tesoro ownership of two of the three full service light petroleum terminals in Boise, significantly reducing competition for local terminal services. The order also contains a separate order to maintain assets to preserve Tesoro's Boise terminal as a viable, competitive, and ongoing business. *See* <http://www.ftc.gov/enforcement/cases-proceedings/131-0052/tesoro-corporation-tesoro-logistics-operations-llc-matter>.

63. **Charlotte Pipe and Foundry Company, et al.** On May 15, 2013, the Commission approved a final order settling charges that Charlotte Pipe and Foundry Company's consummated and non-reportable 2010 purchase of Star Pipe Products, Inc.'s cast iron soil pipe (CISP) business was anticompetitive. CISP products are important components of pipeline systems used to transport wastewater from buildings to municipal sewage systems, to vent plumbing systems, and to transport rainwater to storm drains. To help restore competition in CISP markets in the United States, the proposed order prohibits Charlotte Pipe from enforcing a confidentiality and non-compete agreement with Star Pipe, ensures that Charlotte Pipe publicly discloses its prior acquisitions of other CISP importers, and requires Charlotte Pipe to notify the

Commission before making future acquisitions in this industry. See <http://www.ftc.gov/enforcement/cases-proceedings/1110034/charlotte-pipe-foundry-company-et-al>.

64. **In the Matter of Graco Inc.** On April 18, 2013, the Commission challenged Graco, Inc.'s consummated acquisition of Gusmer Corp. in 2005 and GlasCraft, Inc. (GCI) in 2008. The acquired companies were Graco's two closest competitors in the North American market for fast set equipment (FSE) used by contractors to apply polyurethane foams and polyuria coatings. The consent order aims to restore competition in the FSE market that was lost as a result of these acquisitions. It requires Graco to license certain technology to Polyurethane Machinery Corp. (Gama/PMC) and contains provisions that provide Gama/PMC and other competitors with easier access to distributors so they can distribute competing FSE products in North America. See <http://www.ftc.gov/enforcement/cases-proceedings/1010215/graco-inc-matter>.

65. **In the Matter of Robert Bosch GmbH.** On November 26, 2012, the Commission challenged Robert Bosch GmbH's ("Bosch") acquisition of SPX Service Solutions U.S. LLC ("SPX") as anticompetitive, alleging that the acquisition would have given Bosch a virtual monopoly in the market for air conditioning recycling, recovery, and recharge devices for vehicles. Based on the consent order, Bosch was required to sell its automotive air conditioner repair equipment business to automotive equipment manufacturer, Mahle Clevite, Inc. Bosch also resolved allegations that, before its acquisition by Bosch, SPX harmed competition in the market for air conditioning devices by renegeing on a commitment to license key, standard-essential patents ("SEPs") on fair, reasonable and non-discriminatory ("FRAND") terms. Under the terms of the consent order, Bosch is required to grant manufacturers licenses to key patents that they need to compete in the market for this equipment. Finally, Bosch will end agreements that restrict third parties from advertising, servicing, distributing, or selling competitive products in the United States. See <http://www.ftc.gov/enforcement/cases-proceedings/1210081/bosch-robert-bosch-gmbh>.

66. **In the Matter of Hertz Global Holdings, Inc.** On November 15, 2012, the FTC required Hertz Global Holdings, Inc. ("Hertz") to sell its Advantage Rent A Car ("Advantage") business, as well as the rights to operate twenty-nine Dollar Thrifty Automotive Group, Inc. ("Dollar Thrifty") in on-airport locations around the country, under a proposed settlement that resolves charges that Hertz's \$2.3 billion acquisition of Dollar Thrifty was anticompetitive. As part of the settlement, Hertz agreed to sell the entire Advantage business as well as 16 Dollar Thrifty on-airport locations where Advantage does not yet operate to Franchise Services of North America, Inc. (FSNA) and Macquarie Capital (USA) Inc. In addition, Hertz agreed to sell another 13 Dollar Thrifty on-airport locations to FSNA/Macquarie or another FTC-approved buyer after the deal closes. In July 2013, the FTC approved a modified version of the settlement, adjusting some of the dates by which Hertz must transfer certain airport rental locations to the acquirer, addressing the possible resale of the divested assets by the acquirer, and requiring the divestiture of the Dollar Thrifty location at Ronald Reagan Washington National Airport, rather than the Advantage desk as originally contemplated. See <http://www.ftc.gov/enforcement/cases-proceedings/101-0137/hertz-global-holdings-inc-matter>.

67. **In the Matter of Corning Inc.** On October 31, 2012, the Commission challenged Corning, Inc.'s ("Corning") proposed acquisition of Becton, Dickinson and Company's Discovery Labware Division, alleging that the proposed acquisition would have been anticompetitive in the North American markets for tissue culture treated ("TCT") multi-well plates, dishes, and flasks used in cell culture applications. Under the settlement, Corning will provide assets and assistance to enable life science company Sigma-Aldrich Co., LLC to manufacture Corning's line of these products in a manner substantially similar to Corning's process, replacing the competition lost through the acquisition. See <http://www.ftc.gov/enforcement/cases-proceedings/1210133/corning-incorporated>.

68. **Watson Pharmaceuticals/Actavis Inc.** On October 15, 2012, the Commission challenged Watson Pharmaceuticals, Inc.'s ("Watson") \$5.9 billion proposed acquisitions of Actavis alleging that the acquisition would have been anticompetitive in the markets of 21 current and future generic drugs used to treat a wide range of conditions. The final order settling the Commission's charges required Watson and Actavis to sell the rights and assets to 18 drugs to Sandoz International GmbH and Par Pharmaceuticals, Inc., and to relinquish the manufacturing and marketing rights to three other drugs to protect competition in the markets for these generic drugs. See <http://www.ftc.gov/enforcement/cases-proceedings/1210132/watson-pharmaceuticals-actavis-inc>.

69. **In the Matter of Magnesium Elektron North America, Inc.** On October 12, 2012, the Commission challenged magnesium plate producer Magnesium Elektron's consummated acquisition of rival plate manufacturer Revere Graphics Worldwide, Inc. According to the FTC, Magnesium Elektron's 2007 acquisition of Revere Graphics Worldwide was anticompetitive and resulted in the combination of the only two makers and sellers of magnesium plates for photoengraving in the world. In an effort to restore competition in the market, the consent order required Magnesium Elektron to sell technology and know-how used to manufacture magnesium plates for photoengraving to Universal Engraving, a company uniquely positioned to become an effective competitor in this market because it already sold other metals used in the photoengraving process to customers affected by the merger. See <http://www.ftc.gov/enforcement/cases-proceedings/0910094/magnesium-elektron-north-america-inc>.

70. **Universal Health Services.** On October 5, 2012, the Commission challenged Universal Health Services, Inc.'s ("UHS") proposed acquisition of Ascend Health Corporation (Ascend). The Commission alleged that the proposed transaction would lead to a virtual monopoly in the provision of acute inpatient psychiatric services to commercially insured patients in the El Paso, Texas/Santa Teresa, New Mexico area and would lead to reduced incentives to provide better service and patient care. To resolve the competitive concerns, the settlement order required UHS to sell its Peak Behavioral Health Services facility to an FTC-approved buyer. See <http://www.ftc.gov/enforcement/cases-proceedings/1210157/universal-health-services-alan-b-miller>.

4.2. *DOJ Public Merger Investigations and Challenges*

71. **US Airways/American Airlines.** On August 13, 2013, the Division, seven state attorneys general, and the District of Columbia filed a civil antitrust suit to block the \$11 billion merger between US Airways Group Inc. (US Air) and AMR Corp., the parent company of American Airlines. The lawsuit alleged that the bulk of domestic routes were already highly concentrated, and that the proposed transaction not only would result in the world's largest airline, but also would allow four airlines to control more than 80 percent of domestic commercial air travel. The planned merger between US Air and American would have eliminated direct competition between the two companies. These airlines were head-to-head competitors for nonstop service on routes worth approximately \$2 billion in annual route-wide revenues, and competed directly on more than a thousand routes where one or both offered connecting service.

72. On November 12, 2013, the Division and the states reached a proposed settlement with US Air and AMR Corp. The agreement requires the companies to divest slots and gates to low-cost carriers at key constrained airports nationwide, including airports in Washington DC, New York, Boston, Chicago, Dallas, Los Angeles, and Miami, in order to enhance system-wide competition. These divestitures include 138 slots at Reagan National and LaGuardia airports. This settlement will increase the presence of low cost carriers at key airports, enhancing meaningful competition in the industry and benefiting air travelers. See http://www.justice.gov/atr/public/press_releases/2013/301616.htm and http://www.justice.gov/atr/public/press_releases/2013/299960.htm. On April 25, 2014, the district court

approved the decree and entered final judgment. *See* <http://www.justice.gov/atr/cases/f305400/305489.pdf>.

73. **Anheuser-Busch InBev/Grupo Modelo.** On January 31, 2013, the Division filed a civil suit to block the proposed \$20 billion acquisition by Anheuser-Busch InBev (ABI) of total ownership and control of its rival Grupo Modelo (Modelo). The Division's complaint alleged that the transaction would substantially lessen competition in the market for beer in the U.S. as a whole and in 26 metropolitan areas across the U.S., resulting in consumers paying more for beer and having fewer new products from which to choose.

74. On April 19, 2013, the Division entered into a proposed settlement with ABI and Modelo that required the companies to divest Modelo's entire U.S. business—including licenses to Modelo brand beers, Modelo's most advanced brewery in Mexico, Piedras Negras, its interest in Crown Imports LLC, and other assets—to Constellation Brands Inc., in order to proceed with their merger. As part of the proposed settlement, Constellation committed to expand the capacity of the Piedras Negras brewery in order to meet current and future demand for the Modelo brands in the U.S. The court approved the settlement on October 24, 2013, ensuring that Constellation will fully replace Modelo as an independent competitor in the U.S. *See* http://www.justice.gov/atr/public/press_releases/2013/296018.htm and http://www.justice.gov/atr/public/press_releases/2013/292096.htm.

75. **Ecolab Inc./Permian Mud Service Inc.** On April 8, 2013, the Division obtained a settlement with Ecolab Inc. and Permian Mud requiring the companies to divest assets used by Permian's subsidiary, Champion Technologies, Inc., in order to proceed with their proposed merger. Ecolab's subsidiary, Nalco Company, and Champion were respectively the largest and second-largest providers of production chemical management services for deepwater wells in the U.S. Gulf of Mexico. The transaction, as initially proposed, threatened to eliminate significant competition between Nalco and Champion, leading to higher prices, reduced service quality, and diminished innovation. The Division required the companies, in a court-approved settlement, to divest to Clariant Corp. and its affiliate, Clariant International, certain assets used by Champion to provide deepwater production chemical management services, as well as exclusive licenses to all other production chemicals used by Champion in the Gulf, and the option to buy certain additional assets and related equipment. The settlement also provided Clariant with a right to seek to hire the merged firm's relevant personnel, who possess key know-how and critical expertise in this field. *See* http://www.justice.gov/atr/public/press_releases/2013/295543.htm.

76. **Gannett/Belo.** On December 16, 2013, the Division filed suit to block Gannett's proposed acquisition of Belo, valued at approximately \$2 billion, and Sander Media LLC's related acquisition of six Belo television stations that Gannett cannot hold under Federal Communications Commission (FCC) rules. At the same time, the Division filed a proposed settlement to resolve the competitive concerns the suit raised by requiring Belo and Sander to divest their interests in a CBS affiliate station in St. Louis. The complaint alleged that the proposed transaction would have given Gannett a dominant position in broadcast television spot advertising in the St. Louis designated market area, resulting in higher prices to advertisers. The proposed settlement requires Gannett, Belo, and Sander to divest all assets used primarily in the operation of the CBS affiliate to an independent buyer to be approved by the Division. *See* http://www.justice.gov/atr/public/press_releases/2013/302344.htm.

77. **Cinemark Holdings Inc./Rave Holdings LLC.** On May 20, 2013, the Division and the state of Texas filed a civil suit to block the proposed acquisition by Cinemark of Rave Cinemas. The Division simultaneously filed a proposed settlement, since approved by the court, requiring Cinemark to divest movie theaters in three states before proceeding with the \$220 million acquisition. Additionally, the Division and the state of Texas required Cinemark's chairman to divest Movie Tavern Inc., which operates

theaters that compete with Rave Cinemas in Forth Worth and Denton, Texas. See http://www.justice.gov/atr/public/press_releases/2013/296995.htm.

78. **Delta Air Lines/Virgin Atlantic Airways.** On June 20, 2013, the Division closed its investigation of Delta Air Lines' acquisition of an equity interest in Virgin Atlantic Airways. The closing statement explained that, in December 2012, Delta and Virgin "reached an agreement to establish a joint venture on flights between North America and the United Kingdom. At the same time, Delta entered an agreement to acquire the 49 percent stake in Virgin Atlantic currently held by Singapore Airlines for \$360 million. Virgin Group will retain the majority 51 percent stake." It explained that "[a]fter a thorough investigation of the competitive effects of the proposed equity investment and joint venture, the Antitrust Division concluded that the facts and circumstances did not warrant further investigation or action." The statement also observed that the Division and the European Commission "cooperated closely throughout the course of their respective investigations, with frequent contact between the agencies." See http://www.justice.gov/atr/public/press_releases/2013/298788.htm.

79. **Bazaarvoice, Inc.** On January 10, 2013, the Division filed a lawsuit against Bazaarvoice, Inc., challenging the company's June 2012 \$168 million acquisition of PowerReviews, which the Division alleged substantially lessened competition in the market for Internet product ratings and reviews platforms in the U.S., resulting in higher prices and diminished innovation. Bazaarvoice was the dominant commercial supplier of ratings and reviews platforms in the U.S., and, prior to the acquisition, PowerReviews was its most significant rival. Retailers and manufacturers use product ratings and reviews platforms to collect, organize, and display consumer-generated feedback online.

80. The *Bazaarvoice/PowerReviews* transaction was not reportable under the Hart-Scott-Rodino Act and the parties completed the transaction without review by the antitrust agencies. Division staff discovered the problematic acquisition when reviewing the trade press. In January 2014, the Division won a trial victory in its challenge to the acquisition. The evidence showed that PowerReviews was a significant threat to Bazaarvoice, that other rivals were poorly positioned to fill the competitive void created by the merger, and that Bazaarvoice's executives intended to eliminate competition through the acquisition.

81. On April 24, 2014, the Division announced that Bazaarvoice had agreed to divest the assets it acquired from PowerReviews and adhere to additional measures to ensure that a divestiture buyer could quickly restore the competition that existed prior to the unlawful acquisition. To compensate for the deterioration of PowerReviews' competitive position, Bazaarvoice agreed to provide syndication services to the divestiture buyer for four years, allowing the buyer to build its customer base and develop its own syndication network. Bazaarvoice agreed to allow its customers to switch to the divestiture buyer without penalty. Bazaarvoice will also waive trade-secret restrictions for any of its employees hired by the divestiture buyer, enabling the buyer to leverage Bazaarvoice's post-merger research and development efforts. Additionally, the agreement provides for a trustee to oversee the divestiture process and to monitor Bazaarvoice's compliance with its other obligations under the remedy, which is awaiting final approval by the court. See http://www.justice.gov/atr/public/press_releases/2014/305389.htm.

5. International antitrust cooperation and outreach

5.1 International Antitrust Cooperation Developments

82. On September 25, 2013, the Antitrust Agencies issued a joint model waiver of confidentiality for individuals and companies to use in merger and civil non-merger matters involving concurrent review by the FTC or DOJ and non-U.S. competition authorities. The model waiver is designed to streamline the waiver process to reduce the burden on individuals and companies, as well as to reduce the Agencies' time

and resources involved in negotiating waivers. The model waiver updates and replaces the Agencies' prior waiver forms. It reflects both Agencies' recent experience with waivers, incorporating updated language and provisions, including a provision addressing the Agencies' treatment of privileged information. The model waiver is available at <http://www.justice.gov/atr/public/international/docs/300917.pdf> and http://www.ftc.gov/sites/default/files/attachments/international-waivers-confidentiality-ftc-antitrust-investigations/model_waiver.pdf.

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

84. In January 2014, the Agencies participated in a bilateral consultation in Beijing with China's three antimonopoly agencies—the People's Republic of China National Development and Reform Commission ("NDRC"), Ministry of Commerce ("MOFCOM"), and State Administration for Industry and Commerce ("SAIC"). This was the second annual high-level Joint Dialogue held pursuant to the Memorandum of Understanding ("MOU") on Antitrust Cooperation among the U.S. and Chinese agencies. The officials discussed ways to promote competition in a global economy and various aspects of antitrust enforcement.

85. In November 2013, the Agencies participated in the first official bilateral consultation with the Indian Ministry of Corporate Affairs and the Competition Commission of India since the signing of the bilateral MOU in September 2012. In October 2013, the Agencies held annual bilateral antitrust consultations with the European Commission in Brussels. In September 2013, the Agencies participated in a bilateral meeting with the Japan Fair Trade Commission in Washington, D.C.

86. During FY 2013, the Agencies cooperated on merger reviews – often under waivers from parties and third parties – with many competition agencies around the world, including those of Australia, Brazil, Canada, China, the European Union, Germany, Japan, Mexico, and the United Kingdom.

87. The FTC cooperated with foreign counterparts on 14 merger matters and three conduct investigations. For example, the FTC engaged in substantive cooperation with nine non-U.S. antitrust agencies, including newer authorities, reviewing Thermo Fisher's proposed acquisition of Life Technologies in an effort to reach consistent results. The cooperating agencies include those in Australia, Austria, Brazil, Canada, China, the European Union, India, Japan, Korea and Lithuania. The extent of cooperation with each agency varied, generally depending on the nature of the likely competitive effects in the jurisdictions, and ranged from discussions of timing and relevant market definition and theories of harm to coordination of compatible remedies. As a result of the cooperation efforts, the FTC and the European Commission were able to approve GE Healthcare as the divestiture buyer in this matter on the same day. See <http://www.ftc.gov/news-events/press-releases/2014/01/ftc-puts-conditions-thermo-fisher-scientific-incs-proposed>. Commission staff cooperation with non-U.S. counterparts also 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.

88. In FY 2013, the Division cooperated with non-U.S. antitrust agencies on many civil non-merger, merger, and cartel investigations. An example is the Division's investigation into Samsung Electronics Co. Ltd's alleged anticompetitive use of its portfolio of standards-essential patents ("SEPs")—which Samsung had committed to license to industry participants on fair, reasonable, and nondiscriminatory ("FRAND")

terms. The Division's investigation focused on Samsung's alleged attempts to harm competition by using its F/RAND-encumbered SEPs to obtain exclusion orders from the U.S. International Trade Commission ("ITC") against certain iPhone and iPad models. An exclusion order the ITC issued against Apple to remedy infringement of a Samsung patent was disapproved by the U.S. Trade Representative ("USTR") on policy grounds due to its impact on competitive conditions in the U.S. economy and on U.S. consumers. In light of USTR's action, the Division announced on February 7, 2014, that it was closing its investigation into Samsung's conduct, but would continue to monitor developments in this area. See http://www.justice.gov/atr/public/press_releases/2014/303547.htm.

89. The European Commission similarly investigated whether Samsung's seeking of injunctions against Apple in various member states on the basis of its wireless cellular F/RAND-encumbered SEPs amounts to an abuse of a dominant position prohibited by EU antitrust rules. The Division worked closely and consulted frequently with its colleagues in the European Commission throughout this investigation, and noted in its closing statement that "this cooperation underscores the agencies' common concerns over the potential harm to competition that can result from the anticompetitive use of SEPs." The Division also coordinated and cooperated with competition agencies in other jurisdictions in many ongoing international cartel investigations; the Division worked closely, for example, with the Japanese Fair Trade Commission in the auto parts investigations and prosecutions.

90. In FY 2013, the Agencies continued to play leadership roles in the ICN and to serve as ICN Steering Group members. At ICN's annual conference in Warsaw on April 24-26, 2013, the ICN advanced progress on convergence through important initiatives on international enforcement cooperation and investigative processes in competition cases. The ICN adopted new work product on economic analysis in merger review, legal theories in exclusive dealing investigations, and international cooperation and information sharing in cartel enforcement. See <http://www.internationalcompetitionnetwork.org/>.

91. During FY 2013, the FTC served as co-chair of the ICN's Agency Effectiveness Working Group ("AEWG"), together with the Mexican Federal Competition Commission and the Norwegian Competition Authority. The FTC co-led the Investigative Process Project with the European Commission, which produced reports on investigative tools and agency transparency practices. See <http://internationalcompetitionnetwork.org/uploads/library/doc901.pdf>. The FTC also heads the Curriculum Project, which produced new modules on planning and conducting investigations, competition advocacy, and challenges for agencies in developing countries. See <http://www.internationalcompetitionnetwork.org/about/steering-group/outreach/icncurriculum.aspx>.

92. During FY 2013, the Division served as co-chair of the ICN Cartel Working Group, together with Germany's Bundeskartellamt and the Japan Fair Trade Commission. The group prepared a new chapter on international cooperation and information sharing for its Anti-Cartel Enforcement Manual, a reference tool for antitrust agencies on effective investigative techniques. See <http://www.internationalcompetitionnetwork.org/working-groups/current/cartel.aspx>.

5.2 Outreach

93. In FY 2013, the Agencies continued to provide technical cooperation on competition law and policy matters to their international counterparts. The FTC's international technical assistance antitrust program conducted 38 missions in 19 countries, including Armenia, China, Colombia, the Dominican Republic, Egypt, Gambia, Hungary, Myanmar, Pakistan, Peru, Philippines, Russia, Serbia, South Africa, Turkey, and Vietnam. The FTC also conducted judicial training in the Dominican Republic and Mexico. The Agencies also are working with the Competition Commission of India ("CCI") as it implements the 2002 Competition Act and new merger regime. Since FY 2010, the FTC has conducted 12 capacity-building workshops for the CCI. Training in FY 2013 also included the FTC's sending of a resident

advisor to the CCI. The Division participated in conferences and workshops with many other antitrust agencies, including those in Brazil, India, Korea, and South Africa, and participated in technical cooperation programs with a wide range of countries around the world, including Chile, China, Croatia, the Dominican Republic, Korea, Japan, the Philippines, Romania, South Africa, Turkey, and Vietnam.

94. 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 through its International Fellows and Interns program. In FY 2013, the FTC hosted eight international fellows from countries including Argentina, India, Korea, Lithuania, Mauritius, and Mexico. These assignments provide valuable opportunities for participants to obtain a deeper understanding of their international partners' laws and challenges. This knowledge provides critical support for coordinated enforcement and promotes cooperation and convergence towards sound policy.

95. In FY 2013, the Agencies continued their work with the World Intellectual Property Organization ("WIPO") on its ongoing project to study relationships between intellectual property and competition policy. The Agencies and the U.S. Patent and Trademark Office completed a WIPO survey explaining how the competitive effects of joint R&D agreements are analyzed under U.S. law.

6. Regulatory and Trade Policy Matters

6.1 Regulatory Policies

96. **U.S. Patent and Trademark Office:** On February 1, 2013, the Agencies filed comments with the U.S. Patent and Trademark Office ("PTO") concerning changes to PTO rules to (1) collect information about patent ownership (including the real party in interest during patent prosecution and post-issuance) and (2) make such information publicly available. The comments supported efforts to make public information regarding patent ownership as accurate and complete as possible, as availability of such information enables the patent marketplace to function more efficiently. The Agencies noted that the proposed changes could stimulate innovation, enhance competition, and increase consumer welfare. See <http://www.justice.gov/atr/public/comments/292147.pdf>.

97. **Intellectual Property Rights.** The relationship between IP rights and competition law is a central focus for the Antitrust Agencies. The Agencies engage with federal agencies, industry representatives, and other groups on key issues like standards-setting activities and patent assertion entities. For several years, the Agencies have worked with standards-setting organizations to help them develop IP licensing policies that minimize the potential for anticompetitive abuse of patents incorporated in standards. See, e.g., Edith Ramirez, Chairwoman, Federal Trade Commission, Competition Law & Patent Assertion Entities (June 20, 2013), available at <http://www.ftc.gov/public-statements/2013/06/competition-law-patent-assertion-entities-what-antitrust-enforcers-can-do>, and Renata Hesse, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, The Art of Persuasion: Competition Advocacy at the Intersection of Antitrust and Intellectual Property 4–6 (November 8, 2013), available at <http://www.justice.gov/atr/public/speeches/301596.pdf>.

6.1.1 DOJ Activities: Federal and State Regulatory Matters

98. **Intellectual Property Rights.** As part of its efforts in the area, the Division also assists policy makers and judicial bodies in addressing important IP-antitrust issues. In January 2013, the Department and the U.S. Patent and Trademark Office ("PTO") released a joint Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments, available at <http://www.justice.gov/atr/public/guidelines/290994.pdf>. This statement addressed how federal district courts and the U.S. International Trade Commission ("ITC") resolve cases involving standards-essential

patents which owners have committed to licensing on fair, reasonable, and nondiscriminatory (F/RAND) terms. As noted above in para. 91, in August 2013, the U.S. Trade Representative relied on the policy statement in disapproving an ITC exclusion order barring the importation of certain Apple Inc. products into the United States. The Trade Representative echoed concerns in the policy statement about the potential harms from owners of F/RAND-encumbered, standards-essential patents gaining undue leverage and engaging in hold-up.

99. **Telecommunications Markets.** The Division also advocates actively for competition in the telecommunications sector. On April 11, 2013, the Division filed comments in a Federal Communications Commission (“FCC”) proceeding regarding mobile spectrum holdings. The comments urged that rules for spectrum auctions ensure that smaller nationwide networks have the opportunity to acquire low-frequency spectrum and thereby improve the competitive dynamics among nationwide carriers and benefit consumers. See <http://www.justice.gov/atr/public/comments/295780.pdf>. Similarly, on February 20, 2014, the Division filed comments concerning the FCC’s review of its media ownership rules, especially its attribution rules, which define the financial and other interests that are deemed comparable to ownership and can trigger the FCC’s broadcast ownership limits. The comments discussed a variety of “sharing” agreements, including joint sales agreements (JSAs), shared services agreements, and local news service agreements, explaining that such arrangements can confer influence or control of one broadcast competitor over another and that a failure to account for the effects of these arrangements can create opportunities to circumvent FCC ownership limits. The Division argued that attribution is appropriate for JSAs and similar agreements and that, even where a sharing agreement does not create an attributable interest under the FCC’s bright-line rules, the FCC should scrutinize agreements on a case-by-case basis. See <http://www.justice.gov/atr/public/comments/303880.pdf>.

100. **Federal Energy Regulatory Commission.** On February 1, 2013, the Division filed comments with the Federal Energy Regulatory Commission (FERC) on the agency’s possible changes to natural gas market transparency provisions and public dissemination of detailed transaction-specific information. The Division recommended careful consideration the characteristics of and existing degree of transparency in natural gas markets to avoid unnecessarily increasing the risk of coordination among suppliers, and suggested certain practical safeguards (e.g., aggregation, masking, and lagging) to eliminate or reduce this risk. See <http://www.justice.gov/atr/public/comments/292131.htm>.

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

101. **Utilities, Electricity.** On July 11, 2013, at the request of the Arizona Corporation Commission, FTC staff submitted comments on retail electric competition in Arizona. Staff identified that significant technical developments, including advanced “smart” meters, have made retail electric competition a path to gaining substantial power system efficiencies and facilitating customized electric services that benefit consumers. The FTC staff explained that such power system efficiencies can be achieved by moving away from flat retail electricity rates and toward individually tailored electricity services, which can yield rate savings, environmental improvements, innovative services not previously available, and enhanced service reliability. See http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-arizona-corporation-commission-concerning-retail-electric-competition-docket-no.e0000w-13-0135/130716arizonacorpcomment.pdf.

102. **Transportation, Taxi Services.** On June 7, 2013, FTC staff provided comments to the District of Columbia Taxicab Commission (“DCTC”) on proposed rulemakings regarding D.C. Municipal Regulations concerning taxicabs and public vehicles for hire. These proposed rules follow the recent enactment of two laws intended to modernize Washington, D.C.’s regulatory framework for passenger motor vehicle transportation services. FTC staff explained that such legislation appears to facilitate new and beneficial forms of competition for these services, including by giving legal recognition to new

smartphone software applications used to arrange and pay for such services. However, staff expressed concern that some rules proposed by the DCTC, such as restricting how software applications can affiliate with taxicab operators, may unnecessarily impede competition, and recommended that regulations should be no broader than necessary to address legitimate public safety and consumer protection concerns. Finally, while the comments noted that requiring advance disclosures of certain information in a receipt may be an efficient way to promote pricing transparency, FTC staff also stressed that such requirements should be reasonably tailored to avoid unnecessarily inhibiting the entry and operation of applications. *See* http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comments-district-columbia-taxicab-commission-concerning-proposed-rulemakings-passenger/130612dctaxicab.pdf.

103. **Health Care.** On June 4, 2013, FTC staff responded to the Connecticut General Assembly Labor and Employees Committee's request for comment on the potential competitive impact of Connecticut House Bill 6431. The Bill provides for the formation of "health care collaboratives," comprising otherwise independent health care practitioners, and authorizing them to jointly negotiate prices and other terms with health plans. The Bill also attempts to immunize these joint negotiations from scrutiny under the antitrust laws. FTC staff recognized that efficient health care collaborations that benefit health care consumers can be entirely consistent with the antitrust laws. However, FTC staff expressed concern that the purpose of the Bill appeared to be to permit physicians to extract higher reimbursement rates from health plans through joint negotiations, not to integrate their practices to reduce costs or better coordinate care for their patients. FTC staff stated that the joint negotiations were likely to increase health care costs and decrease access to health care services for Connecticut consumers, and would not pass muster under the antitrust laws. Moreover, FTC staff noted that the attempt to confer antitrust immunity on these collaborations likely would encourage groups of private health care providers to engage in blatantly anticompetitive conduct. *See* http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-connecticut-general-assembly-labor-and-employees-committee-regarding-connecticut/130605conncoopcomment.pdf.

104. **Health Care.** On March 19, 2013, FTC staff, in response to a request from Connecticut State Representative Theresa W. Conroy, provided comments on the likely competitive impact of Connecticut House Bill 6391. The Bill seeks to eliminate the requirement that Advanced Practice Registered Nurses ("APRNs") have collaborative practice agreements with physicians in order to practice independently. FTC staff explained that the proposed Bill could benefit Connecticut health care consumers by expanding choices for patients, containing costs, and improving access to primary health care services. While FTC staff recognized that collaboration between APRNs and other healthcare providers may be beneficial to patients, it stated that, absent a finding of countervailing safety concerns regarding APRN practice, such collaboration should not necessarily require direct supervision of one licensed health care provider by another. The Bill thus seemed to be a pro-competitive improvement to the law that would benefit Connecticut health care consumers. *See* http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-letter-honorable-theresa-w-conroy-connecticut-house-representatives-concerning-likely-competitive-impact-connecticut-house-bill/130319aprnconroy.pdf.

105. **Transportation, Taxi Services.** On March 6, 2013, at the request of the Colorado Public Utilities Commission ("CPUC"), FTC staff submitted comments on proposed changes to the Code of Colorado Regulations. FTC staff expressed concern that the proposed regulatory changes may hurt competition in the marketplace for passenger vehicle transportation services by inhibiting the use of mobile smartphone software applications that allow consumers to arrange and pay for transportation services in new ways. For example, one proposed rule change would create a barrier to the entry and operation of independent smartphone applications that match customers with transportation services. FTC staff recommended that a motor vehicle regulatory framework should be flexible and adaptable in response to new and innovative methods of competition, such as smartphone applications for arranging transportation,

while still maintaining appropriate consumer protections. The comments further recommended that CPUC be guided by the principle that any restriction on competition designed to address potential harm should be narrowly crafted to minimize its anticompetitive impact. See http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-colorado-public-utilities-commission-concerning-proposed-rulemaking-passenger/130703coloradopublicutilities.pdf.

6.1.3 *DOJ and FTC Trade Policy Activities*

106. The Agencies 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. In addition, the Division works with other Department components (including the Civil, Criminal, and Environmental and Natural Resources Divisions) on international trade and investment issues that affect those components or the Department as a whole. The FTC coordinates on consumer protection aspects of trade policy with a number of U.S. government agencies.

107. The Agencies also participate in negotiations and working groups related to regional and bilateral trade agreements. The FTC and the Division participate in competition policy discussions associated with the Trans-Pacific Partnership (“TPP”) and the Transatlantic Trade and Investment Partnership (“TTIP”) negotiations.

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

7.1 *Joint Conferences and Reports*

108. **Patent Assertion Entity Activities Workshop.** On December 10, 2012, the Agencies jointly hosted a workshop in Washington D.C. to explore the impact of patent assertion entity (“PAE”) activities on innovation and competition and the implications for antitrust enforcement and policy. The workshop examined, among other topics, the legal treatment of PAE activity, economic theories concerning PAE activity, and industry experiences. Additional information on the workshop is *available at* <http://www.ftc.gov/news-events/events-calendar/2012/12/patent-assertion-entity-activities-workshop>.

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

7.2.1 *Conferences and Workshops*

109. **Microeconomics Conference.** On November 15-16, 2012, the FTC held its Fifth Annual Microeconomics Conference bringing together researchers from academia and other government agencies and organizations to discuss antitrust, consumer protection, and policy issues that the economists in the FTC’s Bureau of Economics encounter in their work. The conference also provided an opportunity for scholars outside the FTC to gain a better understanding of the work of the FTC and the economic analysis conducted within the FTC’s Bureau of Economics. The topics addressed at the Conference included health care competition, innovation, mergers, monopolization, collusion, and intellectual property. For more information on the conference, see <http://www.ftc.gov/news-events/events-calendar/2012/11/fifth-annual-microeconomics-conference>.

110. **Pet Medications.** On October 2, 2012, the FTC hosted a workshop to examine competition and consumer protection issues in the pet medications industry. The workshop considered: (a) how current industry distribution and other business practices affect consumer choice and price competition for pet medications; (b) the ability of consumers to obtain written, portable prescriptions that they can fill wherever they choose; and (c) the ability of consumers to verify the safety and efficacy of pet medications

that they purchase. The workshop also examined the extent to which recent changes to restricted distribution and prescription portability practices in the contact lens industry might yield lessons applicable to the pet medications industry. Additional information on the workshop is *available at* www.ftc.gov/opp/workshops/petmeds/index.shtml.

7.2.2 *Bureau of Economics Working Papers*

111. The FTC's Bureau of Economic issued the following working papers during FY 2013. The papers are *available at* <http://www.ftc.gov/policy/reports/policy-reports/economics-research/working-papers>.

- Nicholas Kreisle, Merger Policy at the Margin: Western Refining's Acquisition of Giant Industries, September 2013
- Nathan E. Wilson, Thomas G. Koch, Decomposing the American Obesity Epidemic, May 2013
- Luke M. Olson, Brett W. Wendling, Estimating the Effect of Entry on Generic Drug Prices Using Hatch-Waxman Exclusivity, April 2013
- Daniel P. O'Brien, All-units Discounts and Double Moral Hazard, March 2013
- Matthew T. Jones, "Nobody goes there anymore - it's too crowded." Level-k Thinking in the Restaurant Game, February 2013
- Nathan E. Wilson, For-Profit Status & Industry Evolution in Health Care Markets: Evidence from the Dialysis Industry, February 2013
- Daniel Hosken, Luke M. Olson, Loren K. Smith, Do Retail Mergers Affect Competition? Evidence from Grocery Retailing, December 2012

7.3 *DOJ Economic Working Papers*

7.3.1 *DOJ Economic Analysis Group Discussion Papers*

112. The DOJ Economic Analysis Group issued the following papers during FY 2013. The papers are *available at* www.usdoj.gov/atr/public/eag/discussion_papers.htm.

- Nathan H. Miller, Forward Contracting and the Welfare Effects of Mergers, EAG 13-1, May 2013
- Marc Remer, An Empirical Investigation of the Determinants of Asymmetric Pricing, EAG 12-10, November 2012
- Nathan H. Miller, Marc Remer and Gloria Sheu, Using Cost Pass-Through to Calibrate Demand, EAG 12-9, October 2012
- Nathan H. Miller, Conor Ryan, Marc Remer and Gloria Sheu, Approximating the Price Effects of Mergers: Numerical Evidence and an Empirical Application, EAG 12-8, October 2012
- Gloria Sheu and Charles Taragin, Calibrating the AIDS and Multinomial Logit Models with Observed Product Margins, EAG 12-7, October 2012

APPENDICES

Department of Justice: Fiscal Year 2013 FTE² and Resources by Enforcement Activity

	FTE	Amount (\$ in thousands)
Criminal Enforcement	262	\$62,686
Civil Enforcement	392	\$93,880
Total	654	\$156,466

Federal Trade Commission: Fiscal Year 2013 Competition Mission FTE and Dollars by Program, Bureau & Office

	FTE	Amount (\$ in thousands)
Total Promoting Competition Mission		
<i>Bureau of Competition</i>	278.8	46,706.4
<i>Bureau of Economics</i>	72.3	12,174.8
<i>Regional Offices</i>	21.1	5,183.6
<i>Mission Support</i>	132.7	49,359.9
Premerger Notification		
<i>Bureau of Competition</i>	24.3	3,820.0
<i>Bureau of Economics</i>	---	---
<i>Regional Offices</i>	0.3	44.5
Merger & Joint Venture Enforcement		
<i>Bureau of Competition</i>	138.8	23,744.4
<i>Bureau of Economics</i>	44.6	7,427.0
<i>Regional Offices</i>	9.8	2,671.0
Merger & Joint Venture Compliance		
<i>Bureau of Competition</i>	3.1	487.3
<i>Bureau of Economics</i>	0.1	16.6
<i>Regional Offices</i>	---	0.8

² 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).

Nonmerger Enforcement		
<i>Bureau of Competition</i>	95.6	15,126.6
<i>Bureau of Economics</i>	14.8	2,579.9
<i>Regional Offices</i>	8.1	1,868.9

Nonmerger Compliance		
<i>Bureau of Competition</i>	---	---
<i>Bureau of Economics</i>	---	---
<i>Regional Offices</i>	---	---

	FTE	Amount (\$ in thousands)
Antitrust Policy Analysis		
<i>Bureau of Competition</i>	---	---
<i>Bureau of Economics</i>	6.8	1,131.9
<i>Regional Offices</i>	---	---
Other Direct		
<i>Bureau of Competition</i>	17.0	3,528.1
<i>Bureau of Economics</i>	6.0	1,019.4
<i>Regional Offices</i>	2.9	598.4
Support	132.7	49,359.9