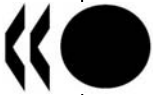


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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

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

-- 2003-2004 --

*This report is submitted by the Delegation of the United States to the Competition Committee FOR DISCUSSION at its forthcoming meeting (1-2 June 2005).*

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## Introduction

1. This report describes federal antitrust developments in the United States for the period October 1, 2003, through September 30, 2004 (“FY 2004”). It summarises the activities of both the Antitrust Division (“Division”) of the U.S. Department of Justice (“Department” or “DOJ”) and the Bureaus of Competition and Economics of the Federal Trade Commission (“Commission” or “FTC”).

2. On April 1, 2004, the Division announced that David A. Higbee had been appointed to serve as Chief of Staff and Deputy Assistant Attorney General. In this new position, he has primary responsibility for several ongoing Division management initiatives aimed at making the Division's enforcement efforts more efficient and effective. On March 31, 2004, the Division announced that Thomas O. Barnett had been appointed to serve as the Deputy Assistant Attorney General in charge of civil enforcement, overseeing three of the Division's civil sections.

3. In October 2003, Bruce Hoffman was appointed as Deputy Director of the Bureau of Competition, replacing M. Sean Royall. In January 2004, Anne Malester, one of three Deputy Directors of the Bureau of Competition, announced her departure from the agency. In February 2004, Nancy Ness Judy was appointed as Director of the Office of Public Affairs, replacing Cathy MacFarlane. In July 2004, Maureen Ohlhausen was appointed as Acting Director of the Office of Policy Planning upon the departure of Todd Zywicki and Lydia B. Parnes was named Acting Director of the Bureau of Consumer Protection after the departure of J. Howard Beales. In August 2004, Deborah P. Majoras replaced Timothy J. Muris as Chairman of the Federal Trade Commission. In September 2004, Jonathan Leibowitz was confirmed as Commissioner upon the departure of Commissioner Mozelle W. Thompson.

### 1. Changes in law or policies

#### A. *Changes in Antitrust Rules, Policies or Guidelines*

4. On June 22, 2004, President Bush signed into law Pub. L. No. 108-237, which includes the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA) and the Standards Development Organisation Advancement Act of 2004 (SDOAA). The ACPERA increases the maximum potential Sherman Act corporate fine to \$100 million, the maximum potential individual fine to \$1 million, and the maximum potential Sherman Act term of imprisonment to 10 years. These increases bring antitrust penalties in line with those for other financial crimes with similar harmful effect, and helps ensure that the antitrust laws remain an appropriately strong deterrent against cartel activity. The Act also strengthens the Antitrust Division's Corporate Leniency Policy – which undermines cartel secrecy by offering cartel participants the chance to avoid criminal prosecution by being the first to come forward and expose the cartel and cooperate with the investigation and prosecution – by also limiting the cartel participant's private damages exposure, if it cooperates with plaintiffs in the private lawsuit, to the amount actually inflicted by its own conduct. The other cartel participants remain liable for the full measure of treble damages, so the result should be more cartels exposed and brought to justice, both in criminal prosecutions and in private legal actions.

5. The SDOAA extends the protections provided by the National Cooperative Research and Production Act of 1993 (NCRPA) – de-trebling of damages, rule-of-reason analysis, and attorneys fees to either prevailing party – to standards development organisations (SDOs) that satisfy specified openness, voluntariness, and due process requirements.

6. *Data on Merger Investigations and Challenges:* In 2004, the FTC released two reports designed to give the public a transparent picture of its enforcement policies and standards. Together with the DOJ, the FTC released a report that summarised market concentration data sorted by market for both agencies'

merger challenges over a five-year period (1999-2003). In February 2004, the FTC released a report that provided data on consumer complaints or “hot” documents (i.e., those revealing a party’s expectation of decreased competition following the merger) for a total of 151 FTC merger investigations over eight years. In August 2004, the FTC supplemented that information with data on ease of entry. In February 2005, the FTC released an econometric analysis of the merger investigations data that showed, *inter alia*, that no structural shift in enforcement patterns had occurred over the eight years covered by the study.

7. *Merger Workshop:* The FTC and the DOJ are currently working on a Commentary on the Horizontal Merger Guidelines. The agencies held a three-day workshop designed to assess the practical efficacy of the 1992 Merger Guidelines in light of 12 years of experience. The workshop provided a forum for two-way information exchange – from the agencies to the public on application of the Guidelines, and from the public to the agencies on the strengths and weaknesses in the Guidelines and areas for clarification. Participants analysed and discussed all sections of the Guidelines with a focus on whether their analytical framework (1) leads to accurate assessments about the likely effects of proposed mergers, and (2) provides adequate guidance to the business and legal communities. Following the workshop, the FTC analysed the testimony and public comments and published these findings on its website. What emerged from this review was a consensus among antitrust practitioners that the analytical framework underlying the Guidelines was functioning effectively, but that some further explanation of the agencies’ practical application of the Guidelines would be beneficial.

8. *Explanations of Merger Investigation Outcomes:* The DOJ and FTC issued reasoned explanations of decisions to clear merger investigations in appropriate cases, for example when the decision has precedential value or represents a change in enforcement policy or practice. In these cases, the agencies issue a public statement and press release on the decision, also made available on the issuing agency’s website. See below, paras 56-58, for DOJ examples. In June, 2004, in *RJR/Brown & Williamson*, the Commission, for example, outlined three reasons for its conclusions that the merger of these two firms was unlikely to harm competition in the U.S. cigarette market: (i) that Brown & Williamson plays and is expected to continue to play an increasingly minor role in the market; (ii) the investigation found no markets in which the firms were each other’s closest competitors; and (iii) a majority of the Commissioners had reason to believe that the evidence indicated that the transaction was unlikely to facilitate or enhance coordination among the major U.S. cigarette manufacturers

9. *Balancing Competition and Patent policy:* In October 2003, after extensive hearings, the FTC released a report on the proper balance between competition and patent law and policy. While both competition (in markets) and patents (for inventors) can promote innovation, a proper balance between these policies is necessary to achieve that goal. The report concluded that questionable patents are a significant competitive concern and can harm innovation. The report made ten recommendations for reducing the number of questionable patents that are issued and upheld. The report is available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>.

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

10. On July 23, 2004, the agencies issued a joint report, *Improving Health Care: A Dose of Competition*, to inform consumers, businesses, and policy makers on a range of issues affecting the cost, quality, and accessibility of health care. The report is based on 27 days of DOJ/FTC Joint Hearings on Health Care and Competition Law and Policy, held from February through October 2003; an FTC-sponsored workshop in September 2002; and independent research. Culminating a two-year project, the report reviews the role of competition and provides recommendations to improve the balance between competition and regulation in health care. The report provides significant recommendations and observations on a variety of topics, including the availability of information regarding the price and quality of health care services, cross-subsidies, physician collective bargaining, insurance mandates, hospital

merger analysis, managed care organisations' bargaining power, and hospital group purchasing organisations. The report is available at [http://www.usdoj.gov/atr/public/health\\_care/204694.htm](http://www.usdoj.gov/atr/public/health_care/204694.htm).

11. *Improving the Merger Review Process*: FTC Chairman Majoras established a task force to recommend further improvements to the merger review process. While the FTC has implemented some improvements in the merger review process in recent years, the agency expects to adopt further improvements to ease the burden on affected parties and increase internal efficiency. These improvements include assessing the data requested on HSR Notification and report forms, the content of the analysis to aid public comment, and the second request compliance process and its impact on both the agency and practitioners.

12. *Electronic Discovery*: The FTC is working to improve its ability to receive and review Second Request and other discovery materials in electronic format, which it views as beneficial both for itself and for those producing documents to the agency. The agency also is adapting Model Second Request language to provide for electronic production, and is working internally and with the DOJ to determine the most effective methods for identifying responsive materials stored in various electronic formats.

### **C. *International Antitrust Cooperation Developments***

13. In the three years since it was launched in 2001, the International Competition Network (ICN) has grown to a very broad network of antitrust officials from around the world. Its membership has grown to nearly 90 antitrust agencies from nearly 80 jurisdictions, joined by the participation of interested international organisations and increasing numbers of non-governmental advisers including academics, industry groups, lawyers, economists, and consumer groups. In 2003-2004, the ICN continued practical work in three substantive working groups focused on mergers, antitrust enforcement in regulated sectors, and competition policy implementation. At the 2004 ICN Annual Conference held in Seoul, South Korea, a fourth substantive working group was created to address anti-cartel enforcement.

14. The ICN's Merger Working Group, chaired by DOJ, through its Notification and Procedures subgroup, chaired by the FTC, added four detailed Recommended Practices for merger notification procedures. With their approval by members at the Seoul conference, there is now a total of eleven agreed Recommended Practices on this subject. The Investigative Techniques subgroup expanded its manual on merger investigation to encompass chapters on investigative planning and private sector perspectives. The Antitrust Enforcement in Regulated Sectors Working Group prepared a comprehensive report based on contributions from participating members on the effects regulation can have on the application of antitrust law, antitrust enforcement experiences in regulated sectors, and the interaction between antitrust authorities and regulatory agencies. The Competition Policy Implementation (CPI) Working Group produced a report on improving the effectiveness of competition advocacy in developing and transition economies and a methodology for examining ways to enhance the stature of competition authorities with consumers. Additionally, the CPI working group held a workshop in February 2004 for technical assistance donors and recipients aimed at strengthening cooperation between the two. The Cartel Working Group was created in April 2004 to address the legal and conceptual challenges of anti-cartel enforcement and to help antitrust agencies to improve their enforcement techniques.

## **II. Enforcement of antitrust laws and policies: actions against anticompetitive practices**

### **A. Department of Justice and FTC Statistics**

#### *1) DOJ Staffing and Enforcement Statistics*

15. At the end of FY 2004, the Division employed 811 individuals: 364 attorneys, 57 economists, 169 paralegals, and 221 other professional staff. For FY 2004, the Division received an appropriation of \$133.1 million.

16. During FY 2004, the Division opened 211 investigations and filed 50 civil and criminal cases in federal district court. In FY 2004, the Division was party to three civil antitrust cases decided by the federal courts of appeals, and eight criminal appeals.

17. During FY 2004, the Division filed 42 criminal cases in which it charged 20 corporations and 39 individuals. Thirteen corporate defendants and fifteen individuals were assessed fines totalling \$141.2 million and 20 individuals were sentenced to a total of 7,334 days of incarceration. Another four individuals were sentenced to spend a total of 1,575 days in some form of alternative confinement.

18. During FY 2004, 1,454 proposed mergers and acquisitions were reported for review under the HSR Act. In addition, the Division screened a total of 1,127 bank mergers. The Division further investigated 89 mergers and challenged 6 of them in court. An additional three transactions were restructured or abandoned prior to the filing of a complaint as a result of the Division's announcement that it would otherwise challenge the transaction. The Division opened 130 civil investigations (merger and non-merger), and issued 562 civil investigative demands (a form of compulsory process). The Division filed two non-merger civil complaints. Also during FY 2004, the Division responded to two requests for review of written business proposals.

#### *2) FTC Staffing and Enforcement Statistics*

19. The FTC has 295 non-administrative staff working on competition enforcement, including 180 lawyers, 49 economists, 66 'other' (the "other" category includes paralegals, investigators, merger analysts, compliance specialists, industry analysts, research analysts, and financial analysts/accountants). The FTC's Maintaining Competition Mission had a budget of \$82.5 million in FY 2004.

20. During FY 2004, the Commission brought a total of 26 competition enforcement actions. The Commission staff opened 184 initial phase investigations under the mergers and joint ventures program and issued requests for additional information ("second requests") in 20 transactions. The Commission challenged 12 mergers. One preliminary injunction was authorized; ten consent orders were accepted; two administrative complaints were issued. In addition, eight transactions were abandoned for antitrust concerns. (One transaction was challenged both through a preliminary injunction as well as an administrative complaint.) Three transactions were abandoned after the issuance of the second request, and five were abandoned during the course of the investigation.

21. The Commission brought 11 enforcement actions challenging a variety of anticompetitive conduct. Seven were tentatively resolved by consent agreements, four of these consent agreements were still pending at the end of FY 2004. There was one administrative complaint issued during the fiscal year.

**B. Antitrust Cases in the Courts**

1) *United States Supreme Court*

22. The United States Supreme Court decided four antitrust and antitrust-related cases in FY 2004. In *Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S. Ct. 2466 (June 21, 2004), the Court construed 28 U.S.C. § 1782(a), which provides that, on the request of “any interested person,” a United States district court “may order” a person to give testimony or produce a document “for use in a proceeding in a foreign or international tribunal.” Advanced Micro Devices (AMD) filed a complaint against Intel with the Directorate-General for Competition of the Commission of the European Communities alleging an abuse of Intel’s dominant market position, and then petitioned a district court to require Intel to produce certain documents to support its complaint. The Court held that the statute authorised, but did not automatically require, a court to order such discovery; that AMD’s status as complainant to the Directorate-General made it an “interested person;” and that the Directorate-General is a “tribunal” for purposes of that section. It also held that a proceeding need not be pending, but only “within reasonable contemplation,” and that discovery is not limited to evidence that would be discoverable under either the foreign law or domestic law, so long as it is not privileged. The Court formulated a number of considerations to guide a district court’s exercise of discretion with respect to such requests, including whether the foreign tribunal needed or wanted help in securing the evidence, whether the application was being used to circumvent other restrictions on gathering the evidence, and how burdensome the request was. Upon remand to consider the matter under those guidelines, the district court denied the application. See *Advanced Micro Devices, Inc. v. Intel Corp.*, 2004 WL 2282320, 2004-2 Trade Cases ¶ 74,569 (N.D. Cal. Oct. 4, 2004).

23. In *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 124 S.Ct 2359 (June 14, 2004), the Court construed the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a, which provides that the Sherman Act “shall not apply to conduct involving trade or commerce ... with foreign nations,” unless the conduct significantly harms imports, domestic commerce, or American exporters. It held that, where the conduct takes place and injury occurs in foreign countries, the Act allows a suit under the Sherman Act for the foreign injury only if it is dependent on the effects of the conduct in the United States. The fact that the conduct causes parallel but independent injury in the United States is not enough. The Court remanded the case for a determination whether it might be maintained on the theory that the alleged domestic effect did contribute to the foreign injury.

24. In *United States Postal Service v. Flamingo Industries (USA) Ltd.*, 540 U.S. 736 (Feb. 25, 2004), the Supreme Court addressed the question of whether the United States Postal Service is subject to liability at all under the federal antitrust laws. The Court unanimously held that the Postal Service is not subject to suit under the federal antitrust laws. The Court explained that Congress is not presumed to have subjected the federal government itself to liability in the absence of clear evidence of such an intent, which is lacking in this statute.

25. Finally, in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (Jan. 13, 2004), the Court construed the antitrust savings clause of the Telecommunications Act of 1996 to bar either an implied immunity arising from the Act, or the creation of new claims that go beyond existing antitrust standards. While the Telecommunications Act requires an incumbent local exchange carrier to share facilities with competitors, the court held that the Sherman Act does not. Thus, a complaint by a customer of a competitive carrier alleging injury because of an incumbent’s discrimination in dealing with the competitor did not state a violation of § 2 of the Sherman Act. Considering the policies of the antitrust laws and the risk of chilling the very competition they are intended to protect, the Supreme Court emphasised the need for caution with respect to government intervention against single firm conduct, especially in imposing antitrust obligations on firms to assist competitors and share resources. The Court’s

opinion strictly circumscribed or eliminated expansive theories of antitrust liability under the labels of “essential facilities” or “monopoly leveraging.”

2) *U.S. Court of Appeals Cases*

a. Significant DOJ Cases Decided in FY 2003

26. In *United States v. LSL Biotechnologies*, 379 F.3d 672 (9<sup>th</sup> Cir. 2004), the court addressed the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a, in connection with an agreement, adopted in Israel, not to compete in the sale of seeds for long shelf life tomatoes in Mexico, where the tomatoes would be sold in the United States. The FTAIA makes the Sherman Act applicable to conduct involving foreign trade only where such conduct has a “direct, substantial, and reasonable foreseeable effect” on United States commerce; in this case, the court thought that the likelihood that the contractually restricted firm would develop a competitive product not barred by the defendant’s patent to be speculative, so the agreement did not have a “direct” effect on the market.

27. In *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004) (en banc), the court affirmed the litigated decree entered in the suit by several state governments; only the Commonwealth of Massachusetts had appealed, seeking additional relief. In reviewing the numerous items of additional relief sought, the court applied three general principles: the relief necessary was limited by its earlier findings on liability; it should be directed to restoring competition, not to benefiting individual competitors; and it should not harm consumer interests. The court also allowed two industry organisations to intervene in the Government’s suit against Microsoft to challenge the consent decree that had been entered by the district court, but upheld the decree as “in the public interest.”

28. In *United States v. Simmons*, 374 F.3d 313 (5<sup>th</sup> Cir. 2004), the court affirmed the appellant’s conviction for price fixing in the sale of auto glass, rejecting challenges to the joint trial with his co-conspirator, the jury instructions, and testimony regarding some of his certain out-of-court statements.

29. In *United States v. Therm-All, Inc.*, 373 F.3d 625 (5<sup>th</sup> Cir. 2004), the court affirmed the price fixing convictions of two companies involved in the sale of laminated fibreglass insulation, although the jury acquitted the responsible corporate officers. It held, among other things, that the statute of limitations in an antitrust case starts to run from the last overt act in furtherance of the conspiracy, and that a single (rather than multiple) conspiracies was shown by a common goal, the need for cooperation among the conspirators, and the presence of a key actor coordinating their efforts.

3) *Private Cases Having International Implications in FY 2003*

30. In *Sniado v. Bank Austria AG*, 378 F.3d 210 (2d Cir. 2004), the court reconsidered an earlier decision in the same case, which involved an alleged conspiracy among European banks to fix currency exchange fees. In light of the Supreme Court’s intervening decision in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), the court held that the complaint must be dismissed under the FTAIA because it did not allege the cause of action arose from the domestic effects of the conspiracy.

31. In *Prewitt Enterprises, Inc v. Organization of Petroleum Exporting Countries*, 353 F.3d 916 (11<sup>th</sup> Cir. 2003), the court held that, under the Federal Rules of Civil Procedure, a gas station owner had not, and could not, adequately serve a complaint in an antitrust case on OPEC. Under Austrian law, pursuant to an agreement between the Austrian government and OPEC, OPEC could not be served with judicial process at its headquarters in Vienna without its consent, which OPEC expressly refused.

32. In *In re Automotive Refinishing Paint Antitrust Litigation*, 358 F.3d 288 (3rd Cir. 2004), the court construed section 12 of the Clayton Act, 15 U.S.C. 22, to allow service of process in an antitrust case



anywhere the defendant, in that case a German corporation, may be found. It also held that the court may constitutionally exercise personal jurisdiction based on the defendant's contacts with the United States, rather than with the forum state. Finally, it held that the plaintiff could pursue discovery related to jurisdiction over the defendant under the Federal Rules of Civil Procedure, and was not required to follow the Hague Convention on the Taking of Evidence Abroad.

### **C. *Statistics on Private Cases Filed***

33. According to the annual report of the Director of Administrative Office of the U.S. Courts, 764 new civil and criminal antitrust actions, both government and private, were filed in the federal district courts in FY 2004. (We do not have data on private cases filed in state courts).

### **D. *Significant DOJ and FTC Enforcement Actions***

#### **1) *DOJ Criminal Enforcement***

34. *Chemical Additives*: On September 30, 2004, Bayer Corporation, a U.S. subsidiary of the German firm Bayer AG, agreed to plead guilty and to pay a \$33 million criminal fine for participating in a conspiracy to fix prices of polyester polyols, a chemical used in a number of consumer products, including plastic grocery bags, shoe soles and automotive parts. Polyester polyols are also used in automotive coatings, filters, belts, seals and gaskets, adhesives, sound-proofing products, and textiles. According to the charge, Bayer Corporation conspired from 1998 to 2002 with an unnamed producer and unnamed individuals to suppress and eliminate competition in the United States for aliphatic polyester polyols.

35. *Rubber Chemicals*: Crompton Corporation was charged on March 15, 2004 and pled guilty in May to participating in an international conspiracy to fix prices in the rubber chemicals market. Rubber chemicals are a group of additives used to improve the elasticity, strength, and durability of rubber products, such as tires, outdoor furniture, hoses, belts, and footwear. Approximately \$1 billion of rubber chemicals are sold annually in the United States. Crompton was sentenced to pay a \$50 million criminal fine for its role in the conspiracy from 1995 to 2001. On July 14, 2004, the German firm Bayer AG was charged with participating in the same conspiracy. Bayer is awaiting sentencing, but has agreed to pay a \$66 million criminal fine. Joseph B. Eisenberg, a former Crompton executive, was charged on September 14, 2004, in the conspiracy. On September 21, 2004, James J. Conway, another former Crompton executive, was also charged. Conway and Eisenberg have entered pleas of guilty and agreed to cooperate with the continuing investigation; their sentencings have been postponed pending completion of their cooperation.

36. *DRAM*: On September 15, 2004, the Division charged Infineon Technologies AG, a German manufacturer of dynamic random access memory (DRAM), with participating in an international cartel from 1999 to 2002 to fix DRAM prices. DRAM is the most commonly used semiconductor memory product, providing high-speed storage and retrieval of electronic information for a wide variety of computer, telecom, and consumer electronic products. Annual sales of DRAM in the U.S. exceed \$5 billion. Infineon pled guilty and was sentenced to pay a \$160 million fine, the largest criminal fine in any DOJ case in the preceding three years. This charge came nine months after an executive of Micron Technology, Inc., a U.S. firm and the largest DRAM manufacturer in North America, had agreed on December 17, 2003, to plead guilty to obstructing the grand jury investigation of the price-fixing conspiracy. Alfred P. Censullo, Micron's regional sales manager for upstate New York, was charged with obstruction of justice for altering and concealing documents containing competitor pricing information, which were requested in a federal grand jury subpoena.

37. *Diamonds*: On July 13, 2004, De Beers Centenary AG pled guilty and was sentenced to pay a \$10 million criminal fine to resolve a longstanding indictment for conspiring to fix the price of industrial diamonds in the United States and elsewhere. Diamond tool manufacturers use industrial diamond products in cutting and polishing tools for a variety of manufacturing and construction applications, including road construction, stone cutting and polishing, automobile manufacturing, mining, and oil drilling. In 1994, a federal grand jury in Columbus, Ohio indicted De Beers Centenary for conspiring to raise list prices of various industrial diamond products worldwide in 1991 and 1992. De Beers' alleged co-conspirator, General Electric, was tried and acquitted by the district court on this charge. De Beers Centenary, headquartered in Switzerland, was not tried on the charge because the court had not acquired jurisdiction over the company. As a result of the plea agreement, De Beers Centenary consented to the jurisdiction of the court and admitted that it conspired to raise list prices for certain industrial diamond products sold worldwide, as charged in the indictment. The 2004 plea agreement resolves the Department's 1994 indictment.

38. *E-Rate*: On May 27, 2004, NEC-Business Network Solutions Inc., a subsidiary of NEC America Inc., pled guilty and was sentenced to pay a total \$20.6 million criminal fine, civil settlement and restitution relating to charges of collusion and wire fraud in the Federal Communications Commission's E-Rate program. The E-Rate program, created by Congress in the Telecommunications Act of 1996, provides funding for needy schools and libraries to connect to and use the Internet. NEC-Business Network Solutions Inc. (NEC/BNS), based in Irving, Texas, was charged with allocating contracts and rigging bids for E-Rate projects in five different school districts in Michigan, Wisconsin, Arkansas, and South Carolina. NEC/BNS was also charged with wire fraud by entering into a scheme to defraud the E-Rate program and the San Francisco Unified School District by inflating bids, agreeing to submit false and fraudulent documents to hide the fact that it planned on installing ineligible items, agreeing to donate "free" items for which it planned to bill E-Rate, and submitting false and fraudulent documents to defeat inquiry into the legitimacy of the funding request. In another case involving the E-Rate program and filed in the Eastern District of Wisconsin, the Division on Sept. 24, 2004, charged three brothers, Haider, Qasim, and Raza Bokhari, with defrauding the program via a conspiracy to commit mail fraud, mail fraud, a money laundering conspiracy, and money laundering. The brothers defrauded the E-Rate program by subverting the E-Rate bid process by offering schools improper inducements for selecting the Bokhari's company as the E-Rate vendor and by submitting false documentation that work had been performed when it had not, and then they concealed the fraudulently obtained E-Rate payments. Haider and Qasim Bokhari pled guilty to all charges and each was subsequently sentenced on January 28, 2005 to a six-year jail sentence, to pay jointly \$1.2 million in restitution, and to forfeit property derived from the charged crimes. Raza, a Pakistani national and resident, is an international fugitive. Additional cases are expected to be generated from this ongoing investigation.

39. *DOD Household Goods*: On April 29, 2004, Cartwright International Van Lines, Inc. pled guilty and was sentenced to pay a \$250,000 fine for conspiring to increase the rates paid by the Department of Defence (DOD) for the transportation of military and civilian DOD household goods. Cartwright was charged with conspiring to fix prices in connection with the transportation of military and civilian DOD household goods from Germany to the United States in 2002. As part of the same federal investigation of anticompetitive and fraudulent conduct in the industry, on February 18, 2004, the Department filed charges against Belgium-based Gosselin World Wide Moving N.V. (Gosselin) and the Pasha Group (Pasha), a U.S.-based firm. The two count Information charged Pasha and Gosselin with participating in: (1) a conspiracy to fix the prices that the DO paid for the shipment of military and civilian household goods from Germany to the United States; and (2) a conspiracy to defraud the United States. On August 16, 2004, the district court held that defendants' agreement was immune from antitrust prosecution under the Shipping Act and dismissed the price-fixing count of the Information against Pasha and Gosselin. On September 15, 2004, the government filed a notice of appeal; the appeal is currently pending.

40. Other significant criminal investigations reported during FY04 include matters relating to the following industries: linen supply, scrap metal, textbook stores, road construction, printing and graphic services, and roofing contracts.

2) *DOJ Civil Non-Merger Enforcement*

41. *Movies-on-Demand*: On June 3, 2004, the Department announced that it had closed its investigation into Movielink, a joint venture formed by five major movie studios - Sony (Columbia-TriStar Pictures), Warner Bros., MGM, Paramount and Universal - to provide video-on-demand (VOD) services. VOD is a new technology that has enabled the studios to distribute their films in digital format to consumers over two primary platforms, the Internet and digital cable. The terms of the Movielink agreements provide that each studio determines pricing and release dates for its own films. The Department's investigation focused on whether formation of the joint venture facilitated collusion among the studios or decreased their incentives to license movie content to competing video-on-demand providers. The Department considered several theories of competitive harm but ultimately determined that the evidence does not support a conclusion that the structure of the joint venture increased prices or otherwise reduced competition in the retail markets in which Movielink competes.

42. *Digital Music*: On December 23, 2003, the Department announced that it was closing its investigation into the major record labels' pressplay and MusicNet joint ventures, two joint ventures formed by the major record labels to distribute music over the Internet. Pressplay began as a joint venture of major labels Sony Music Entertainment and Universal Music Group, but recently was sold to software supplier Roxio. MusicNet is a joint venture of major labels Warner Music Group, EMI Group, and BMG Music, as well as RealNetworks, an Internet media company. In its investigation of pressplay and MusicNet, the Division focused primarily on two questions. First, did the joint ventures restrain competition among the major record labels on the terms on which they would license their music to digital music services not owned by the record labels themselves? Second, did the joint ventures allow the major record labels to impede the growth of the Internet as a channel for the authorized promotion and distribution of music, and thereby help the major labels solidify their central roles in the existing music market? Having answered both questions in the negative, the Department closed the investigation.

43. *Microsoft*: The DOJ's complaint and the subsequent proceedings against Microsoft have been described in prior years' reports. In November 2002, the district court approved the settlement, finding that entry of the Final Judgment was in the public interest. In June 2003, the U.S. Court of Appeals for the District of Columbia soundly approved the District Court's findings, as previously described. The United States continues to actively enforce Microsoft's compliance with the Final Judgment, coordinating its efforts with the various state enforcement authorities to collectively ensure the remedial effect intended by the Final Judgment. Over the past year, the Department has worked to resolve numerous complaints against Microsoft, including a change in web browser default functionality within Windows XP. The Department continues to oversee the communications protocol licensing program, a significant provision of the final judgment. In this role, the Department has worked to expand the scope of the protocols available for use by licensees; extend the life of the licensing program by two years; and improve the completeness, accuracy, and usability of the Technical Documentation.

3) *Modification or Enforcement of DOJ Consent Decrees*

44. On August 11, 2004, the Department, along with SBC Communications Inc. and BellSouth Corp., filed a request for a modification of a consent decree that prohibited the two firms from reacquiring previously divested spectrum licenses in California and Indiana. The modification, approved by the U.S. District Court in Washington, D.C. on October 13, 2004, allowed SBC and BellSouth, through their joint venture Cingular Wireless LLC, to reacquire certain of the divested spectrum licenses as part of their

acquisition of AT&T Wireless Services, Inc. The original consent decree, filed at the time of the formation of Cingular in 2000, required SBC and BellSouth to sell wireless businesses in 16 markets and prohibited reacquisition of the divested spectrum licences in those markets. AT&T Wireless purchased the divested wireless businesses in California and Indiana. The Department supported the modification of the consent decree after reviewing changes in the marketplace and the increased competition in the affected markets.

45. On August 6, 2004, the Department announced a settlement with American Airlines resolving alleged violations of a 1994 consent decree in the Airline Tariff Publishing Co. (ATPCO) case. In that case the Department alleged that American and other major domestic airlines used fare filings disseminated by ATPCO to communicate proposed fare increases to competitors. American agreed to pay a \$3 million civil penalty in response to the Department's claim that it violated the consent decree through its publication of fares in a manner prohibited by the decree.

4) *FTC Non-Merger Enforcement Actions*

46. The FTC has identified priorities and sought systematically to bring non-merger cases in key areas. Consistent with a consumer welfare approach, the agency focuses on industries of fundamental importance to most consumers, including health care, prescription drugs, standards setting, professional associations, and immunities from and exceptions to the antitrust laws.

47. *Health care:* The FTC has been active in prosecuting unlawful conduct in the health care and pharmaceutical industries. The FTC has continued to take action against groups of physicians and other health providers for agreements relating to prices. The agency obtained four settlements, including one in a case in administrative litigation (*Southeastern New Mexico Physicians, White Sands Health Care System, Preferred Health Services and Piedmont Health Alliance*). The Commission is now considering the appeal of an Initial Decision upholding the complaint (*North Texas Specialty Physicians*). The Commission also required two pharmaceutical firms to disgorge \$6.25 million in alleged illegal overcharges for children's pain medicine (*Perrigo/Alpharma*), and issued an order denying a motion to dismiss the FTC's challenge to alleged restrictions on competition for dental services in South Carolina (*South Carolina Board of Dentistry*).

- a. **Southeastern New Mexico Physicians:** In June 2004, a consent agreement resolved FTC charges that 73 percent of the physicians independently practicing in Roswell, New Mexico, collectively negotiated their fees with payers, resulting in prices above those prevailing elsewhere in the state. The consent order bars similar future conduct.
- b. **White Sands Health Care System.** In September 2004, a physician-hospital organisation in New Mexico settled the Commission's allegations that it fixed prices charged to health plans for physician and nurse anesthetist services, agreeing to cease and desist such conduct.
- c. **Piedmont Health Alliance.** In August 2004, a 450 member group of North Carolina physicians agreed to settle price-fixing charges made by the Commission in a 2003 administrative complaint, just before the scheduled beginning of trial.
- d. **Perrigo/Alpharma:** In August 2004, generic drug manufacturers Alpharma, Inc. and Perrigo Company agreed to give up \$6.25 million in illegal profits to settle Federal Trade Commission charges that their agreement to limit competition for over-the-counter store-brand children's liquid ibuprofen drove up prices and violated federal law. Alpharma, Inc. and Perrigo Company signed an agreement under which Alpharma allegedly agreed not to compete in selling children's liquid Ibuprofen for seven years in exchange for an up-front payment and a royalty on Perrigo's sales of the product. The complaint further alleges that

Perrigo raised its prices following the agreement. The Commission will use the \$6.25 million payment to reimburse consumers harmed by the alleged illegal conduct. This is the first case in which the Commission has applied its new guidelines on the use of disgorgement in antitrust cases.

- e. **South Carolina Board of Dentistry:** The FTC challenged restrictions against dental hygienists providing basic dental care to South Carolina school children – particularly those that are economically disadvantaged. In July 2004, the Commission denied the South Carolina Board of Dentistry’s motion to dismiss the FTC’s administrative complaint, rejecting the Board’s contention that the State Action doctrine (immunising sovereign state conduct) protected its actions against antitrust challenge. The Commission noted that the Board’s actions were not pursuant to a clearly articulated policy of the state and appeared to have been contravened by the legislature. The Commission has agreed to stay the administrative proceedings pending the resolution of the Board’s appeal of the Commission’s decision.

48. *Energy:* The Commission’s efforts to protect competition in the petroleum industry include a significant adjudicative matter involving the alleged acquisition of monopoly power in the technology market for producing a formulation of gasoline in California:

- a. **Unocal:** In an Opinion issued in July 2004, the Commission reversed an Administrative Law Judge’s (ALJ) initial decision that the *Noerr-Pennington* doctrine (immunising certain petitioning to the government) protected Union Oil of California from charges of monopolisation, thus sending the matter back before an administrative law judge (ALJ) for a full trial on the merits. The Commission held that, in some circumstances, false petitioning does not enjoy *Noerr-Pennington* protection. According to the Commission, these circumstances include “when the petitioning occurs outside the political arena; the misrepresentation is deliberate, factually verifiable, and central to the outcome of the proceeding or case; and it is possible to demonstrate and remedy this effect without undermining the integrity of the deceived governmental entity.” The case concerns energy and standards setting, and the Commission’s complaint alleges that Unocal made misrepresentations to the California Air Resources Board (CARB) and to industry participants concerning its research relating to low-emissions reformulated gasoline (RFG). Unocal’s actions allegedly led to a regulatory standard that overlapped with Unocal patents, giving Unocal a monopoly over the technology used to produce and supply California “summertime” RFG and costing California consumers hundreds of millions of dollars in higher gasoline prices. The case is awaiting the ALJ’s decision following the completion of the administrative trial.

49. *Other Non-merger Enforcement:* In the past year, the Commission accepted consent agreements in two other non-merger cases raising important conduct issues:

- a. **Clark County, Washington, Attorneys:** In June 2004, the Commission charged an attorneys’ group in Clark County, Washington with price fixing. The group consisted of 43 independently practicing attorneys who represented criminal indigent defendants. According to the FTC’s complaint, the attorneys formed a consortium through which they collectively demanded higher fees from the county for defending certain types of criminal cases and **threatened to refuse to take additional cases of these types unless the county agreed to the higher fees. The Commission settled with the group and issued an order barring the attorneys from engaging in similar conduct in the future.**

- b. **Virginia Board of Funeral Directors and Embalmers: In August 2004, the FTC charged the Virginia Board of Funeral Directors and Embalmers with violating the antitrust laws and restraining competition** by prohibiting funeral directors from advertising discounts for “pre-need” funeral planning and services. The parties agreed to a settlement, and an order bars the Board from prohibiting or restricting truthful price advertising, including enforcing any regulation that might prevent Board licensees from using truthful advertising to notify consumers of prices and discounts for funeral products and services.

50. Two additional non-merger adjudicative matters are pending before the Commission following appeals from ALJ decisions:

- **Kentucky Movers:** In 2003, the Commission filed a complaint against several associations of household goods movers, charging that the associations, consisting of competing firms, each violated the FTC Act by jointly filing tariffs containing collective rates on behalf of their members. All but one of the matters have settled. In June 2004, the ALJ’s Initial Decision upheld the complaint’s allegations that the Kentucky association had engaged in horizontal price-fixing and that its conduct was not protected by the State Action doctrine because the state had not actively supervised the association’s rate-making activities. At the end of FY 2004, the Commission was scheduled to hear oral arguments on the matter in January 2005.
- **Rambus:** The Commission is considering an appeal from an ALJ’s dismissal of the complaint in an administrative proceeding against Rambus, Inc. The complaint charged that Rambus violated the antitrust laws by knowingly failing to disclose its relevant intellectual property holdings to a standards setting organisation in which it participated. In dismissing the complaint, the ALJ concluded that Rambus’s conduct did not amount to deception or a violation of Rambus’s duties and that complaint counsel did not prove that Rambus’s conduct violated the antitrust laws.

#### ***E. Advisory Letters from the Commission***

51. In FY 2004, FTC staff issued the following advisory letters: (1) to Medical Group Management Association (MGMA), stating that MGMA’s proposal to conduct and publish the results of a survey of physician practices does not appear to prompt coordinated anticompetitive behaviour by physicians; (2) to Dunlap Memorial Hospital regarding the Non-Profit Institutions Act (NPIA) on the sales of pharmaceuticals, stating that the pharmaceuticals Dunlap transferred to the Free Clinic (at a small fee) would be covered by the NPIA as long as Dunlap does not profit from the transfer; (3) to Bristol-Myers Squibb Company (“BMS”), stating that the proposed agreement with Teva Pharmaceuticals USA, Inc. to settle litigation over the validity of BMS’s patent for the drug Carboplatin does not raise issues under Section 5 of the Federal Trade Commission Act (prohibiting unfair methods of competition); (4) to the American Down and Feather Section (“AD&FS”) of the American Home Fashion Products Association stating that the staff would not recommend bringing enforcement action challenging AD&FS’s proposed labelling compliance program; and (5) to the Electronic Retailing Association (“ERA”), stating that it would not challenge ERA’s implementation of a program that would review and if necessary, discontinue, direct response television shows (*i.e.*, infomercials).

#### ***F. Business Reviews Conducted by the Department of Justice***

52. In FY2004, the Department issued two business review letters. On October 17, 2003, the Department announced it would not challenge proposed changes in the procedures for the National Cable

Television Cooperative Inc. (NCTC), a consortium of primarily independent and smaller owners of cable television systems, to jointly purchase national cable programming. The Department said that with respect to the overwhelming majority of NCTC member cable systems, there is no danger that NCTC's procedures will facilitate retail price collusion because those cable systems do not compete with each other in the sale of multichannel video programming distribution (MVPD) services to consumers. Furthermore, it said that the proposed changes to the joint purchasing procedures would result in lower programming costs to members that could be passed on to consumers, so the proposed conduct could potentially have procompetitive effects. On May 25, 2004, the Department announced it would not challenge an online fee survey proposal among competing Internationally Board-Certified Lactation Consultants (IBCLCs). Lactation consultants provide breast-feeding assistance to mothers. Based on information provided in the proposal, the Department said the proposed survey would determine the range of prices customarily charged by self-employed IBCLCs and would allow independent practitioners to set reasonable fees for their area, providing procompetitive benefits while raising little risk of anticompetitive effects.

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

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

53. On May 3, 2004, the Department and the Federal Trade Commission announced that Bill Gates had agreed to pay an \$800,000 civil penalty to settle charges that he violated pre-merger reporting requirements. According to the complaint filed by the Department at the request of the FTC, Gates, through his personal investment company, acquired more than \$50 million of the voting securities of ICOS Corporation in 2002 without complying with pre-merger notification requirements. He did not qualify for the "solely for the purpose of investment" exemption because he intended to participate in the basic business decisions of ICOS, a pharmaceutical company, through, among other things, his longstanding membership on its board of directors. The case was not related to Gates' position in Microsoft Corporation nor to the Department's antitrust litigation against the company.

54. On May 3 the Department also announced that Manulife Financial Corporation, a Canadian-based insurance and financial services company, agreed to pay a \$1 million civil penalty to settle charges that it violated pre-merger notification requirements when it acquired more than \$50 million of John Hancock common stock in the spring of 2003. Manulife and John Hancock announced in September 2003 an intent to merge, and they consummated the transaction in April 2004. The Department alleged that the initial purchases in the spring of 2003 did not qualify for the "solely for the purpose of investment" exemption because at the time of the acquisitions, Manulife was considering a Manulife-John Hancock combination.

#### ***Significant Merger Cases***

##### *1) DOJ Merger Challenges or Cases*

55. *Oracle/PeopleSoft*: On February 26, 2004, the Department filed suit in the U.S. District Court for the Northern District of California (San Francisco Division) to block Oracle Corporation's proposed acquisition of PeopleSoft, Inc. The Department alleged that the acquisition would substantially lessen competition in North America for high-function financial management system and human resource management software. The trial began on June 7, 2004, after two months of discovery, and lasted over four weeks. On September 9, 2004, the District Court ruled in favour of Oracle Corp., concluding that the Department failed to meet the requisite burden on a number of factual issues surrounding relevant markets, entry, and competitive effects. The District Court made various conclusions of law that were often very much intertwined with its factual findings. While the Department disagreed with the District Court's decision, the Department ultimately decided not to appeal. Throughout the investigation and trial, the

Department worked closely with the European Commission on its review of the proposed transaction; the European Commission ultimately decided not to issue a Statement of Objections.

56. *United Health Group/Oxford Health Plans*: On July 20, 2004, the Department announced that it had recently closed its investigation of United Health Group's proposed acquisition of Oxford Health Plans. United is one of the largest health insurance companies in the country and Oxford is a significant regional health insurer, focused on the tri-state area of Connecticut, New Jersey, and New York. The Department's review focused on the proposed merger's potential effects on the sale of health insurance products by insurance plans and on the purchase of health care provider services. The Department concluded that the merger would not substantially lessen competition in any relevant market and that the product market involved in the proposed acquisition was no broader than the market for fully-insured health insurance products sold to employers that are largely located in the tri-state area.

57. *Anthem/WellPoint*: On March 9, 2004, the Department announced that it was closing its investigation of Anthem, Inc.'s proposed acquisition of WellPoint Health Networks, Inc. Anthem and WellPoint are two of the largest health insurance companies in the country, and the two largest licensees of the Blue Cross Blue Shield Association. Under their agreement, Anthem would acquire WellPoint for \$16.4 billion in cash and stock. The combined entity would become the largest managed care insurance company in the country. The Department's review focused on four separate areas: the extent to which Anthem and WellPoint compete for the sale of health insurance products, the possibility that this transaction could give a combined Anthem/WellPoint buyer-side market power over health care providers, the possibility that the combination of Anthem and WellPoint's complementary plans might increase their incentives or ability to exercise monopsony power, and the possible effects of this deal on the acquisition of Blue Cross Blue Shield plans. After a thorough review, the Division decided that it was unlikely that this transaction would result in substantial competitive harm in the foreseeable future.

58. *NewsCorps/Hughes*: On December 19, 2003, the Department stated that it would not challenge News Corp.'s proposed acquisition of Hughes Electronics Corp., including its DirecTV subsidiary. The Department's decision was based in part on the announcement by the Federal Communications Commission (FCC) that it will approve the transaction subject to certain conditions imposed on News Corp.'s licensing of its regional sports networks and granting of retransmission consent for its Fox Broadcasting Network. The restrictions imposed by the FCC as a condition for granting its approval of the transaction will reduce News Corp.'s ability to withhold, or threaten to withhold, its programming content from cable television and Direct Broadcast Satellite providers that currently compete with DirecTV.

59. *First Data/Concord*: On December 15, 2003, the Department reached a settlement with First Data Corporation and Concord EFS under which First Data agreed to divest its entire interest in NYCE Corporation in order to proceed with its proposed \$7 billion acquisition of Concord EFS. The Department had filed a civil lawsuit on October 23, 2003, to block the acquisition, stating that the transaction would have substantially reduced competition among Personal Identification Number, or PIN, debit networks. This would have resulted in consumers paying higher prices for goods and services from merchants that offer debit transactions. According to the complaint, filed in the U.S. District Court in Washington, D.C., Concord owns STAR, the largest PIN debit network, and First Data owns NYCE, the third-largest PIN debit network. These networks enable consumers to purchase goods and services from merchants through PIN debit transactions by swiping their bank cards at a merchant's terminal and entering a PIN. According to the complaint, the competition that the divestiture preserves has brought lower prices and better services for PIN debit transactions both to merchants and to the consumers who purchase goods and services from them.

60. *Dyno Nobel/El Paso*: On December 2, 2003, the Department filed a civil lawsuit to block Dyno Nobel Inc.'s proposed acquisition of ammonium nitrate production assets from El Paso Corporation. The



Department required Dyno Nobel Inc. to divest its 50 percent interest in an industrial grade ammonium nitrate (IGAN) production facility in Utah in order to proceed with the multi-million dollar acquisition. IGAN is an essential ingredient in the production of blasting agent explosives used commercially in industries such as mining and construction. The Department said that the transaction, as originally proposed, would have resulted in higher prices for IGAN purchasers in the western United States. The Department also noted in its complaint that if the acquisition had been allowed to proceed as originally proposed, two firms would have controlled about 90 percent of IGAN sales in western North America. Dyno and El Paso would have had a combined share of about 50 percent, and the proposed transaction would have eliminated competition between them.

61. *DFA/Southern Belle*: On April 24, 2003, the Department filed a lawsuit against Dairy Farmers of America Inc. (DFA) and Southern Belle Dairy Co. LLC to compel DFA to divest its interests in Southern Belle Dairy. The Department said DFA's acquisition eliminated the only other independent bidder for school milk - resulting in a monopoly - in over 40 school districts, and reduced the number of independent bidders from three to two in approximately 50 more school districts, in Kentucky and Tennessee. On August 31, 2004, the district court granted summary judgment for the defendants, relying on DFA's removal of its voting rights on the representative committee for Southern Belle. The court did not address the two years that DFA operated under the old governance agreement, the econometric evidence of a price effect during that period, or the ease with which the markets could be allocated, as demonstrated by a bid-rigging scheme that Southern Belle participated in from the late 1970s until 1989. Instead, after acknowledging that control is not necessary and that statements of good intentions are not a valid defence, the court concluded that, given the absence of voting rights, there was no mechanism for the transaction to cause anticompetitive effects. The court gave no weight to the Department's argument that DFA had selected the heads of the two competing dairies, had a history of past deals with those executives demonstrating their fidelity to DFA, and offered them through past, present and potentially future deals very lucrative compensation for advancing DFA's interests. The case is currently on appeal in the Sixth Circuit.

## 2) *FTC Merger Challenges or Cases*

62. During FY 2004, the number of pre-merger filings under the Hart-Scott-Rodino Act (HSR) increased by more than 40 percent over the previous year, with a commensurate increase in the number of mergers requiring investigation by the FTC or the DOJ. The value of mergers reported under HSR increased by about 54 percent over the FY 2003 level. The following cases were significant merger cases in FY 2004, although all four were closed with no action.

- **Sunoco/Eagle Point:** In December 2003, the Commission concluded that Sunoco's proposed acquisition of Eagle Point Oil Company from El Paso Corporation would not substantially lessen competition. Although Sunoco owned three Philadelphia-area refineries and the acquisition would add a fourth, the FTC's investigation identified significant sources of both reformulated and conventional gasoline that likely would prevent Sunoco from raising prices above the competitive level. In addition, Sunoco presented credible evidence that the acquisition likely would produce substantial merger-specific efficiencies relating to refinery synergies and optimisation.
- **Genzyme/Novazyme:** In January 2004, the Commission closed its consummated merger investigation of Genzyme Corporation's 2001 Acquisition of Novazyme Pharmaceuticals, Inc. At the time of its acquisition, Novazyme was engaged primarily in conducting early pre-clinical studies relating to enzyme-replacement treatment (ERT) for Pompe disease. Genzyme was also engaged in preclinical animal testing of ERTs. The Commission's investigation focused on the transaction's potential impact on the pace and scope of research

into the development of a treatment for Pompe disease. The Commission concluded that the transaction was not likely to substantially reduce competition, and would more likely result in major benefits to patients.

- **RJR/Brown & Williamson:** In June 2004, the Commission outlined three reasons for its conclusion that the merger of these two firms was unlikely to harm competition in the U.S. cigarette market. It explained, first, that Brown & Williamson plays an increasingly minor role in the market, with that trend expected to continue. Second, the investigation found no markets in which the two firms are each other's closest competitors. Third, a majority of the Commissioners believed the evidence indicated that the transaction was unlikely to facilitate or enhance coordination among the major U.S. cigarette manufacturers. (One Commissioner issued a concurring statement.)
- **Victory/St. Therese.** In July 2004, FTC Commissioners issued two statements explaining their differing assessments of evidence obtained in an investigation of a consummated merger of Victory and St. Therese hospitals in the Waukegan, Illinois area, leading to a 3-2 vote not to challenge the transaction. The majority emphasised that the merged hospital had not succeeded in renegotiating contracts with payers, indicating a lack of market power, that post-merger price increases were no greater than those at similar hospitals, and that the two hospitals had been steadily losing market share before the merger. The two dissenting Commissioners stated that the empirical evidence of post-merger price increases was inconclusive, and that the totality of the evidence, including documents and testimony, supported an enforcement action.

63. In FY 2004, the FTC had three merger cases in adjudicative status. In *Aspen Technology*, the Commission reached a settlement. The second case, *Evanston/ Highland Park* was still in administrative litigation at the close of FY 2004. In the third case, *Arch Coal*, the Commission withdrew the case from adjudication following an unsuccessful action in federal court for preliminary injunction and the subsequent consummation of the transaction, and is considering whether to return the matter to administrative adjudication.

- **Evanston/Highland Park:** Based on its hospital merger retrospective project, the Commission issued an administrative complaint challenging a hospital acquisition in Chicago's northern suburbs by Evanston Northwestern Healthcare Corporation. The complaint alleges that the merger resulted in large price increases compared to a control group of comparable hospitals. In a separate count, the Commission alleged price fixing by some doctors associated with the hospitals. That count was recently removed from the ongoing litigation for the Commission to consider a settlement proposal.
- **Arch Coal:** In early 2004, the Commission approved a preliminary injunction action to block Arch Coal's planned acquisition of Triton Coal Company, based on concerns that the merger would harm competition in the market for coal production from Wyoming's Southern Powder River Basin. That area supplies one-third of U.S. coal production and fuels electrical power generation in 26 states. The Commission also issued an administrative complaint against this transaction in April 2004. The district court denied the injunction, stating that the agency's concern over the likelihood of coordinated interaction was based on a "novel theory" of output coordination and that the testimony of the merging parties' customers had little or no probative value. In response to the Commission's emergency motion, the U.S. Court of Appeals for the District of Columbia Circuit denied an injunction pending appeal. Although the court granted an expedited appeal, the parties consummated the transaction shortly after the court ruled. The appellate

court's per curiam order noted, however, that there was "nothing novel about the theory [the Commission] has advanced in this case." Subsequently, the Commission withdrew the case from administrative litigation in August 2004 to facilitate consideration of next steps.

- **Aspen Technology/Hyprotech:** In another case reflecting the FTC's emphasis on high technology matters, the parties resolved the challenge to the acquisition of Hyprotech's software assets by Aspen Technology just weeks before an administrative trial was set to begin last summer. As the transaction was exempt from pre-merger reporting requirements, the FTC challenged it administratively after consummation. The consent order, issued in July 2004, remedies the concerns outlined in the Commission's complaint by requiring Aspen Technology to divest the overlapping Hyprotech assets and take several other measures to restore competition to pre-merger levels.

#### IV. Regulatory and Trade Policy Matters

##### A. Regulatory Policies

###### 1) *FTC Staff Activities: Federal and State Regulatory Matters*

64. In FY 2004, the FTC's regulatory matters were focused on the health, energy and professional services industries.

- **Pharmacy Benefit Manager Comments:** Concerned with likely price increases in pharmaceutical markets, in September 2004, the FTC staff submitted comments on proposed California legislation that would have required pharmacy benefit managers (PBMs) to disclose certain information to health plans and consumers regarding their arrangements companies. The FTC pointed out that these provisions likely would reduce competition between pharmaceutical companies and thus decrease the incidence of cost-reducing drug substitutions. The Governor of California vetoed the legislation, citing the FTC letter as a basis for his decision.
- **"Any Willing Provider" and "Freedom of Choice" Bills:** Concerned about rising pharmaceutical costs and other harm to consumers, FTC staff responded to requests for comments on seven proposed bills in Rhode Island that contain so-called "freedom of choice" and "any willing provider" provisions for pharmaceutical sales. All seven bills require health plans to ensure "freedom of choice" for consumers to choose among all sources of pharmaceutical services and to include in their networks any pharmacy willing to accept the contractual terms offered to other pharmacies. Although the bills are designed to increase competition by letting consumers choose their pharmacy provider, staff concluded that the bills likely would increase the cost of pharmaceutical services as well as limit competition and undermine consumer choice.
- **Contact Lens Competition:** The agency has been active in ensuring competition in the contact lens industry. Under with pharmaceutical the Fairness to Contact Lens Consumers Act, in July 2004, the FTC issued the Contact Lens Rule which requires, inter alia, that prescribers provide patients with a copy of their prescriptions after a fitting and verify those prescriptions to any third party a patient designates.
- **Below Cost Gasoline Sales Bills:** In FY 2004, FTC staff responded to requests from Alabama and Michigan legislators for comments on bills to ban below-cost gasoline sales. FTC staff concluded that, if enacted, the bills likely would restrict competition, deter pro-

competitive price cutting, and lead to higher prices for the states' consumers. Moreover, staff concluded that such bills are unnecessary because federal antitrust laws already cover below-cost pricing that has the potential to harm competition.

- **Electricity:** The FTC filed two comments with the Federal Energy Regulatory Commission (FERC) in July 2004 about how to assess and safeguard against the exercise of market power and accompanying price increases. The first comment recommended that FERC's assessments of when to permit electric utilities to sell wholesale power at market rates be based on the principles and framework outlined in the DOJ/FTC Horizontal Merger Guidelines. FERC has not yet ruled on these issues. The second comment concerned FERC's policies governing electric utility procurement. FERC cited this comment to support new policies to prevent rate regulation evasion and anticompetitive cross-subsidisation that have the effect of raising consumer prices.
- **Corporate Ownership of Funeral Homes:** In April 2004, FTC staff commented on a bill to permit corporate ownership of funeral homes in Maryland in response to a legislator's request. Staff concluded that the bill would permit easier entry into the funeral home business, increasing competition and potentially offering consumers lower prices and better quality for funeral home services.
- **Professional Services:** The FTC and DOJ continue to be concerned about efforts to prevent non-lawyers from competing with attorneys in the provision of certain services through the adoption of overly broad "unauthorised practice of law" opinions and laws by state bar associations, courts, and legislatures. In FY 2004 the FTC and the DOJ continued advocacy activities in Michigan and Ohio, including filing a brief amicus curiae with the Supreme Court of Ohio in *Cleveland Bar Ass'n v. Comp Management, Inc.* (Case No.: UPL 02-04) in August 2004.

## 2) *DOJ Activities: Federal and State Regulatory Matters*

65. In FY2004, the DOJ filed its last comments with the Federal Communications Commission (FCC) in a "Section 271" proceeding involving the FCC's determination of whether it was in the public interest to permit a Regional Bell Operating Company to offer long-distance service in its own area. The last 271 comments, recommending that the FCC approve Qwest's application to provide long distance services in Arizona because local telecommunications markets there were fully and irreversibly open to competition, were filed on October 9, 2003, and the FCC granted 271 approval in the last case at the end of 2003. The Regional Bell Operating Companies are now permitted to offer long distance services anywhere in the country. The Division's comments are available at <http://www.usdoj.gov/atr/public/comments/sec271/sec271.htm>.

66. On February 18, 2004, the DOJ filed comments with the U.S. Department of Agriculture opposing a proposal under the Agricultural Marketing Agreement Act of 1937 to establish a Hop Administrative Committee to control the quantity of hops that domestic producers may market. The comments asserted that the proposed restrictions on output would lead to non-competitive pricing effects and resource misallocations, in an industry with a well-performing, competitive market with many producers and dealers who have ready access to high-quality market information and ample opportunities to enter into long-term contracts as they see fit to hedge against price fluctuations.

67. On February 24, 2004, the DOJ submitted comments to the Surface Transportation Board (STB) urging it to impose conditions on any approval of Canadian National Railway Company's acquisition of railroad assets from Great Lakes Transportation, in order to preserve the potential competition that

Canadian National's build-out opportunities provided to Great Lakes' customers. The conditions would include giving a replacement railroad trackage rights over Canadian National's line and authorising it to connect that line to certain facilities through build-outs.

68. On October 10, 2003, the DOJ filed comments with the Federal Maritime Commission supporting the petitions of United Parcel Service and other non-vessel-owning common carriers (NVOCCs) for an exemption from tariff filing and publication requirements. The DOJ argued that by negotiating service contracts with vessel-operating common carriers (VOCCs) for the aggregated volume of their underlying shippers' cargoes, NVOCCs can reduce smaller shippers' ocean transportation costs and compete to lower VOCC prices. Eliminating the tariff filing requirements would permit NVOCCs to enter into confidential service contracts with shipper customers in same manner as VOCCs, thereby increasing competition, lowering costs, and improving service in U.S. liner trades.

69. On November 7, 2003, the DOJ filed comments with the Board of Governors of the Federal Reserve System regarding the Board's proposed interpretation and supervisory guidance to the anti-tying provisions in the Bank Holding Company Act. The DOJ recommended that the Board interpret these provisions to be consistent with, and not broader than, the federal antitrust laws, in order to avoid prohibiting some procompetitive practices, such as multi-product discounting, and to avoid disadvantaging banks as competitors in markets in which banks and nonbanks compete.

70. On October 1, 2003, the FTC and DOJ filed comments with the Indiana State Bar Association regarding a proposed amendment to Indiana Supreme Court rules that would define for the first time the practice of law for purposes of bringing actions to restrain or enjoin the unauthorised practice of law. The agencies concluded that the proposed draft would harm consumers because it was overbroad and likely to prevent nonlawyers (e.g., real estate agents, tenants' associations, consumer associations, independent contractors, income tax preparers and accountants, and investment bankers and other business planners) from providing a number of services in competition with lawyers, thus raising costs and limiting choices for consumers while providing little benefit.

## ***B. DOJ and FTC Trade Policy Activities***

71. Both the Division and the FTC are involved extensively 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 Division participates in interagency trade policy discussions chaired by the Office of the U.S. Trade Representative. The Department provides antitrust and other legal advice to U.S. trade agencies, and has been actively involved in certain NAFTA Chapter 11 arbitrations relevant to competition issues and in the recently settled WTO Mexican telecommunications case. The Division also works with other Justice components (including the Criminal, Environment, and Civil Divisions) on international trade and investment issues that affect those components or the Department as a whole.

72. Both DOJ and FTC participate in bilateral and multilateral discussions and work projects to improve cooperation in the enforcement of competition laws. The Division and the FTC participate in a number of negotiations and working groups related to regional and bilateral trade agreements. The Division and the FTC participate with the Office of the U.S. Trade Representative and other U.S. agencies in competition policy groups associated with the Free Trade Area of the Americas (FTAA) and Asia-Pacific Economic Cooperation (APEC), and we chaired or co-chaired the negotiating teams for the competition chapters of the U.S.-Thailand, U.S.-Andean Community, and U.S.-Australia free trade agreements. The antitrust agencies also have played an important role in the working group established by the World Trade Organisation (WTO). The WTO working group did not meet in FY2004, but the DOJ and FTC continued to monitor competition policy developments in the WTO closely.

73. For more than a decade the Department and the FTC have assisted transition and developing economies that have made the commitment to market and commercial law reforms. In addition to advancing the adoption of competition policies that incorporate sound economic principles and effective enforcement mechanisms, these programs create long-term cooperative relationships with policy and enforcement officials in the countries involved. During FY 2004, the technical assistance program was active in India, Southeast Asia, South and Central America, Russia, Southeast Europe, Mexico and South Africa. These programs rely on a combination of resident advisors, regional workshops, and targeted short term missions, with a focus on the development of investigative skills.

74. The Division co-chairs (with the Office of the U.S. Trade Representative) the Cross-Sectoral Working Group under the U.S.-Japan Regulatory Reform and Competition Policy Initiative. In these discussions, the United States has urged the Japanese government to take a variety of actions to strengthen its enforcement of Japan's antimonopoly law, take effective measures to eliminate bid rigging, make its administrative procedures fair and open, and accelerate an effective program of deregulation to open markets to competition

## **V. New Studies related to antitrust policy**

### **A. *Antitrust Division Economic Analysis Group Discussion Papers***

75. The Economic Analysis Group issued the following papers during FY2004. Copies may be obtained by contacting Janet Ficco at 600 E Street, N.W., Suite 10000, Washington, D.C. 20530 or at (202) 307-3779 ([janet.ficco@usdoj.gov](mailto:janet.ficco@usdoj.gov)). Other Division public materials may be obtained through the Antitrust Documents Group of the Division's Office of Operations. Requests should be directed to Ms. Janie Ingalls, Room 215, Liberty Place Building, 325 7th Street, N.W., Washington, D.C. 20530. Ms. Ingalls may be reached via fax at (202) 514-3763 or e-mail ([janie.ingalls@usdoj.gov](mailto:janie.ingalls@usdoj.gov)).

Alexander Raskovich, Solving Holdup through Intermediation, EAG 04-12, August 2004.

Kenneth Heyer, A World of Uncertainty: Economics and the Globalisation of Antitrust, EAG 04-11, August 2004.

Charles J. Romeo and Mary W. Sullivan, Controlling for Temporary Promotions in a Differentiated Products Model of Consumer Demand, EAG 04-10, August 2004.

Ari Gerstle, Mergers in Durable-Goods Industries: A Re-Examination of Market Power and Welfare Effects, EAG 04-9, August 2004.

David S. Sibley, Michael J. Doane, Michael A. Williams, and Shu-Yi Tsai, Pricing Access to a Monopoly Input, EAG 04-8, March 2004. Forthcoming *Journal of Public Economic Theory*.

David S. Sibley and Simon Wilkie, Equilibrium Exit from a Long Term Contract, EAG 04-7, March 2004.

David S. Sibley, Cost Asymmetries, Mavericks and Coordinated Behavior, EAG 04-6, March 2004.

Thomas P. Lyon and Jing Li, Regulatory Uncertainty and Regulatory Scope, EAG 04-5, January 2004.

Thomas P. Lyon and Eric Rasmusen, Buyer-Option Contracts Restored: Renegotiation, Inefficient Threats, and the Hold-Up Problem, EAG 04-4, January 2004.

Patrick Greenlee and Keith Waehrer, The Effect of Profit Sharing on Auction Markets, EAG 04-3, February 2004.

Patrick Greenlee and David Reitman, Competing with Loyalty Discounts, EAG 04-2, February 2004.

Russell Pittman, Abuse-of-Dominance Provisions of Central and Eastern European Competition Laws: Have Fears of Over-Enforcement Been Borne Out?, EAG 04-1, January 2004. Published at 27 *World Competition* 245 (2004).

## **B. Commission Studies, Reports and Economic Working Papers**

### **1) Commission Studies and Reports**

76. The FTC's studies and reports during FY 2004 included reports on patent reform, health care, and mergers in the petroleum industry.

- *Patent Reform*: In April 2004, the FTC co-sponsored a conference, "Ideas into Action: Implementing Reform of the Patent System," with the National Academy of Sciences (NAS) and the Berkeley Center for Law and Technology to address patent reform and possible implementation. The event provided a forum for government officials, business representatives, scholars, lawyers, and others to evaluate and discuss recommendations from recent reports on patent reform released by the FTC and the NAS.
- *Health Care Report*: In July 2004, the FTC and the DOJ released a joint report, *Improving Health Care: A Dose of Competition*, which distilled a wealth of information gained from 27 days of public hearings and other data collected over a two-year period. To promote policies that ensure access to quality health care and enhance informed consumer choice, the report provided significant observations and recommendations about the availability of information regarding the price and quality of health-care services, physician collective bargaining, insurance mandates, hospital merger analysis, managed care organisations' bargaining power, and hospital group purchasing organisations.
- *Petroleum Merger Report*: In August 2004, the staff of the FTC's Bureau of Economics released a report, *The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement*, which presented a detailed review of structural changes and the FTC's antitrust law enforcement efforts in the petroleum industry over the past 20 years. Consistent with the purpose of enhancing public understanding and policy making concerning competition in this industry, the report also elaborated on the analytical process the Commission uses to review petroleum-related mergers. The report concluded that thorough FTC oversight of the industry, including both investigations and enforcement actions, has helped preserve industry competition and prevent gasoline price increases beyond those dictated by market conditions.

77. The FTC also hosted a two day research symposium in September 2004, in honour of the agency's 90th anniversary. Current commissioners and agency officials, FTC alumni, prominent scholars and practitioners addressed the FTC's mission, competition and consumer protection issues, the FTC's relations with domestic and international government agencies, and other related topics.

2) *Economic Working Papers*

78. 78. The following papers may be obtained at <http://www.ftc.gov/be/econwork.htm>.

Can Ranking Hospitals on the Basis of Patients' Travel Distances Improve Quality of Care?, Daniel P. Kessler, June 2004

Identifying Demand in eBay Auctions, Christopher P. Adams, June 2004

The Economics of Price Zones and Territorial Restrictions in Gasoline Marketing, David W. Meyer, Jeffrey H. Fischer, March 2004

The Economic Effects of the Marathon-Ashland Joint Venture: The Importance of Industry Supply Shocks and Vertical Market Structure, Christopher T. Taylor, Daniel S. Hosken, March 17, 2004

The Union Pacific/Southern Pacific Rail Merger: A Retrospective on Merger Benefits, Denis A. Breen, March 11, 2004 (published in the Review of Network Economics, 2004 )

Is It Always Optimal to "Sell the Firm" to a Risk-Neutral Agent?, Christopher P. Adams, February 2004

Quantifying Antitrust Regimes, Michael W. Nicholson, February 2004

Bargaining, Bundling, and Clout: The Portfolio Effects of Horizontal Mergers, Daniel P. O'Brien and Greg Shaffer, December 2003 (forthcoming in RAND Journal of Economics)

Reconciling the Off-Net Cost Pricing Principle with Efficient Network Utilization, Patrick DeGraba, October 2003 (published in Information Economics and Policy, 2004)



## APPENDICES

## Department of Justice: Fiscal Year 2004 FTE and Actual Resources by Enforcement Activity

	FTE	AMOUNT
Criminal Enforcement	271	\$46,442,000
Civil Enforcement	504	\$86,250,000
TOTAL	775	\$132,692,000

Federal Trade Commission: Fiscal Year 2004 Competition Mission FTE and Dollars  
by Program by Bureau/Office

	FTE	Amount (\$ in thousands)
Total Maintain Competition Mission	505	\$81,443
<i>Bureau of Competition</i>	277	\$31,697
<i>Bureau of Economics</i>	73	\$8,497
<i>Regional Offices</i>	30	\$3,724
<i>Mission Support</i>	125	\$37,525
Premerger Notification	28	\$3,206
<i>Bureau of Competition</i>	27	\$3,090
<i>Bureau of Economics</i>	1	\$116
<i>Regional Offices</i>	--	--
Merger & Joint Venture Enforcement	205	\$23,684
<i>Bureau of Competition</i>	149	\$17,050
<i>Bureau of Economics</i>	41	\$4,772
<i>Regional Offices</i>	15	\$1,862
Merger & Joint Venture Compliance	11	\$1,260
<i>Bureau of Competition</i>	10	\$1,144
<i>Bureau of Economics</i>	1	\$116
<i>Regional Offices</i>	--	--
Non merger Enforcement	106	\$12,309
<i>Bureau of Competition</i>	74	\$8,468
<i>Bureau of Economics</i>	17	\$1,979
<i>Regional Offices</i>	15	\$1,862

	FTE	Amount (\$ in thousands)
Non merger Compliance	7	\$805
<i>Bureau of Competition</i>	5	\$572
<i>Bureau of Economics</i>	2	\$233
<i>Regional Offices</i>	--	--
Antitrust Policy Analysis	7	\$815
<i>Bureau of Competition</i>	--	--
<i>Bureau of Economics</i>	7	\$815
<i>Regional Offices</i>	--	--
Other Direct Mission Resources	16	\$1,839
<i>Bureau of Competition</i>	12	\$1,373
<i>Bureau of Economics</i>	4	\$466
<i>Regional Offices</i>	--	--